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The law relating to the distribution of prize money in the Royal Navy and its relationship to the use of naval power in war, 1793-1815

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The Law Relating to the Distribution of Prize Money in the Royal Navy and its Relationship to the Use of Naval Power in War, 1793-1815

PhD Thesis

Grahame Aldous

Contents

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Abstract

Prize money was paid to officers and crew of ships who captured enemy ships and cargo at sea in time of war. It was a form of bounty providing private profit for officers and crew involved in public service. In the absence of proper historical research the distribution of prize money to the Royal Navy has been categorised as state piracy at one extreme, and a system administered by the courts applying international law at the other. This thesis traces the development of the rules for prize money distribution in Royal Proclamations and their application through decisions of the English courts that have not previously been explored in any detail. It also considers the political context in which changes to the system were made.

The result of this research shows that neither assumption at the extremes is correct. The award of prize money was not state piracy. It was subject to the rule of law and the supervision of the courts. The law that it was subject to, however, was municipal law influenced by international concerns. It was not the administration of 'international' as opposed to municipal law. The research also provides a valuable insight into the customs and usage of the Royal Navy in a war for national survival.

Comparison with US provisions for prize payments and also with freight payments and head money in the Royal Navy using the same research methodology helps to understand the remarkable features of the Royal Navy prize system that ended not with the age of sail as commonly assumed, but in 1945.

This thesis contributes to a better understanding of how the Royal Navy functioned, but also challenges misplaced assumptions about the role of 'international' law in the decisions of English courts in the long eighteenth century.

Chapter 1, Introduction

Prize money was the money paid to the officers and crew of ships who captured ships and cargo belonging to an enemy at sea in time of war. It was a form of bounty whereby service in the Royal Navy could produce a private profit for the officers and crew involved.

The distribution of prize money to serving Royal Navy personnel continued into the twentieth century. On 19th December 1945 the First Lord of the Admiralty, A. V. Alexander, rose to address the House of Commons. With the end of war the food shipments from America under the Lend-Lease Act came to an abrupt end. Britain was hungry. Housing, clothes and much else were in short supply. Gazing on bombed out London it was hard to realise that it was the capital of a victorious country.[1] Alexander had been asked by Vice-Admiral Taylor MP whether a decision had been made about payment of prize money for vessels captured by the Royal Navy during the Second World War. He announced that rather than being paid as a bounty to those involved in each specific capture, the prize fund would be divided between all those who had served, including the RAF. Taylor congratulated Alexander 'on being successful in being able to maintain this ancient custom of giving prize money'.[2]

The following day a headline in *The Times* thundered 'From Plunder and Pillage to Common Fund' over a celebration of 'the ancient custom of giving prize money'.[3] Having evoked the spirit of Drake, the columns below the headline referred to the reigns of the Georges as 'the second golden period of prize money'. *The Times* estimated that the total value of prize money for the Second World War would amount to £20 million. The common fund approach had also been adopted during the previous world war, when the fund had reached some £14 million.

Of less immediate concern to his audience was the quiet postscript that Alexander added to his announcement: 'it is the government's intention that this shall be the last occasion on which prize money will be paid'. And so it was. Thus did the 'ancient custom of giving prize money' quietly slip away into history. How was it that this 'ancient custom' seemingly rooted in 'plunder and pillage' had survived into the 20th century? What had happened during the Georgian 'golden period' to bestow upon it such longevity?

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[1] Lynne Olson, *Citizens of London: The Americans Who Stood with Britain in Its Darkest, Finest Hour* (London: Scribe, 2015), 366.
[2] *Hansard*, HC Deb. 19th December 1945, Vol. 417, cc1312-4
[3] *The Times* December 20th 1945, p. 5,

In recent times various strands of the social history of Nelson's Navy have been picked apart to reveal a fresh view of life in the Georgian Royal Navy. Areas of study have included food, victualling, transport, dockyards, impressment, punishment, discipline and religion. Prize money has often been referred to in the course of these various studies, but not in any detail or with the benefit of any informed study of the subject. As a result of the lack of detailed study, the range of opinion has remained a wide one.

The whiff of 'plunder and pillage' has hung over prize captures, and the money that was paid to the captors, in the public imagination, where it is seen as a form of state approved piracy. As Kert has put it in relation to privateering, i.e. the capture of enemy vessels by private ships authorised to do so by the state by Letters of Marque,:

'Unfortunately for the business of privateering, many of the early practitioners under Queen Elizabeth I operated on their own account rather than the crown's. Their unsavoury reputation for piratical captures and the political problems they created prejudiced history's subsequent view of privateering'.[4]

The prejudice has persisted even though, as Kert notes:

'In fact, by the end of the eighteenth century, there was almost universal recognition that privateering was not only a legitimate pursuit in time of war, but a perfectly respectable one for members of mercantile society'.

The reputation of privateers, however, has polluted the reputation of all captures at sea, including those by the Royal Navy. As Corbett put it in 1907, when supporting the continued use of capture at sea by the Royal Navy as an instrument of war: 'The real reason why capture at sea got a bad name was due to privateers'.[5] An accurate public image has not been helped by Napoleon's description of the arch Royal Navy prize-taker Thomas Cochrane as the *loup des mer*, nor by the portrayal of Cochrane's 'swashbuckling' fictional alter ego in the Patrick O'Brian Aubrey/Maturin novels. In reality, whilst Cochrane was a controversial figure and a prodigious capturer of prizes, his prize captures were not piratical acts. He may have been a maverick, but his prize captures were carefully planned, and executed within a legal framework. He took care for both his own men and his prisoners. He expressly eschewed the

[4] Faye Kert, *Prize and Prejudice: Privateering and Naval Prize in Atlantic Canada in the War of 1812*, (St. John's, Nfld: International Maritime Economic History Association, 1997), 3.
[5] Julian Stafford Corbett and Andrew D. Lambert, *21st Century Corbett: Maritime Strategy and Naval Policy for the Modern Era*, 21st Century Foundations (Annapolis, Maryland: Naval Institute Press, 2017), 77.

notion of war being an excuse for 'extermination', and considered that respect for the values of civilised nations should be a part of war. [6] Privateering was effectively abolished after the Crimean War by the Declaration of Paris in 1856, but by the time of the next major naval war involving Britain in 1914 payment of prize money was collectivized. The payment of prize money direct to the captors has therefore remained associated in the public mind with the age of privateering and ideas of 'plunder and pillage'.

Naval historians and lawyers have certainly appreciated the difference between piracy and prize taking. As will be seen, however, they have tended to reiterate a notion at the other extreme that the prize courts operated as a system compliant with a strict code of international law. This thesis explores the validity of that assertion, in order to place prize money in its proper context.

Prize money has been described by naval historians both as the greatest incentive for efficient service, and also as the cause of considerable discontent and disharmony among officers and crew; a force that both raised the warriors behind Britain's wooden walls to near supernatural feats in the service of their country and also brought them to mutinous uprising. Little attention has been paid to the way in which provisions for the distribution of prize money changed during the French Revolutionary and Napoleonic wars. They have either been seen as essentially static, or any change has been viewed as part of an historic process of liberalisation towards a fairer means of distribution as sailors found their voice and exerted their power.

This study reveals that these preconceptions need to be challenged. The truth is to be found at neither extreme of piracy nor international court of law, but in the reality of operating a functioning naval service in accordance with the rule of law. The navy was not given free hand to seize and pillage the goods of the enemy. The taking of prizes was controlled by statute and Orders-in-Council making detailed provisions for distribution of shares. The application of these provisions was subject to the rule of law as can be seen in a large number of cases that came before the English courts, not just the Admiralty Court, but also the common law courts. Although the Admiralty was closely involved in supervising the forces that made prize captures, it was prepared, indeed happy, to leave the resolution of disputes between officers to the courts.

[6] Donald Thomas, *Cochrane, Britannia's Sea Wolf* (London: Cassell, 1999), 132.

The English courts looked to concepts of international law as sources for English law where they thought appropriate, but they were not subject to international law as has been frequently suggested. Indeed, the English approach to international law was as much an attempt to create and influence international law as to follow it.

Whilst prize money was an incentive for officers and crew to do their duty it did also have the potential to create discord and disharmony. The discord was kept in check, and the system preserved, by the application of the rule of law. Such changes as were made were part of the practical management of the complex organisation that was the Royal Navy, not part of a liberalising drift of policy.

Sources and Methodology of Research Underlying this Thesis

The research presented in this thesis addresses the gaps in understanding of the law on the distribution of prize money in the Georgian navy. It aims to provide a reliable statement of the rules, and how and why they developed as they did. It draws out the lessons that can be gleaned from this analysis about the way the Admiralty worked with its officers and the courts. The research has involved a study of the available law reports for the period, but not simply to dig up more anecdotes about prize cases. The aim has been to establish the body of law as it was understood at the time by those practising in the courts. For a guide to the standard legal referencing used, see Appendix 1.

The methodology has not been to try and assemble as many reported cases as possible, but has been that of a practising lawyer seeking to ascertain the law. Thus, cases that the courts themselves relied upon as providing useful precedent have been investigated further, providing a natural chain of enquiry. The study has included those cases identified as dealing with prize disputes, but has also included judgments in related topics by way of comparison in order to identify the legal language and issues of the day. This process of following case references back to the authorities that the courts themselves referred to at the time is a standard method of legal research, but has also proved to be a very useful tool for historical research. Once the relevant volumes of law reports were identified then those complete volumes were studied further to identify any other reports in those volumes relevant to the subject, whether directly or tangentially. The law reports provide more detailed information, and were found to be more accurate than, less formal reports of the same cases, for example in *The Naval Chronicle.* As the objective was to determine the material used to establish legal precedent at the time, the

research concentrated on the law reports rather than less formal reporting. This has had the benefit of exposing to scrutiny a previously under-utilised source.

The period 1793-1815 includes twenty years of war during the French Revolutionary and Napoleonic wars. During that time there were significant changes to the way the system worked. The research for this thesis included a search for direct contemporary evidence of the reasons for the changes in parliamentary papers, privy council petitions, correspondence, or elsewhere. The best evidence found was that within the law reports and set out below. Despite a want of detailed direct evidence expressing in plain terms the reasons behind the changes, the high level of activity within the period chosen for the study means that the internal architecture of the changes when seen in context allows conclusions to be drawn about the reasons behind the changes.

At times the investigation of the case law has taken the research to the cases from earlier periods that were referred to as authorities in the period of this study. This reveals both the reasoning of the courts in the period of study and the way in which the law had already developed.

In many cases our understanding of Georgian case law has been coloured by later, mainly Victorian, judgments. In terms of historical research, those judgments are part of the historiography that needs to be subjected to critical analysis. Thus, where appropriate their effect on our understanding has also been considered.

The primary sources are the Prize Acts and the Royal Proclamations that provided for the distributions and the reports of the cases in which those provisions were considered. The Prize Acts are available as acts of parliament in printed sources such as *Statutes at Large*. The Royal Proclamations were published in the *London Gazette* and are searchable online.[7] Some key proclamations were identified from the law reports, but that did not identify all the relevant proclamations. Using the chronology of the wars, missing proclamations were identified and then traced using more specific online searches. This allowed the comparative exercise to be completed.[8]

Previous studies have not made use of the wealth of contemporary material that is available from law reports. Whilst some attention has been paid previously to decisions of the Admiralty Court, decisions of the Court of Common Pleas and the King's Bench have not previously been studied in detail, despite the fact that contemporary reports are available in law libraries. Many

[7] https://www.thegazette.co.uk/
[8] See App. 3 & 5.

historians have relied on reports of cases in *The Naval Chronicle*, though they tend to be less accurate than legal reports such as those of Christopher Robinson, Sir Edward Hyde East, William Taunton or John Bosanquet and Christopher Puller. It was said of Isaac Espinasse who reported nisi prius cases from 1793 to 1807 that he only heard half of what went on in court and reported the other half.[9] This criticism has at times unjustifiably attached itself to his contemporaries. The quality of the reports on prize cases considered below is markedly good. The reports of the King's Bench and Court of Common Pleas tend to be factually better than the reports of the Admiralty Court, which are more concerned with facts just to demonstrate the principle that the case establishes rather than accurate recitation of the facts for their own interest. The information that the reports contain is even more useful when cross-referenced to the evidence of logbooks, muster books, journals and correspondence in archives such as the National Archives, the British Library and the National Maritime Museum.

Where legal reports have been referred to in the past it has mainly been as a source of anecdote, rather than to provide any structured study of what they tell us about the development of the law and the Royal Navy. The reports contain lengthy, sometimes full, recitations of relevant correspondence. Some of this correspondence is not available in the archives of the Treasury or Admiralty, perhaps because before the days of the photo-copier it was removed for litigation purposes and then either not replaced, or 're-filed' in a place where it cannot now be located.

Many prize payments were not the subject of dispute. Those that were did not necessarily go to law. Even those that came to court and reached a judgment may not have been fully reported by the private individuals who published the law reports at the time. Some are only referred to in passing in other, reported, cases. The reported cases refer mostly, but not exclusively, to disputes between senior and commissioned officers. The lower decks found access to the law harder. A specialist body of impressment attorneys solicited business around naval ports.[10] For between £10 and £20 an application might be made for a writ of habeas corpus to free a man from naval impressment.[11] Although that represented a year's pay for an able seaman it was still a sum that might be afforded with the assistance of friends, family and/or employers on shore. A large number of prize agents would also take powers of attorney to claim prize money on behalf of their clients.[12] Prize litigation though was far less streamlined than applications

[9] Per Chief Baron Pollock, Mathew, "Law-French," (1938) 54 LQR 358, 368.
[10] Kevin Costello, 'Habeas Corpus and Military and Naval Impressment, 1756-1816', *The Journal of Legal History* 29, no. 2 (2008): 246.
[11] Costello, 249.
[12] See, Report of the Commission on Frauds 1803, HC Paper 160, p. 251.

for habeas corpus, and therefore potentially more expensive. In the absence of 'no win no fee' arrangements, prohibited by the laws of champerty, there was limited access to justice for the lower decks to litigate to recover their relatively much lower share of the spoils. Nevertheless, as will be seen in Chapter 9 below, the reforms of 1808 were aimed principally at enhancing the position of the middle ranks in the Royal Navy. Litigation between senior officers did not prompt the change, but it does illuminate the world in which the changes were made to meet the realities of war.

When considered with the available records about the incidents with which they were concerned, the reports that are available provide valuable evidence about both the legal framework and what was regarded as 'use and custom' in the Royal Navy. They identify the points of tension in the system for all ranks. Ideas of 'use and custom' within the culture of the Royal Navy may have settled many disputes, along with peer pressure and pressure from senior officers on their juniors, but these factors were not operating in a vacuum. As will be seen below, they influenced the development of the law, but they also operated within a framework that was provided by statute and proclamations and their application by the courts.

This research aims to supplement, rather than supplant, the growing body of research that draws on the written records of the experience of the officers and men of the Royal Navy, and of their wives and families. A clearer understanding of the framework within which the subjects of that research were operating will help in understanding its significance, and the culture of the Royal Navy and the society in which it operated during the long eighteenth century

Chapter 3 considers the early development of prize money up to the eighteenth century. Chapter 4 then considers the role of international law in English law in the eighteenth century and chapter 5 considers whether prize courts were a special case, as so often claimed. These three chapters set the scene for the study that follows of prize money during the wars of 1793-1815. The study includes the litigation that arose from the wars, but lasted into the 1820s. For the purposes of this study references to the eighteenth century will be references to the so called 'long eighteenth century', which includes these early years of the nineteenth century as the concluding narrative to the previous century.

The next three chapters consider the Prize Acts and Royal Proclamations that governed the distribution of prize money between 1793 and 1815, and the extensive litigation which both applied and influenced the way the proclamations were drafted. Chapter 6 introduces the provisions in the context of the officers and crew of Royal Navy ships involved in capturing

prizes. Chapter 7 extends that consideration to the important, and potentially lucrative, area of the entitlement of flag-officers to a share of the spoils. Chapter 8 completes this area of consideration by setting out the position of commodores and fleet captains as flag-officers.

A constant issue that arises in chapters 6-8 is the reasoning behind the significant rule changes in 1808. Accordingly, chapter 9 considers the context of the 1808 changes, and what that tells us about the culture of the Royal Navy and the political and economic worlds in which it was operating at the time. In particular it reveals that the reason behind the change was not a desire for greater equity, but a practical desire to recruit and retain skilled men in the navy.

Chapters 10 and 11 then offer comparative studies to highlight the nuances of the English system for distributing prize money. Chapter 10 considers other forms of bounty paid to the Royal Navy and Chapter 11 considers the US experience in adopting, but amending, the English model of prize distribution. The US prize system was chosen as the fact that the records are in English affords greater confidence when making comparisons of the written records and statutes. The clear British heritage of the US provisions also allows the comparison to illuminate both systems through their differences, similarities and dynamics.

The conclusions that can be drawn from this study are brought together in Chapter 12.

The next Chapter will consider the current literature.

Chapter 2, Review of the Existing Literature

There is no comprehensive study of the law relating to the distribution of prize money in the existing literature. Some historians have considered prize money, but none have provided a comprehensive review of the law or the way that it operated.

Prize Money in Naval Histories

The only modern history that is dedicated to the topic of the British system of prize money is Richard Hill's Prizes of War.[1] It is the work of a retired rear-admiral who had fallen among lawyers as Under-Treasurer of the Middle Temple. Making use of the Inn's library of law reports, and its connection with Lord Stowell, he researched a series of aspects of prize law and how it operated. The result is a useful introduction to the subject of prize money, but it treats prize law as an essentially static system, rather than a fluid system changing with political and social changes going on around it. Hill does not attempt to set out what prize law actually was at different times and why it changed.

Hill mentions four of the Prize Acts during the period, though he does not consider them as a series of interlinked changes. Whilst some historians such as Morriss and Knight have recognised that there were changes in prize law throughout the period, most treat prize law as a fixed set of rules.[2] There is occasional reference to isolated reforms, but they are scarcely investigated or set in context. Most published historians do not consider the way the rules changed during the period at all. There were at least 21 prize or prize related Acts of Parliament between 1780 and 1817, 14 of them were passed between 1793 and 1815. There were a number of prize-related Orders-in-Council, the secondary legislation that implemented the Prize Act distribution system and laid down the entitlements to shares of prize money. Significant orders (or 'Royal Proclamations') were made in 1793, 1797, 1800, 1803, 1805, 1807, 1808, 1812 and 1815. Rarely, however, do historians distinguish between them or consider in any detail how they compared with those such as in 1744 or 1756 during earlier conflicts. The research

[1] J. R. Hill, *The Prizes of War: The Naval Prize System in the Napoleonic Wars, 1793-1815* ([Portsmouth: Stroud: Royal Naval Museum Publications ; Sutton Pub, 1998).
[2] E.g. 1803, Roger Morriss, *The Royal Dockyards during the Revolutionary and Napoleonic Wars* (Leicester: Leicester University Press, 1983), 198; R. J. B. Knight, *Britain against Napoleon: The Organization of Victory, 1793-1815* (London: Allen Lane, 2013), 323.

presented here attempts to fill this void by considering how and why prize law changed and what that tells us about the system and the way it operated.

Greater attention has been paid to the prize-taking activities of privateers, both British and American, than to the Royal Navy.[3] Some additional insight into the way naval prize payments were handled in practice can be found in Geoffrey L. Green's *The Royal Navy and Anglo-Jewry 1740-1820*, but that work did not consider the law in any systematic way. [4] Other attempts to describe the prize system tend towards the simplistic and anecdotal.[5] Anecdote and personal views revealed by quotable quotes about the desire for prizes have masked the reality of what the system for prize distribution actually was and how it operated. The 'scientific' approach advocated by Sir John Knox Laughton has not hitherto been taken to the subject of prize law during the wars of 1793-1815.[6] His language may have been intended to appeal to the technological modernisers in the Royal Navy, but his advocacy of detailed source-based analysis had, and has, much to recommend it.

Individual biographies of naval officers of the age, and social histories about the seamen bringing their own correspondence to light make occasional reference to their success or otherwise in matters of prize money. A published collection of accounts of Nelson's contemporaries permits of a broader perspective on the importance of prize money.[7] Each one is written by a leader in the field of naval history in this era. The subjects represent the 'normal' group of those who 'succeeded' in the Royal Navy and rose to senior rank along with Nelson. Nelson is excluded as he does not want for biographies and was an exception that does not prove any rule. Although prize money is mentioned a number of times across the chapters, none of the contributors suggest that the 'success' of their subjects was motivated by prize money. Those who commanded frigate squadrons, such as Warren and Pellew, made money from their captures. Money was important to them, as it was to Cochrane, who is not included in the collection.[8] But the clear suggestion by each contributor is that it was the success that

[3] David J. Starkey, *British Privateering Enterprise in the Eighteenth Century* (Exeter: University of Exeter Press, 1990); Kert, *Prize and Prejudice*.
[4] Geoffrey L. Green, *The Royal Navy and Anglo-Jewry, 1740-1820: Traders and Those Who Served* (London: GL Green, 1989).
[5] See e.g. Dudley Pope, *Life in Nelson's Navy* (Annapolis, Md: Naval Institute Press, 1981); Patrick O'Brian, *Men-of-War* (New York: W.W. Norton, 1995); Peter Kemp, *A Survey of the History and Distribution of Naval Prize Fund* (Aldershot: Gale, 1946).
[6] Andrew D. Lambert, *The Foundations of Naval History: John Knox Laughton, the Royal Navy and the Historical Profession* (London: Chatham Publishing, 1998), 47. Richard Harding, *Modern Naval History: Debates and Prospects* (London: Bloomsbury Academic, 2016), 5.
[7] Peter Le Fevre and Richard Harding, eds., *British Admirals of the Napoleonic Wars: The Contemporaries of Nelson* (London: MBI Pub. Co, 2005).
[8] But see: Thomas, *Cochrane, Britannia's Sea Wolf*.

was craved and that the money came with success in a particular area of operation.[9] Similarly those who commanded in the east, such as Rainier and Pellew, made money from captures on the station and did their best to maximise their incomes, but that is not the same as suggesting that it was prize money that motivated them.

Warren, in a letter to Admiral Keith in 1801, gave the state of his finances as a reason to stay in the Mediterranean, but this was after his supposed considerable financial success as a frigate commander.[10] Indeed a number of the accounts bring out the negative effect of the prize system. Admiral Knowles lost the value of prizes taken on Minorca when the island was recaptured and was ordered to pay damages of £14,000 for an illegal capture, a debt that remained a burden for years after.[11] Later a captured Danish prize was damaged on the way to being condemned in England and was lost to Knowles as a prize when it had to put into a port in neutral Norway. The prize crew were stranded and had to make their own way home.[12] Calder was criticised for being over-protective of his prizes when not following up the attack on Villeneuve's fleet.[13]

Social Historians

There is a common assumption among writers dealing with the British naval wars of 1793-1815 that prize money was a significant incentive for officers and men of the Royal Navy to encourage them in active service for the public good. That, after all, was the stated aim in the preamble to successive Prize Acts. As the Admiralty judge Sir William Scott put it: 'The great intent of prize is to stimulate the present contest, and to encourage men to encounter present fatigue and present danger'.[14] Recruiting posters for sailors and marines proclaimed the opportunities for prize money in both Britain and the US.[15] Michael Lewis in 1960 ranked prize money first in a list of financial inducements for service in the Royal Navy of this period, followed by freight money and only then by pay and allowances.[16] N.A.M. Rodger also placed prize money first among the attractive prospects for a career at sea in this period.[17] He has

[9] Le Fevre and Harding, *British Admirals of the Napoleonic Wars*.
[10] Ibid, 232n75.
[11] Ibid, 126. It is difficult to give a modern equivalent, but £14,000 is one and a half times the purchase price of Merton Place when Nelson bought it.
[12] Ibid, 131.
[13] Ibid, 208.
[14] The Vryheid, (1799) 2 Rob. 16, 28.
[15] E.g. *Trafalgar Chronicle 2017*, 6–7.
[16] Michael Lewis, *A Social History of the Navy 1793-1815* (London: Chatham Publishing, 1960). p. 340
[17] N. A. M Rodger, *The Wooden World: An Anatomy of the Georgian Navy* (London: Fontana, 1988), 256.

described prize money as 'the traditional balm to the wounded naval spirit'.[18] Rodger has, however, recognised that there was a tension for naval officers between private profit and public duty and that there was a sense of honour in putting duty first.[19] Lavery, in a brief consideration of prize money suggested that it gave seamen some 'residual hope, like winning the lottery', but pointed out that the uneven distribution made it difficult to assess its full effect.[20] Rodger's lead has been followed by further research into the social history of the Royal Navy undertaken by Wilson, but again without a systematic study of the rules for prize money distribution.[21]

Economic Historians

That British success at sea in and around Trafalgar owed a great deal to economic, financial, political and organisational factors is well recognised.[22] A number of historians have considered the effect of economic warfare in the era, but they have tended to concentrate on the nature and effect of blockade rather than the mechanism of prize money as a means of policy implementation.[23]

Attempts at calculating the global scale of prize payments in the era on both sides of the Atlantic have failed to produce a reliable figure. One methodology has been to assess the payments made to the sailors' funds that benefited from unclaimed shares of prize awards. Wareham has attempted the exercise in Britain as part of his research into frigate captains.[24] He also attempted a more focused exercise in an in-depth study of a single frigate commander, Captain Graham Moore.[25] McKee has attempted the exercise in the more limited field of the

[18] Cheryl A. Fury, ed., *The Social History of English Seamen, 1650-1815* (Woodbridge; The Boydell Press, 2017) 69.
[19] Rodger, *The Wooden World*, 314–17.
[20] Brian Lavery, *Nelson's Navy: The Ships, Men and Organisation ; 1793 - 1815 (*London: Conway, 1992), 131.
[21] Evan Wilson, *A Social History of British Naval Officers, 1775-1815* (Woodbridge: The Boydell Press, 2017) 145–53.
[22] E.g. Peter Padfield, *Maritime Power and the Struggle for Freedom: Naval Campaigns That Shaped the Modern World 1788-1851* (Woodstock: Overlook Press, 2006); Knight, *Britain against Napoleon*; James Davey, *In Nelson's Wake: The Navy and the Napoleonic Wars* (New Haven, Yale University Press, 2015).
[23] E.g. Melvin, Frank Edgar, *Napoleon's Navigation System: A Study of Trade Control During the Continental Blockade* (New York: University of Pennsylvania, 1919); Eli F. Heckscher, *The Continental System: An Economic Interpretation* (Oxford: The Clarendon Press, 192); Lance E. Davis and Stanley L. Engerman, *Naval Blockades in Peace and War: An Economic History since 1750* (Cambridge: Cambridge University Press, 2006); Katherine Aaslestad, *Revisiting Napoleon's Continental System: Local, Regional and European*, (Basingstoke: Palgrave Macmillan, 2014).
[24] Tom Wareham, *The Star Captains: Frigate Command in the Napoleonic Wars* (London: Chatham Publishing, 2001).
[25] Tom Wareham, *Frigate Commander* (Barnsley: Pen & Sword Maritime, 2012).

US navy.[26] Due to the limits of the available records both researchers recognised that there was a limit to what was achievable through such work. A reliable figure has commonly been thought to be unachievable.[27]

Hill and Benjamin have each attempted a global estimate of prize earnings by taking samples from the records of the High Court of Admiralty. The data studied included the identity of prizes, the captors, the gross and net value of the prizes, the prize agent, the date of the capture and the date the account was brought in to the court. The records in the National Archive are kept alphabetically, by the name of the prize. Within the alphabetical groupings they are kept chronologically by the date that the prize record was brought into the Admiralty Court in London for final distribution. Hill's sampling covered letters I, J and N. Benjamin adhered to the same methodology, but investigated letters T, U and V. The letters were selected to give broad representation to the nationalities of the prizes seized.[28] Taking the product of both Hill's research and his own, Benjamin amassed a sampling of some 20 per cent of the total records. The methodology necessarily excludes any prizes that were not recorded by the courts. Thus, captains who ransomed their prizes for cash, or took matters into their own hands and sold them locally rather than bringing them in for condemnation will have earned prize money that will not appear in these records. If returns from Vice-Admiralty courts on foreign stations never made it to London or into the court files, then they too will be missing. Captures made during major amphibious operations may also be excluded. These factors suggest that, if anything, the figures that Benjamin has produced will be an under-estimate of the prize income rather than an over-estimate. Based on this sampling, however, Benjamin estimates that prizes taken by the Royal Navy during the wars of 1793-1815 had a gross value of £30.8 million and that 86.7 per cent of that value was available for distribution to the captors, £26.6 million. That represents an average supplement to the income of the Royal Navy of £1.2 million per annum. Benjamin's research suggests that as the wars went on the value of individual prizes went down, but the number of prizes went up. Further, Benjamin's figures suggest that far from tailing off as the war went on, the number of prizes captured grew throughout the war. It was only after 1814 that the number of captures dipped. Benjamin's work, though in part unpublished, has been

[26] Christopher McKee, *A Gentlemanly and Honorable Profession: The Creation of the U.S. Naval Officer Corps, 1794-1815* (Annapolis, Md: Naval Institute Press, 1991).
[27] Rodger, *The Wooden World*, 332.
[28] Daniel K. Benjamin, '*Golden Harvest: The British Naval Prize System, 1793-1815'* , Clemson University (unpub., 2009), 6–7.

considered in published literature, but not in the context of a detailed consideration of the underlying provisions.[29]

The significance of these figures can be seen when one considers the level of British naval prize values in later conflicts. In the two world wars between 1914-18 and 1939-45 Britain adopted a collective fund approach to prizes. The proceeds were divided among all those who served rather than those directly concerned in the captures. The collective fund for the First World War was estimated at £14 million. For the Second World War it was £20 million.[30] Although the 1793-1815 figures cover a longer period than either of the later conflicts, the overall proceeds of prize taking were higher even without any adjustment for inflation over more than a century.

Legal Historians

Lewis was aware of, and considered, a number of reported court cases but he did not attempt to analyse what they said about the wider system. His references have not been followed up by those coming after him. Previous studies of admiralty law of the time have understandably concentrated on the Admiralty Court and the work of judges such as Sir William Scott.[31] Although many of these sources are relied upon by Brinkman in her thesis on the international politics of what she calls the Court of Prize Appeal during the Seven Years War, her work is, expressly, not a history of prize law during the eighteenth century.[32] The current thesis endeavours to be such a history in relation to the distribution of Royal Navy prize money.

The Admiralty Court had the exclusive jurisdiction to condemn seized ships and goods as lawful prize.[33] Where there was a dispute between parties as to the division of a share, however, then proceedings were usually brought outside the Admiralty Court in the Court of Common Pleas. It was a time when claims needed to be brought within a strict form of action. Prize

[29] E.g. Fury, *The Social History of English Seamen, 1650-1815*, 69; Wilson, *A Social History of British Naval Officers, 1775-1815*, 145.
[30] *The Times*, December 20th 1945, Issue 50330, p. 5.
[31] Henry J Bourguignon, *Sir William Scott, Lord Stowell: Judge of the High Court of Admiralty, 1798-1828* (Cambridge: Cambridge University Press, 2004); C. John Colombos, *A Treatise on the Law of Prize* (London: The Grotius Society, 1940); Edward Stanley Roscoe, *Studies in the History of the Admiralty and Prize Courts* (London: Stevens, 1932); Edward Stanley Roscoe, *The Admiralty Jurisdiction and Practice of the High Court of Justice* (London: Stevens, 1882; Edward Stanley Roscoe, *History of the English Prize Court* (London: Lloyds', 1924). James Wilford Garner, *Prize Law during the World War* (New York: Macmillan, 1927).
[32] Anna Brinkman, '*The Court of Prize Appeal as an Agent of British Wartime Foreign Policy: The Maintenance of Dutch and Spanish Neutrality During the Seven Years War*' (PhD thesis, King's College London, 2017), 37.
[33] Le Caux v Eden (1781) 2 Douglas Rep. 614.

claims often involved an action for money had and received, referred to as indebitatus assumpsit. This involved a legal fiction that whoever had received prize money thereby assumed a debt to whoever was lawfully entitled to those monies. Claimants could thus sue the holder of the monies in an action for payment of a debt. The prize fund would normally be paid out to the prize agent appointed by the putative commander-in chief. As the holder of the funds, the prize agent could be sued for payments alleged to be due from the fund. In the litigation considered below between Nelson and St Vincent the commander-in-chief's share was paid out to St Vincent's secretary and agent, Benjamin Tucker, who effectively held the monies as stakeholder while the claims on the monies were adjudicated. If a stakeholder pays out the money to the wrong person and is then faced with a claim by another party then they may have to pay the money again if the claim is upheld. As the judge at the trial of the action in March 1801 advised Tucker:

"The defendant would take care to pay money into the right hand, in case it might be claimed by somebody else".[34]

At times the holders of prize money did pay out monies without a court order, but were wise to do so in return for an indemnity from the recipient against other claims.[35]

The fact that naval officers chose to sue outside of the Admiralty Court when they could is itself instructive. The main benefit of bringing a claim outside of the Admiralty Court was that the captors claiming a share of the prize could have their own representation rather than being obliged to rely on representation by the King's Proctor.[36] Naval officers traditionally mistrusted the Admiralty Court as a place where their efforts were turned to the profit of the law officers, agents and clerks and where their interests were prejudiced by conflicts of interest. They thought that if they could have their own representation then they would pay lower fees and their interests would be better protected.[37] Among those most voluble on the subject was St Vincent, who wrote to Sir William Scott in 1803 that:

"until the officers of the Navy are permitted to nominate their own proctors, a privilege possessed by privateers, their suspicions will remain."[38]

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[34] NC Vol. V 256
[35] Se e.g. draft deed of indemnity prepared by Booth & Haslewood for Nelson, NMM CRK/6/ 142.
[36] An office roughly equivalent to the Treasury Solicitor in Admiralty Matters, but still with a reputation as "a place of considerable profit", a description from 1745, see David J Starkey, *British Privateering Enterprise in the 18th Century*, p. 27.
[37] See Hill, *The Prizes of War*, pp 163/4 and Henry J. Bourguignon, *Sir William Scott, Lord Stowell*, page 274.
[38] *Letters of Admiral of the Fleet Earl St Vincent* ed. Bonner-Smith, NRS, 1926, Vol II page 221.

That same year St Vincent, as First Lord of the Admiralty, set up a Commission of Naval Enquiry to investigate frauds and abuses, whose fourth report considered the workings of prize agencies, leading to some tightening of regulation.[39]

When Edward Stanley Roscoe, the then Admiralty Registrar, produced his digest of prize cases in 1905 he limited it to decisions of, or on appeal from, the Admiralty Court.[40] He thereby pushed the prize decisions of the Court of Common Pleas and the King's Bench further into obscurity. He was not preparing his digest as a work of historical research. It was produced following a recommendation of a committee established by the government to consider prize law. In 1905 the British government was attempting to negotiate international agreements controversially aimed at regulating prize-taking, but also preparing for war, not just with dreadnoughts but with the legal structures for economic war by seizing prizes.

The Prize Court was active during and after the First World War, and in 1924 Roscoe produced a short *History of the English Prize Court*. He was supported in doing so by the committee of Lloyd's, the London insurance market, and what he produced is a short work focusing on the court itself and relying largely on secondary sources. He supplemented this work in 1932 with his *Studies in the History of the Admiralty and Prize Courts*, but it is another slim volume that says little about substantive prize law. In 1946, after the Second World War, a slim volume was produced by Commander Kemp as a lay explanation of the prize bounty that was about to be paid out. It is, however, largely anecdotal and lacking in depth.[41]

Confusion over the Legal History

The byzantine ways of the Court of Common Pleas can cause confusion amongst even the most eminent historians in the field. Thus, Nelson's litigation with St Vincent over prize money had finished its journey through the Court of Common Pleas by 1802, but Nelson had not won at that point. Technically he had lost after a split decision of the court in 1802 and was forced to appeal to the court of the King's Bench. He did not win the case in that court until November 1803. Nevertheless, one of the recent biographies to explore the complex character of the Earl St Vincent recites that Nelson had won in 1802.[42] This shortened chronology reduces the period

[39] Hill, p.139.
[40] Edward Stanley Roscoe, *Reports of Prize Cases Determined in the High Court of Admiralty, before the Lords Commissioners of Appeals in Prize Causes, and before the Judicial Committee of the Privy Council from 1745 to 1859* (London: Stevens and Sons Ltd, 1905).
[41] Peter Kemp, *A Survey of the History and Distribution of Naval Prize Fund*.
[42] Andrew D Lambert, *Admirals* (London: Faber, 2009) 194.

of legal uncertainty which affected both Nelson's finances at a key time and his relationship with his old mentor. When the Court of Common Pleas delivered its split decision in 1802 Britain was enjoying the Peace of Amiens. By the time the case was concluded in favour of Nelson in the King's Bench in 1803 Britain was once again at war with France, and St Vincent had sent Nelson to command the Mediterranean fleet.

An earlier thoughtful contribution on St Vincent in a collection of essays about precursors of Nelson made no reference at all to the litigation and its effect on the relationship between the two men.[43] Davidson's biography of St Vincent in 2006 does not mention the litigation either, despite being a full length work.[44] As St Vincent's secretary, Benjamin Tucker was closely involved in the prize litigation with Nelson and others on St Vincent's behalf. Tucker has been described as St Vincent's 'ideological support', and reputedly enjoyed considerable influence over St Vincent.[45] In Davidson's account of St Vincent, however, Tucker is relegated to a bit-part player.

Many Nelson authorities do not even attempt to understand the chronology or effect of the litigation with St Vincent. The late Colin White, ignored the litigation in his study of Nelson.[46] He did so even though he was described in his obituary as Nelson's 'representative on earth', and he tried to make sense of Nelson's relationship with St Vincent.[47] Knight recognised the strain that the litigation put on Nelson, but did not attempt to analyse the litigation in any detail.[48]

The omissions are not limited to studies of Nelson. Musteen has produced a well-researched account of the history of Gibraltar, including the Battle of Algeciras in 1801.[49] Another good account of the battle is given by Morriss in *Nelson Against Napoleon*, even though Nelson was not involved in the battle.[50] McCranie has provided an insightful account of the character of

[43] Peter Le Fevre, ed., *Precursors of Nelson: British Admirals of the Eighteenth Century* (London: Chatham Publishing, 2000), Chap. 13 by Patricia Crimmin.
[44] James D. G. Davidson, *Admiral Lord St Vincent - Saint or Tyrant? The Life of Sir John Jervis, Nelson's Patron (*Barnsley: Pen & Sword Maritime, 2006).
[45] Roger Morriss, *Naval Power and British Culture, 1760-1850: Public Trust and Government Ideology (*Aldershot: Ashgate, 2004), 186; Knight, *Britain against Napoleon*, 320.
[46] Colin White, *Nelson: The Admiral*, (Stroud: Sutton Pub., 2005) 51.
[47] *The Daily Telegraph*, 18th January 2009.
[48] R. J. B. Knight, *The Pursuit of Victory: The Life and Achievement of Horatio Nelson* (London: Allen Lane, 2005) 387.
[49] Jason R. Musteen, *Nelson's Refuge: Gibraltar in the Age of Napoleon* (Annapolis, Md: Naval Institute Press, 2011).
[50] Robert Gardiner, ed., *Nelson against Napoleon: From the Nile to Copenhagen, 1798-1801* (Annapolis, Md: London: Naval Institute Press, Chatham Pub, 1997) 88.

Lord Keith and his approach to prize money.[51] Sullivan has done the same for Admiral Saumarez.[52] None of these accounts, however, make use of the accounts given in the proceedings that the battle of Algeciras gave rise to in the dispute between Keith and Saumarez over Keith's claim to prize entitlement.[53] Keith was also involved in extensive litigation in other areas, especially the expedition to the Cape in 1795 and 1796.[54] Naval historians have not considered the accounts given in that litigation, although they have been considered in detail by the South African professor of commercial law, JP Van Niekerk.[55]

For all its complications, prize litigation provided a public method of overseeing the operation of payments of public monies to individuals. The litigation can be seen in the context of reforms to government bureaucracy at the time, which as the 18th turned into the 19th century effected structural changes from collective to individual responsibility in government oversight.[56] The reforms included those prompted by St Vincent's commission of enquiry into naval abuses and its fourth report dealing with the prize system, but a more general reform was already underway as a result of the earlier commission on fees, gratuities, perquisites and emoluments in public office set up by William Pitt. Whether prize litigation and courts-martial were the models of equity reflecting changing times suggested by Morriss is open to question, however.[57] He suggests that the rules of equity emerging from the Chancery courts were part of a process of modernisation of the common law, and they are often seen as such. Like the common law, however, the rules of equity were another way to try and provide jurisdiction for the courts to reflect the times they lived in. The Prize Court and other courts considering prize law were undertaking the same task. They were not attempting to be a progressive movement to effect change themselves, rather they were reflecting the society in which they were operating.

International Lawyers

There is a considerable body of literature concerning the meaning and purpose of international law. This thesis is not intended to consider those aspects beyond the role of the idea of

[51] Kevin D. McCranie, *Admiral Lord Keith and the Naval War against Napoleon* (Gainesville: University Press of Florida, 2006).
[52] Anthony Sullivan, *Man of War: The Fighting Life of Admiral James Saumarez: From the American Revolution to the Defeat of Napoleon* (Barnsley: Frontline Books, 2017).
[53] The San Antonio (1804) 5 Rob. Adm. Rep. 209
[54] The Dordrecht (1799) 2 Rob. 55 and The Cape of Good Hope (1799) 2 Rob. 274.
[55] JP van Niekerk, 'The First British Occupation of the Cape of Good Hope and Two Prize Cases on Joint Capture in the High Court of Admiralty', *Fundamina, A Journal of Legal History* 11, no. 2 (2005): 155–81.
[56] Roger Morriss, *The Foundations of British Maritime Ascendancy: Resources, Logistics and the State, 1755-1815*, 2014, 14.
[57] Ibid, 26.

international law in the eighteenth-century English courts. Neff has liberated the history of international law from the often unread, and unreadable, first chapters of books on international law. He has focused, however, on the nature and character of international law, declaring that the content of that law 'we can safely leave in the hands of professional lawyers'.[58] He describes 'the bewigged judges of the admiralty courts of England' in the eighteenth century, in particular Sir William Scott, as the most lasting of the innovators in the field of international law.[59] As will be seen in this thesis, however, it is only by looking at the detail of what Scott and other judges were saying about the content of international law that one can really see what they were saying about its nature and character.

Commentators on international law, or the law of nations, have considered prize law, often considering it to be an exemplar of a municipal court applying international law. A statement by the jurist Sir William Blackstone that the law of nations 'is here adopted in its full extent by the common law, and is held to be part of the law of the land' has often been cited over the years.[60] It has been abandoned more recently, as the chapter on the role of international law below reveals, but in the meantime its influence has been significant. Dicta to similar effect in prize judgments from the eighteenth century need to be read in context and without the embroidery added later by the Victorians. The embroidery owes more to their attempts to establish a body of international law relying on purported historical precedent than any objective analysis of the dicta. In 1942 Sir William Holdsworth, towards the end of a distinguished career providing a commentary on the history of the English Law, argued successfully against Blackstone's view, but reserved an exception for the Prize Courts.[61] The whiff of a law of nations has lingered over the Prize Courts ever since even though they have been of largely historical interest. This has tainted even well-considered histories of prize law to the extent that they even suggest that it evolved into 'a smoothly functioning system of international law'.[62] Holdsworth's arguments apply equally to the Prize Courts, however, and as the text below reveals, the Prize Courts were no exception. They applied municipal rather than international law. They looked to international law arguments as a source when determining what municipal law should be, but they were not bound by them.

[58] Stephen C. Neff, *Justice among Nations: A History of International Law* (Cambridge, Massachusetts: Harvard University Press, 2014) 2.
[59] Neff, 206, 212-213.
[60] Sir William Blackstone, *Commentaries on the Laws of England*, (1769) Book 4, Chapt. 5.
[61] William S. Holdsworth, 'The Relation of English Law to International Law', *Minnesota Law Review* 26, no. 2, (January 1942) 141–52.
[62] Kert, *Prize and Prejudice*, 36.

Litigation as a source of 'custom and usage' and social attitudes

Prize actions frequently involved evidence about the perceived 'use and custom' of the navy that is not available elsewhere. The rights of commodores to share in prize money as flag-officers was a fruitful source of litigation. The evidence in such cases makes plain that a captain appointed to act as a commodore with the right to appoint a captain under him ('commodore first class') was paid the full pay and allowances of a rear-admiral whereas a commodore appointed without that right ('commodore second class') was paid only a daily allowance of ten shillings, and was thus called a 'Ten Shilling Commodore'. Whereas the former enjoyed the rights of a flag-officer to prize money, the latter did not. Yet the current leading biography of Duckworth in a collection of essays about the contemporaries of Nelson confuses the status of commodores. The contributing author refers to Jervis (later St Vincent) inspecting Duckworth 'with a view to his possible appointment as the captain to which Jervis was entitled as a 'Ten Shilling Commodore'', thus missing the nuance between so-called first and second class commodores in a way that neither of the men being discussed would have done.[63]

The status of a Ten Shilling Commodore was an essential ingredient of the dispute over Sir Home Popham's entitlement to monies from the River Plate expedition in 1806, but the available records of the litigation have been little used by those who have considered the campaign.[64] They offer a wealth of information not just about prize and freight law, but also about naval 'custom and usage'. Popham was involved in both legal and political attempts to resolve the ongoing disputes arising from the expedition. They are unusually well documented as the House of Commons published much of the relevant correspondence, and a verbatim account of the court proceedings was published soon after the event.[65]

Disputes about prize money posed an unwelcome distraction from conflict with the enemy and the right to prize money carried with it considerable burdens as well as benefits. On occasion the level of anticipated benefit could be too large for the good of the service.[66] At times it turned

[63] Le Fevre and Harding, *British Admirals of the Napoleonic Wars*, Chap. 7 on Duckworth by Capt. A B Sainsbury, 169

[64] Hugh Popham, *A Damned Cunning Fellow: The Eventful Life of Rear-Admiral Sir Home Popham, KCB, KCH, KM, FRS, 1762-1820* (Tywardreath, Cornwall: Old Ferry Press, 1991); John D. Grainger, *British Campaigns in the South Atlantic, 1805-1807: Operations in the Cape and the River Plate and Their Consequences* (Barnsley: Pen & Sword Military, 2015); Ben Hughes, *The British Invasion of the River Plate 1806-7: How the Redcoats Were Humbled and a Nation Was Born* (Barnsley: Pen & Sword Military, 2013).

[65] HC Misc Accounts and Papers 1812 Vol. X, p. 383. Anon, *A Correct Account of The Trial at Large between Ross Donnelly, Esq. a Post Captain in His Majesty's Navy, Plaintiff and Sir Home Popham, Knt. Defendant*.

[66] Lewis, *A Social History of the Navy 1793-1815*, 332.

military campaigns into little short of counter-productive plunder.[67] It also had the potential to do damage as well as good to motivation and efficiency in the navy. As Sir John Knox Laughton pointed out, 'the bitterness which frequently arose out of considerations of prize-money was undoubtedly increased by the disproportionate share of the senior officers'.[68]

Lord Granville's comment from the time of the Seven Years' War that seizing merchantmen involved 'vexing your neighbours for a little muck' is often quoted.[69] He was speaking, however, before the outbreak of war when controversial pre-emptive measures were being considered, not the well-recognised right to take prizes once war had been declared. In the same period the Duc de Mirepoix, the French ambassador to St James', is reported to have said of interference with the French beaver fur trade with Canada that 'it was a great pity to cut off so many heads for the sake of a few hats'.[70] His concern, however, was over a naval war across the Atlantic at all, and he would have been trying to diminish the importance of Canada as an object worthy of war. If he had a concern about prize taking then it would have been that France would come off worse.[71] Concern about the potential effect of seizing prizes was understood during the eighteenth century. There was particular concern about the effect that it might have on neutral powers, as will be explored below.

US Prize Money

A useful comparison, that can help shed light on both systems, is with the US prize system.

Petrie considered US Prize law during the early years of the US navy, but again the approach was largely anecdotal rather than systematic.[72] His work was created out of a series of articles about interesting aspects of US prize law. As such it provides a series of windows into the subject, without considering the overall architecture of the topic. Petrie mentions that to a large extent US prize law is based on English prize law, but does not deal with the shift away from

[67] Michael Duffy, *Soldiers, Sugar, and Seapower: The British Expeditions to the West Indies and the War against Revolutionary France* (Oxford, Clarendon Press, 1987) 106–14.
[68] John Knox Laughton, *Studies in Naval History* (London: Longmans, Green & Co., 1887), 197.
[69] *The Diary of the Late George Bubb Dodington, Baron of Melcombe Regis*, H. P. Wyndam (ed), (London: 1784, 344–45); William Knox, *Helps to a Right Decision Upon The Merits of the Late Treaty of Commerce with France*, 35; Corbett and Lambert, *21st Century Corbett*, 80. , Basil Williams, *Carteret and Newcastle A Contrast in Contemporaries (*Cambridge: Cambridge University Press, 1945) 199.
[70] William Knox, *Helps to a Right Decision*, 35. Hall, *The State*, 264 n45
[71] Daniel A. Baugh, *The Global Seven Years War, 1754-1763: Britain and France in a Great Power Contest* (Harlow: Longman, 2011) 71–108.
[72] Donald A Petrie, *The Prize Game: Lawful Looting on the High Seas in the Days of Fighting Sail* (New York: Berkley Books, 2001).

a more democratic system implemented during the American Revolutionary War towards the English system favouring the senior officers. An extensive selection of Naval Documents of the American Revolution was published under the auspices of the US navy's Navy Historical Centre in the 1960s onwards.[73] Understandably, it has been the focus of naval historians considering this era.[74] The selected material includes reference to documents in the UK National Archives which have been the subject of informed journal comment.[75] There has been no attempt, however, to undertake a comparative study of the stages of reform of US prize money distribution. The leading work on the creation of the US naval officer class during the US navy's early period contains a useful chapter on the rewards of service, including freight and prize money, but does not explore the differences between the English and US systems.[76]

A detailed analysis of US prize money provisions in their 19th century context and their abolition in 1899 appears in the impressively researched and referenced work of Nicholas Parrillo, a professor of law at Yale.[77] He does not, however, consider the origins of the system. Valle considers the origins of the system in the context of President John Adam's Federalist agenda, but only briefly and with a frustrating lack of referencing.[78] Symonds considers the politics of the navy at the time, but, reflecting the available contemporary evidence of debate, only in the context of the Navalist/Federalist vs Anti-navalist debate and the size and purpose of a navy.[79]

There is a frustrating lack of direct evidence in the US of the reasons for changes in prize distribution. Drafting discussions of committees of the early Congresses dealing with prize regulation have not survived amidst the wealth of founding documentation preserved in the US, much of it available online. Very possibly the discussions took place informally over dinner given the limited time available in the early congresses. Further, there were enough other issues, in particular the size and role of a navy, to keep the technicalities of drafting prize provisions out of any remaining records of congressional debate or correspondence, even

[73] William Bell Clark et al., *Naval Documents of the American Revolution*, A Naval History of Britain (Washington, USA: Naval Historical Centre, 1964).
[74] e.g. Sam Willis, *The Struggle for Sea Power: A Naval History of American Independence* (London: Atlantic Books, 2015) 101.
[75] See e.g. Washington's instruction to Sion Martingale 8th October 1775, *NDAR* Vol. 2 pp 354-5 and D. Bonner Smith, The Capture of the Washington, *The Mariner's Mirror* (1934) 20:4, 420-425.
[76] McKee, *A Gentlemanly and Honorable Profession*.
[77] Nicholas R. Parrillo, *Against the Profit Motive: The Salary Revolution in American Government, 1780-1940*, (New Haven: Yale University Press, 2013).
[78] James E. Valle, *Rocks & Shoals: Order and Discipline in the Old Navy, 1800-1861* (Annapolis, Md: Naval Institute Press, 1980).
[79] Craig L. Symonds, *Navalists and Antinavalists: The Naval Policy Debate in the United States, 1785-1827 (*Newark: University of Delaware Press 1980).

among those legislating. Once again, however, the internal architecture of the reforms tells its own story. In 1841 when the former Chief Clerk to the US Navy Department, Benjamin Homans, produced a compilation of the *Laws of the United States Navy and Marine Corps* to be published by authority of the Navy Department he included the Acts of 1798 and 1799 along with the longer lasting Act of 1800.[80] He clearly anticipated that future historians would make use of the provisions that he had selected. But his lead has not been followed. The opportunity to consider the founding provisions of the US navy has arisen in works on the so-called Quasi War between the US and France between 1789 and 1801. Palmer in his classic work on the Quasi War primarily used the documents published by the US navy in 1935. [81] The digest of '*Naval Documents Relating to the Quasi-War between the United States and France'* had been published in 1935 under the authority of Congress in an initiative supported by President Franklin Roosevelt. Toll in his later work on the early frigates of the US navy primarily used the same source.[82] Thus the selections made by Dudley Knox, the retired captain of the US navy in charge of the US office of Naval Records in 1935, have affected, and perhaps distorted, the view that has been taken of the early US navy and its origins. This has led to some unfortunate effects, in particular in the debate about US captures of ships of 'superior or equal force'. If the signposts left by Homans to the statutory framework are followed then a different picture emerges as considered in chapter 11 below.

Conclusion

Thus, despite the growing body of research about the Royal Navy of the eighteenth century, there has yet to be an analysis of the changes in the rules for distribution of prize money, and what they tell us about the navy, the courts or the cultural, political and economic times. This thesis aims to provide such an analysis for the crucial period on the French Revolutionary and Napoleonic wars, and to set that analysis in context.

[80] Benjamin Homans, *Laws of the United States, in Relation to the Navy and Marine Corps.*,(Repr.: Gale, Sabin Americana, 2012) 47.
[81] Michael A. Palmer, *Stoddert's War: Naval Operations during the Quasi-War with France, 1798-1801* (Annapolis, Md: Naval Institute Press, 2000).
[82] Ian W. Toll, *Six Frigates: The Epic History of the Founding of the U.S. Navy* (New York: Norton, 2008).

Chapter 3, The Origins and Development of Prize Law

Prize law originates in the right asserted by sovereigns to take reprisals against the subjects of other sovereigns, or authorise such reprisals to be taken. It was a claim to such a right that turned unlawful piracy into lawful seizure. The authorisation of reprisals became part of the administration of relations between medieval European states, and provided a remedy for perceived wrongs.[1] As such, it is as old as war at sea, but its formalisation became part of the process of crafting and empowering the concept of sovereignty.

Reprisals could take two forms. Where a King's subject had been wronged by a subject of another state and the sovereign of that state had refused to provide any means of redress then the King could grant the wronged individual the right to seize ships and goods belonging to the other state by way of redress. In contrast to these individual reprisals, a proclamation of general reprisals allowed all the King's ships to take reprisals against any ships or goods of an enemy state with whom the King was at war. In either case the ships and goods seized could be condemned by the Prize Court as valid prizes. Conditions on the exercise of individual reprisals introduced by the treaties of Ryswick in 1697 and Utrecht in 1713, and followed thereafter, led to their decline and the present study deals with prizes taken under general reprisals. Accordingly references to reprisals are to general reprisal save as otherwise appears. General reprisals were enforced either by the national ships of the Royal Navy or by private ships authorised by the King to do so by Letters of Marque. These were either armed merchant ships that made captures opportunistically in addition to their trading activities, or privateers, fitted out and crewed at private expense for the purpose of capturing prizes. This study is concerned with the control and distribution of prize money arising from seizures by the Royal Navy.

For an island nation the exercise of such naval power was a strategic means to establish security. The general understanding of early prize law owes much to the research undertaken as part of a movement in the build up to the First World War to found Britain's right to interfere with trade at sea in historical precedent, and to convince those in power of the need to keep that right in time of war. With each major naval war British writers sought to refresh this understanding of the rights of naval powers at sea. The admiralty lawyer Reginald Marsden

[1] Stephen C. Neff, *War and the Law of Nations: A General History* (Cambridge: Cambridge Univ. Press, 2005), 76–82.

was amongst those who bent to the task. In 1909 he published his seminal article on Early Prize Jurisdiction and Prize Law in England in *The English Historical Review*.

Nor was the argument one that only needed to be won in war. It also needed to be won in the peace. In 1918 the American Branch of the Oxford University Press published an anthology of extracts from works by jurists of many nations on international law dealing with the freedom of the seas in the context of the Armed Neutralities of 1780 and 1800.[2] Assembled by the American James Brown Scott, Director of the International Law Division of the Carnegie Endowment for International Peace, this was no mere historical curiosity, but an attempt to place the freedom of the seas on the agenda of the belligerent nations. The British Foreign Office, anticipating a fresh assault on Britain's historical claims to interfere with trade at sea had sought an historical briefing paper from the former Chief Justice of Hong Kong, Sir Francis Piggott.[3] They also recruited Corbett to write his persuasive paper on The league of Nations and the Freedom of the Seas.[4] The outcome of this propaganda effort was that the right to take prizes at sea survived the 1919 Versailles peace treaty, as it had the 1783 version after the war with France over American Independence and the Congress of Vienna after the war against Napoleonic France.

These works, albeit published for contemporary purposes, help to provide an understanding of how prizes were treated under English law. Vessels and goods taken as lawful prizes were claimed by the sovereign who took, or authorised, the reprisals. In English law the ships and goods seized belonged in law to the Crown as 'jure coronae'. The captors' right to prize derived from the crown, and the crown determined what was, and was not, a valid prize.[5] The crown also decided who took the benefit of lawful prizes. The purpose of the sovereign in ceding prize to the captors may originally have been to reward successful valour, as the then Admiralty judge Dr Stephen Lushington described it in 1866. As Lushington noted, however, the object of prize payments changed over time:

'But captures are made under all circumstances, and by the nature of the case are as often the result of careful vigilance or even fortuitous finding as of actual combat; and accordingly the

[2] James Brown Scott, *The Armed Neutralities of 1780 and 1800* (New York, Oxford University Press, 1918).
[3] Sir Francis Piggott, *The Freedom of the Seas Historically Treated* (London, Oxford University Press, 1919); Sir Francis Piggott, *The Free Seas in War A Talk to the Men and Women of Great Britain on the Freedom of the Seas* (London: P. S. King & Son Ltd, 1918).
[4] Corbett and Lambert, *21st Century Corbett*, 118.
[5] R. G. Marsden, Early Prize Jurisdiction and Prize Law in England, *The English Historical Review* (1909), vol. 24, No. 96 page 675, at page 677.

system of ceding Prize to the takers is not limited, either in purpose or effect, to this primary object, the rewarding of successful valour. It may now, I think, be regarded as providing a stimulus to the performance of every kind of duty, by furnishing certain gratuities as incidental to certain services. Another result of the cession of Prize, and that by no means unimportant, is that it restrains pillage. That property captured at sea should be preserved intact is in the interest of all parties; of neutral and friendly powers, that, if not Prize, it may be restored; and of the Captors, that, if Prize, it may be legally distributed.'[6]

The Thirteenth Century to the Civil War

From the thirteenth century the King agreed with his Lord Admiral what could be taken as prize and who was to benefit.[7] The King also decided disputes, either in person or in Council. The definition of prize gradually came to be more clearly defined. Where disputes arose as to the validity of prizes they were determined by the Admiral in a judicial capacity with an appeal to the King-in-Council. By the fourteenth century this was recognisably a specialist Admiralty Court acting separately from the other courts administering the sovereign's justice.[8] By the sixteenth century the lawyers practising in the court, from whom the judges were also drawn, had their own professional body, referred to as Doctors' Commons. Both the court and Doctors' Commons were based around St Pauls' Cathedral, rather than in Westminster. Although the Doctors' Commons acted like another Inn of Court for lawyers, the distinction ran deeper than the distinctions between the other Inns. Members of Doctor's Commons were trained in the jurisprudence of Roman law and termed civil lawyers. Civil lawyers were distinguished from their common law colleagues, who looked primarily to the English common law as the source of their practices. The distinction was not as great as might appear from the nomenclature, and the ideas of both traditions were becoming fused by the end of the eighteenth century, as the present study illustrates.

Before Henry VIII the idea of a fixed and constant royal navy did not exist in England. Ports fitted out their quota of ships of war for public service in response to a summons from the king. They met at a rendezvous and put themselves under the command of the king or his admiral. The command for each expedition included the king's apportionment of any proceeds. The customary disposition of the spoils of naval war were recorded in a collection of ancient

[6] *In the Matter of the Banda and Kirwee Booty*, 30th June 1866, p. 6.
[7] Marsden, 'Early Prize Jurisdiction and Prize Law in England', 675. The functions of the Lord High Admiral were exercised by the Commissioners for the Admiralty from 1628.
[8] Roscoe, *History of the English Prize Court*, 4–5.

Admiralty statutes 'to be observed both upon the ports and havens, the high seas and beyond the seas' known as The Black Book of the Admiralty. The Black Book was said to have been engrossed upon vellum and written in an ancient hand, in 'the ancient French language'.[9] The ancient statutes included the so called Rolls of Oleron, one of the earliest codes governing trade by sea with England, and one that continued to influence the development of English maritime law. The Rolls of Oleron were the laws applied in the 14th century by the mercantile court on the island of Oleron, off the coast of France near La Rochelle. Oleron was handy for the wine trade between Gascony and England, then in common ownership by virtue of Eleanor of Aquitaine. With a wealth of disputes from the wine trade to resolve, the court codified the accepted practices of merchants relating to carriage by sea in terms that are still in use today, such as 'demurrage' the term still used today for the payments due where loading is delayed.[10]

The Black Book itself apparently dated from the fifteenth century and resided in the archives of the Admiralty Registry to be consulted by the judges. The original volume appears to have gone missing at the beginning of the nineteenth century, although the prize provisions were quoted by Christopher Robinson in 1801 in his work on prize law and its historical justification.[11] Fortunately a number of copies existed in different hands. In 1857 Sir John Romilly, the then Master of the Rolls, suggested that key historical documents from the Roman invasion to Henry VIII should be edited and published for the public record. The editing of the Black Book of Admiralty was entrusted to Sir Travers Twiss QC, who consulted the extant copies and produced an authoritative version, with translation into English, in 1871. The editing of the Black Book was, however, the last task that Twiss would undertake before retiring from public life as the result of allegations by a blackmailer that his wife had been a prostitute, rather than the gentlewoman she was presented as.[12] Twiss carried on writing, however, and became 'a prolific, if somewhat pedestrian, authority on international law and a dangerously inaccurate legal historian'.[13] The 'pedestrian' skills were suited, however, to piecing together the evidence of the contents of the Black Book and his work remains the best evidence that we have of its contents.

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[9] Per Dr Exton in *The Maritime Dicaeologie* published in London in 1664 and quoted in the introduction to Sir Travers Twiss (ed.), *The Black Book of the Admiralty* (London: Longman and Co., 1871), ix.
[10] Kert, *Prize and Prejudice*, 37; Timothy J Runyan, 'The Rolls of Oleron and the Admiralty Court in Fourteenth Century England', *The American Journal of Legal History* 19, no. 2 (1975): 95–111.
[11] Christopher Robinson, *Collectanea Maritima; Being a Collection of Public Instruments Etc... Tending to Illustrate the History and Practice of Prize Law* (London: Butterworths, 1801) 188–89.
[12] Michael Taggart, 'Alexander Chaffers and the Genesis of the Vexatious Actions Act 1896', *Cambridge Law Journal* 63, no. 3 (November 2004): 656–84.
[13] Taggart, 661.

Article 19 of Book A of the Black Book as recorded by both Robinson and Twiss provided that the King was to have a quarter share of all prizes taken by one of the King's ships. Where the King was paying to use a ship owned by someone else, then the owner also took a quarter share. If the ship was not in the King's pay then the King took no share at all. In each case, however, each ship had to account to the Admiral for part of their share. The Black Book suggests that the Admiral would be entitled out of the half that went to the mariners of ships paid for by the King to the same equal share as a mariner, or to two such shares if he was actually present at the time the prize was taken. In the case of prizes taken by privateers or others not in the King's pay then the Admiral took two shares whether he was present or not. Twiss notes, however, that the Admiral's share was actually traditionally regarded as one tenth, as it had been in France by the ordinance of Charles V of France in 1373.[14]

Henry VIII put the navy on a more permanent footing, building ships of war and erecting yards and magazines. In return for the King paying the costs of wages and victualing of the fleet the Admiral had to account to the King for one half of any proceeds, together with any artillery or ordinance and apparel captured in ships taken by the fleet.[15]

Prize-taking continued under Elizabeth I, indeed her reign has commonly been regarded as the first Golden Age of prize-taking as a result of the activities of Drake and his contemporaries.[16] Prize-taking with and without the Queen's involvement certainly continued. Sir William Monson in his *Naval Tracts* suggested, however, that despite the destruction they wrought on Spanish commerce, most Elizabethan adventurers made losses rather than fortunes by their enterprises.[17] Monson was in a good position to comment on such matters. He participated in one of the glorious prize successes of the age, the capture of the spice ship *Madre de Dios*, studied for the Bar and went on to become an Admiral. Oppenheim, who edited the Naval Tracts for the Navy Records Society, adopted Monson's assessment when he wrote his own *History of the Administration of the Royal Navy*.[18] Oppenheim also confirms that the one tenth share of the Admiral remained the rule, at least in theory. In practice, Oppenheim suggests, the distribution was somewhat more pragmatic: 'Officers and men pillaged first, the captains took what they could from them, and when the admiral came up…. he plundered the captains'.[19] The

[14] Sir Travers Twiss (ed.), *The Black Book of the Admiralty*, 1:23 n5.
[15] Christopher Robinson, *Collectanea Maritima*, 190.
[16] See e.g. *The Times* Thursday December 20th 1945, p. 5, Issue 50330
[17] Sir William Monson, ed. Michael Oppenheim, *The Naval Tracts of Sir William Monson,* NRS, 1902.
[18] M. Oppenheim, *A History of the Administration of the Royal Navy 1509-1660* (London: John Lane The Bodley Head, 1896) 165.
[19] M Oppenheim, 166–67.

Queen then demanded the lion's share as she saw fit.[20] Unlike the second Golden Age which will be considered in detail below, the rule of law had little part to play, either internationally or as between the claimants to a share of the spoils, during the Elizabethan Golden Age.

As Sir William Holdsworth put it in his *History of English Law*, 'It is clear that in the sixteenth and seventeenth centuries the judges of the court of Admiralty, exercising [prize] jurisdiction, were very much under the thumb of the crown, which was accustomed to issue its Orders to them.'[21] Some of the evidence for this might not be as clear cut as is sometimes presented, however. For example Marsden recites a letter of 1593 from the Lord High Admiral, Howard of Effingham, to the Admiralty Judge, Sir Julius Caesar, under the title 'Letter from Howard to Caesar directing him to condemn a Spanish prize to the captor, although she was not captured under letters of marque'.[22]

The text in fact reveals a rather more nuanced message:

> 'Mr Caesar,
>
> One captaine Berie, having order from Sir Francis Drake to goe on the coaste of Spaine for discoverie of the enemye's enterprises and forces prepared there, which was don with my privity and allowance, happened to take a brasill prize at sea, and to bring her into Plymouthe. And having sent [her] up for adjudication in the Admiralty Courte, I have thought good to let you knowe the premises, and to require you that the want of a commissione may be noe let unto the same. And soe fare you hartelye well. From the courte at Windsor the 27th November 1593.
>
> Your loving freind,
>
> Howard'

Thus, the letter in fact reveals a rather touching appreciation of the niceties of Admiralty Court procedure and the need for proper adjudication by the court. Howard is conveying his evidence that far from acting as an unauthorised pirate, Berie was acting under Admiralty orders at the time of the capture and accordingly his prize could properly be condemned.

[20] M Oppenheim, 165.
[21] William S. Holdsworth, *History of English Law*, 1903, 566, Vol. 1.
[22] Reginald Godfrey Marsden, *Documents Relating to Law and Custom of the Sea*, vol. I NRS, 1923, 281.

That the executive did try to interfere with the judiciary in relation to prize matters is clear, however. As Holdsworth pointed out, in 1672 it produced a threat by the then Admiralty Judge, Sir Leoline Jenkins, to resign if the interference was persisted in.[23] Holdsworth suggested that the interference continued into the eighteenth century, at least in the Vice Admiralty Courts based at British naval stations abroad, but as will be seen below, by the end of the eighteenth century the courts were, within the confines of the English law and its view of the public interest, asserting their independence in matters such as the rights of neutrals.

It was not just the executive that had sought to interfere with the work of the Admiralty Court. Other courts had cast an envious eye over the work of the Admiralty Court and had tried to encroach on its jurisdiction from time to time, or to overrule decisions of the Admiralty Court by issuing prohibitions to prevent enforcement of Admiralty Court decisions. By the eighteenth century the competition between the common law courts and the Admiralty Court had largely played itself out. Whilst the common law courts had succeeded in taking possession of some jurisdictions that the Admiralty Court had previously enjoyed, the prize jurisdiction was securely in the hands of the Admiralty Court.[24] Indeed the Prize Court had earned a status of its own. Although it formed part of the Admiralty Court, and was presided over by the Admiralty Judge, by 1781 Lord Mansfield was able to say that 'the whole system of litigation and jurisprudence in the Prize court, is peculiar to itself: it is no more like the Court of Admiralty, than it is to any court of Westminster Hall'.[25] As this study shows, by the end of the eighteenth century the Admiralty Court and the common law courts were acting in harmony and with mutual respect, due not least to the efforts of Sir William Scott to introduce some measure of consistency and principle into Admiralty law, following Lord Mansfield's attempts to achieve the same with the common law.

Ongoing conflict in the seventeenth century, between the Dutch and the Portuguese in particular, had prompted a fresh wave of writing to explore the legal and moral basis for regulating international trade by sea and the justification for the seizure of property in the course of disputes. The contributions of such writers as Grotius, Bynkershoek, Vattel and others influenced the development of English prize law, as will be considered further below.

[23] William S. Holdsworth, *History of English Law*, 566.
[24] James Oldham and William Murray Mansfield, *The Mansfield Manuscripts and the Growth of English Law in the Eighteenth Century* (London: University of North Carolina Press, 1992), 658.
[25] Lindo v Rodney (1781) 2 Doug. 614

The Commonwealth and Restoration Navies

After the English civil war in the mid-seventeenth century, parliament embraced the idea of prize seizure during the interregnum, but gave it their own twist. During the commonwealth captors were granted half the value of a captured warship, the other half going for the relief of sick and wounded sailors, widows and dependants. An enemy warship sunk in action would be deemed a prize and valued according to the number of guns it had carried. Payments were made to ships' crews and officers calculated at £10 per gun above a minion in size, or more for guns of a flagship. Proceeds from captured merchantmen and their cargoes would be shared equally between the captors, the state and the relief fund, while the tenths traditionally paid to the Lord Admiral were assigned for medals and gratuities to reward outstanding service.[26]

The combination of a cash-strapped King following the restoration and the need to incentivise a navy for war with the Dutch led to a number of attempts to revise prize provision. Various adjustments to the division of shares to be enjoyed by the state, the officers and crew and a relief fund for sailors were attempted, though some proved in practice to be little more than wishful thinking, with payments so long delayed as to remove the incentive effect that they were intended to have.[27] Nevertheless, the principle of prize payments, remained intact.

Regulation of behaviour towards the goods and crew of captured ships, which had been a matter of concern down the years, was, however, addressed by the administration of Charles II with lasting effect. The Navy Act of 1661 expressly provided that nothing should be taken out of a prize ship until it was condemned by the Admiralty Court. An account then had to be given of everything seized 'of the whole without fraud' on pain of court martial or such other punishment as the Admiralty Court might decree. Personal items 'above the gun deck' were, however, excluded from the injunction and remained subject to a right of 'plunder' by the captors claimed by custom and usage. The right of plunder was finally taken away in the reign of William and Mary in an Act of 1692.[28] The 1692 Act also provided for the distribution of prize money. One fifth of the proceeds of the cargoes of prizes taken by privateers was payable to the crown and the privateers took the captured ship and its equipment. For prizes taken by

[26] Bernard Capp, *Cromwell's Navy: The Fleet and the English Revolution 1648 - 1660* (Oxford: Clarendon Press, 1992), 58. C. H. Firth, and R. S. Rait, (Eds.). *Acts and Ordinances of the Interregnum 1642-1660*. Vol. II. 2 vols. (London: HMSO, 1911) Vol I, 74, 11.9-10, 18, 66-73.
[27] J. D. Davies, *Pepys's Navy: The Ships, Men & Warfare, 1649-1689* (Barnsley: Seaforth Publishing, 2016) 104.
[28] 4&5 Will. And Mary c.25

the navy the proceeds were divided into three. One third went to the ship's crew, one third went to a fund for wounded sailors and the widows, children and parents of those slain and the remaining third went to the crown. A bounty was also payable of £10 for each gun on the taking or destroying of an enemy ship of war.[29]

Before the Act of Union in 1707 Scotland had its own hereditary Lord High Admiral and Admiralty Court. At times, however, admiralty rights were devolved or usurped while a given admiral was in prison, in exile or out of favour at court.[30] The Scottish legal system has its own roots in a so called 'civil' version of Roman law, and it is tempting to think that that played a part in the development of British prize law.[31] The evidence suggests, however, that Scotland adopted the practices of the English prize court, rather than the other way round.[32] The abolition of the Scottish Admiralty offices and courts in 1707 in favour of London was a takeover and not a merger.[33] The decisions of the Scottish prize courts were 'sunk in the volumes of miscellaneous repertories of jurisprudence' and difficult to identify.[34] Despite many Scottish naval officers and lawyers featuring in prize cases, Scottish prize cases are notably absent from both texts on the law of nations and the body of English case law referred to below. In keeping with the nomenclature at the time, therefore, references to English and British prize law after 1707 are used interchangeably.

In what has been described as "the greatest step forward in the whole of prize legislation", the Cruizers and Convoys Act 1708 in the time of Queen Anne determined that the whole proceeds of prize captures should be paid to the captors.[35] Whether or not it was the 'greatest step forward', it did set the pattern for prize apportionments throughout the eighteenth century and beyond.[36] It did so in order to encourage the outfitting of privateers, but to satisfy Royal Navy interests the whole share was extended to them also. Gun bounty went, but head money

[29] Christopher Robinson, *Collectanea Maritima*, 193.
[30] Steve Murdoch, *The Terror of the Seas? Scottish Maritime Warfare 1513-1713* (Leiden , Brill, 2010) 12.
[31] Cf. Murdoch, 31.
[32] Thomas Callander Wade (ed.), *Acta Curiae Admirrallatus Scotiae, 6 Sept. 1557-11 March 1562* (Edinburgh:The Stair Society, 1937) xii.
[33] Murdoch, *The Terror of the Seas?*, 10.
[34] Thomas Baty, 'Scottish Prize Decisions of the Seventeenth and Eighteenth Centuries', *Yale Law Review* 27, no. 4 (1918): 453.
[35] Peter Kemp, *A Survey of the History and Distribution of Naval Prize Fund*, 14.
[36] 6 Annae c. 13.

remained.[37] The example set by Queen Anne was followed elsewhere. In 1715, for example, a Swedish Order granted the whole benefit of prizes to Swedish cruisers.[38]

The Eighteenth Century and Neutral Rights

That there was common provision in different states was no coincidence. As Kulsrud's work in the 1930s shows, there was an active diplomatic intercourse between European nations during the seventeenth and eighteenth centuries on matters of prize law.[39] The intercourse related to matters of substantive law as well as distribution of the proceeds. For countries whose policy was in favour of free trade, there were some incentives to recognise a law of prize that was common to all, with limitations on the rights of captors over the rights of neutrals. By doing so they might encourage others to follow an example if it was set at home, and they might avoid turning neutrals into additional enemies to contend with.

The line between foreign policy and the law could sometimes become blurred, and politicians, then as now, found it hard to resist the urge to interfere with the courts. A realisation of the importance of the appearance, at least, of independent courts on the international scene began to emerge during the eighteenth century. During the war of Austrian Succession, which broke out in 1744, British ships had captured Prussian vessels. As reprisals for these captures Frederick II of Prussia suspended interest payments that were due on the Silesian Loan. As part of the effort to resolve the crisis, George II appointed a committee to consider the Prussian complaints. It reported in 1753, as the next war loomed.[40] Amongst the signatories of the report was William Murray, Solicitor General, later to be the Lord Chief Justice, Lord Mansfield. Murray's signature added greatly to the authority of the report, but it was a political, rather than a judicial, report.

The report noted, somewhat piously, that in England 'the Crown never interferes with the course of justice. No order or intimation is ever given to any judge', and further that:

'All captures at sea, as prize, in time of war, must be judged of in a Court of Admiralty, according to the law of nations and particular treaties, where there are any. There never existed a case where a Court, judging according to the laws of England only, took cognizance of

[37] see Chapter 10 below
[38] Christopher Robinson, *Collectanea Maritima*, 194 and 175.
[39] Carl J. Kulsrud, *Maritime Neutrality To 1780*.
[40] Francis Hargrave, *Collectanea Juridica*, vol. 1, (London: 1840) 138, 147, 152.

prize….it never was imagined that the property of a foreign subject, taken as a prize on the high seas, could be affected by laws peculiar to England.'

The veracity of these statements will be considered in chapters 4 and 5 below, but they did at least indicate an aspiration for how the courts should be perceived abroad. They also supported the unsurprising conclusion that as the English prize court administered the law of nations impartially there was no justification for the Prussian reprisals.

Britain needed to keep hold of trade in times of war in order to shoulder the financial burden of war. This meant avoiding losing trade to neutral states unhindered by hostilities, setting up an inherent conflict with the rights of neutrals. As pressures mounted during war, the rights of neutrals felt the strain. By the time of the Seven Years' War, 1756-1763, the Royal Navy was strong enough to strangle French attempts to trade with its islands in the Caribbean. As a result, by 1756 the French minister of marine and colonies, Machault, had to propose that trade with the islands, normally reserved to French shipping, be thrown open to neutral shipping.[41] The French Atlantic merchants protested, but to no avail as they were unable to service the trade. The number of successful voyages by French merchants sank so low that there was no choice but to let France's commercial rivals, particularly the Dutch and Danish, undertake the lucrative trade under special wartime licences.

This was not new. France had reluctantly resorted to similar action in earlier wars.[42] By 1756, however, Britain's naval strength was such that it no longer had to stand by and accept the French use of neutral ships. If a ship of a neutral would not ordinarily be allowed to participate in a trade, such as the Caribbean trade, in time of peace, then if it carried on that trade in time of war under a special licence from the enemy it stood to be condemned as lawful prize with its cargo before a British Prize court under what has become known as 'the Rule of the War of 1756'. In truth, however, the so-called 'rule' had been around for generations and had been relied upon, and objected to, by various states according to their own interests at the time. Indeed in 1674 when England was neutral during wars conducted by the Dutch, she had forcefully argued against the position that she would end up adopting as the Rule of the War of 1756.[43] Protestations of claimed principles during peace soon dissolved in self-interest in time of war.[44] The Rule of the War of 1756 enforced by the British courts was created by the

[41] Baugh, *The Global Seven Years War*, 323.
[42] Richard Pares, *War and Trade in the West Indies* 1739-1763, 343.
[43] Carl J. Kulsrud, *Maritime Neutrality To 1780*, 84.
[44] Carl J. Kulsrud, 90, 336–37.

government and the courts working together.[45] Pragmatism overcame such constitutional sensitivities as there may have been about the executive being seen to 'interfere' with the judiciary.[46]

1756 was only eight years after the first publication of Montesquieu's *De l'Esprit des Lois*, hailing the separation of powers as at the heart of Britain's success. Although Montesquieu's work would inspire constitutional reform in Corsica and then the American colonies, it was the culture of respect for separation of powers within the rule of law that he identified, rather than any necessity for purity of formal separation.[47] The judiciary had to be free to accept or reject the ideas of the executive, and the executive had to respect that decision, but they could work together for a common purpose.[48]

The unwritten British constitution was not as clear cut as some readers of Montesquieu might have assumed. Indeed, the supreme court of appeal was nominally at least a judicial committee of the House of Lords, part of the legislature, and the Lord Chancellor was the senior judge as well as a member of the executive and the legislature until the reforms introduced by the Constitutional Reform Act 2005. Brinkman has explored the way in which the Lord Commissioners of Prize Appeals, in what she calls the Court of Prize Appeal, were used as an agent of British policy to maintain the neutrality of the Dutch and Spanish fleets during the Seven Years War. There is little doubt that the public policy of maintaining neutrality played a significant role in the court's deliberations, due in large part to the influence of the Lord Chancellor, Lord Hardwicke.[49] What is notable, however, is that the political pressure applied to decisions of the court was not in favour of oppressing neutrals in order to support the war. On the contrary it was to assist neutrals in order to reduce the chances of them becoming enemies. Political intervention came at a cost as it risked embroiling the government in decisions without the protection of being able to distance itself from an independent judiciary, and risked encouraging the erroneous view that the release of prizes was a political gesture within the gift of the Crown.

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[45] See Baugh, *Global Seven Years* War, p. 324 and Pares, *Colonial Blockade and Neutral Rights 1738-1763* (Oxford: Clarendon Press, 1938) 100–101.
[46] Richard Pares, *Colonial Blockade* p. 180.
[47] Peter Adam Thrasher, *Pasquale Paoli: An Enlightened Hero, 1725-1807* (London: Constable, 1970) 44.
[48] Charles de Secondat Montesquieu, *The Spirit of the Laws* (Cambridge: Cambridge University Press, 1989) Bk 11, Ch. 6, Bk 19 Ch. 27.
[49] Brinkman, '*The Court of Prize Appeal as an Agent of British Wartime Foreign Policy: The Maintenance of Dutch and Spanish Neutrality During the Seven Years War*'.

To understand the nature of such political influence fully requires a consideration of the role of appeals from the Prize Court and how this changed during the eighteenth century. As has been seen above, the role of the Prize Court grew out of judges taking over the determination of disputes from the King, either in person or in council. The King-in-Council retained the right, however, to review decisions of the Prize Court on appeal. This right had become an established system of appeal by the sixteenth century.[50] Appeals were heard by members of the Privy Council specifically appointed as Lords Commissioners of Prize Appeals. This system of appeal was given statutory authority by the Prize Act of 1707.[51] The Lords Commissioners of Prize Appeals did not necessarily have any judicial experience to bring to bear on the appeals they heard. In 1748 Lord Hardwicke as Lord Chancellor issued a list of standing commissioners that included the names of some of the common law judges who were not Privy Counsellors to try and improve matters and speed up the process of determining appeals.[52] This proved controversial, however, with opponents complaining that the inclusion of judges was unlawful at common law as well as in breach of treaty obligations such as those of the 1677 treaty with France that provided in terms for a right of review of prize decisions by 9 members of the King's Council. The inclusion of judges was carried, however, so long as they were in the minority, and was given statutory authority.[53] One of the problems during the Seven Years War was that the Admiralty Court Judge, Sir Thomas Salusbury did not have a reputation for competence.[54] By the end of the century, however, the Admiralty Court was in the safer hands of Sir William Scott, who was himself appointed one the judges entitled to sit as a Lord Commissioner of Prize Appeals.[55] As Roscoe, the then Registrar of the Admiralty Court, put it in 1924 'surveying the course of appellate jurisdiction in prize the general tendency for the tribunal to become a court of law is marked.'[56] By the Seven Years War it was still work in progress, although Harwicke was trying to improve matters. By the end of the century the Lords Commissioners had earned the right to be called a court, although their decisions carried little weight as precedents as the reasons for their decisions were not generally stated.[57] In 1833 the jurisdiction of the Lords Commissioners was transferred to the Judicial Committee of the Privy

[50] Roscoe, *History of the English Prize Court*, 83.
[51] 6 Anne c. 37 s 8, Roscoe, 90.
[52] Roscoe, 88.
[53] Prize Causes Act, 22 Geo. II c 3, Roscoe, 89.
[54] Brinkman, *The Court of Prize Appeal*, 84, 115.
[55] Roscoe, *History of the English Prize Court*, 89.
[56] Roscoe, 91.
[57] Roscoe, 91.

Council by statute, establishing the jurisdiction as a de jure as well as a de facto judicial tribunal.[58]

The judiciary were not immune from the influence of public policy, however, and were quite capable of reflecting the wartime needs of the state. Brinkman has pointed out the close-knit personal relations between the law and politics in the mid-eighteenth century. So too, as will be seen below, judges, advocates, and politicians during the wars of 1793-1815 came from a small circle of inter-related men familiar with the levers of power and the arguments over the interests of a maritime state at war. It could hardly be expected that the courts would ignore those interests; nor did they.

The sight of neutral rivals profiting from the war for which British merchants were paying through their losses and their taxes was too much to bear, and whatever the legal controversy, the 'Rule of the War of 1756' was popular at home.[59] As belligerents in what they saw as a just war the British considered that they were entitled not only to protect their own trade but also to outmuscle their enemies in trade. As Nicolas Magens, a German financier in London, expressed it in his 1755 Essay on Insurances:

'Might not those who fought the battles ask, what signifies our being masters of the sea, if we shall not have liberty to stop ships from serving our enemy? And when we examine to the bottom of the thing, it appears very evident, that sea battles are fought not so much to kill people, as to be masters of trade, whereby people live; and by stopping their supplies, to compel our enemies in the end to live in friendship with us.'[60]

The position was more complex than this argument supposed, however, as Britain depended for its war effort not just on finance from its own money markets, but from the financiers of neutral states as well.[61] Under this sort of complex pressure the more traditional distinction between neutrals trading *for* an enemy and trading *with* an enemy broke down and all trade involving neutrals and the enemy became a target for prize-taking unless permitted by licence.

The 'rule' did not mean that Britain would not make use of neutral ships for trade when it suited her interests. Britain regularly openly allowed trade under licence that would otherwise have

[58] 3 & 4 Will. IV c. 41, Roscoe, 90.
[59] For a Danish perspective see: Ole Feldbæk, *Denmark and the Armed Neutrality 1800-1801: Small Power Policy in a World War* (Copenhagen: Akademisk Forlag, University of Copenhagen, 1980); Ole Feldbæk, *The Battle of Copenhagen 1801, Nelson and the Danes* (Barnsley: Leo Cooper, 2016).
[60] Vol. 1 p. 435; Pares, *Colonial Blockade,* p. 181.
[61] Brinkman, *The Court of Prize Appeal,* 68.

been deemed unlawful, even to the extent of permitting trade with an enemy during wartime, where the government saw fit and her interests required it.[62] When Britain was at war with America after 1812, in part over disputed neutral rights, she fed her troops on the Iberian Peninsula with American grain despite the American government's attempts to prevent it.[63]

The Rule of the War of 1756 dealt with neutral ships trading with French colonies. It did not deal with the suspicious increase in trade from Dutch and Danish islands in the Caribbean. In particular the small Dutch island of St Eustatius operated as a transhipment port for French goods to become neutral goods before the voyage to Europe. St Eustatius would feel the backlash for these activities in a later war when Rodney seized the island, giving rise to a wealth of litigation about the prizes that he took. In 1757, however, Britain was not at war with the Dutch and so the response was not to invade the island, but to seize the dubious trade. To do so the British developed the doctrine of 'Continuous Voyage', a concept borrowed from the developing law of marine insurance. Marine insurance was essential to the development of international trade and the English courts had deliberately developed a body of insurance law to assist the growth of British commerce in international trade in competition with rivals in other jurisdictions, even in times of war.[64] French goods from French colonies that had gone in to neutral islands were not to be treated as neutral goods when they set off again for Europe just because they were carried in neutral ships ostensibly as neutral cargo. The goods, though not the ships, could be condemned as prize.[65]

The English Courts and the Royal Navy

18th century English courts frequently stated their enormous respect for the Royal Navy and its personnel. They recognised that in time of war 'the existence of the country depends upon its fleets'.[66] It is tempting to read into this that the courts were reluctant to interfere with the way that the navy conducted itself, and that military law took the navy beyond the reach of the courts. That was not, however, the case. The courts regularly dealt with applications for writs of habeas corpus to procure the release of men who had been unlawfully pressed. They did not

[62] See for example the notifications of licences in Anon, *Notifications, Orders, and Instructions, Relating to Prize Subjects during the Present War.* (London: 1815), 123ff.
[63] Andrew D. Lambert, *The Challenge: America, Britain and the War of 1812* (London: Faber and Faber, 2012), 199 and 231.
[64] Norman S Poser, *Lord Mansfield: Justice in the Age of Reason*, 2015, 237–40.
[65] Baugh, *The Global Seven Years War*, 324.
[66] Per Lord Kenyon C.J., Ex parte Softly (1801) 1 East 466, 471

regard the activities of the press gang as under the exclusive control of the navy without supervision by the courts. Indeed, the King's Bench Court under Lord Chief Justice Mansfield had developed its procedures to provide effective remedies against unlawful impressment. It had been prepared to hear applications in chambers during vacation, rather than waiting for the court to sit again at the beginning of the next law term, despite doubts raised over the enforcement of writs issued out of term time. More significantly it had been prepared to proceed by an order to those detaining impressed men to show cause why the detention was lawful rather than issue a writ of habeas corpus to bring the man before the court. This assisted the Admiralty as it did not involve the logistics of producing the man to the court. Instead the matter was dealt with by sworn statements in the form of affidavits. It also gave the Admiralty the opportunity to investigate the detention and concede where appropriate without a public hearing. It was an opportunity that the Admiralty often took, thereby providing a very real remedy.[67] The Admiralty did not want the embarrassment of contested recruitment at a time when it might test the loyalty of the nation.[68] Mansfield was succeeded in 1788 by Lord Kenyon who is generally remembered as the successor who ended or restricted Mansfield's reforms.[69] Indeed, the general use of habeas corpus was heavily restricted in Lord Kenyon's time, but it continued to be used for supervising impressment.[70] In 1801 Lord Kenyon, stated publicly that he frequently dealt with applications for the release of impressed men made to him out of court, as had his predecessors.[71] Where there was an issue as to the lawfulness of an impressment they were prepared to determine the issue in court and give reasoned judgments as to the construction of the acts under which the right to press arose, whatever the need of the navy to impress men.[72]

From time to time the courts had to consider whether they could interfere in matters of military discipline, and if so on what basis. One case in particular gave rise to extensive litigation on the issue, which still casts its shadow on the law today. In 1781 Commodore George Johnstone was sent with a British fleet to secure the Cape before the French could do the same. At Porto Praya on the neutral Portuguese Islands of Cape Verde, the French fleet under Admiral Suffren

[67] See: Poser, *Lord Mansfield*, 314; Paul D Halliday, *Habeas Corpus: From England to Empire* (Cambridge, Mass.; London: Harvard University Press, 2012), 114–16; Denver Alexander Brunsman, *The Evil Necessity: British Naval Impressment in the Eighteenth-Century Atlantic World* (Charlottesville: University of Virginia Press, 2013), 194; Costello, 'Habeas Corpus and Military and Naval Impressment, 1756-1816'.
[68] Nicholas Rogers, 'British Impressment and Its Discontents', *The International Journal of Maritime History* 30, no. 1 (2018): 73.
[69] See e.g. Poser, *Lord Mansfield*, 388–89.
[70] Halliday, *Habeas Corpus*, 134.
[71] Ex parte Softly (1801) 1 East 466.
[72] See Ex parte Bruce (1806) 8 East 27, per Lord Ellenborough C.J.

attacked the ill-prepared British fleet watering in the bay on 16th April 1781. Although the French suffered damage in the exchange, they did not linger but escaped and sailed on for the Cape. The British response in contrast was slow and ineffectual. As a result, Suffren won the race to the Cape. Johnstone placed the blame on Captain Sutton of *HMS Isis* for being too slow to respond to his order to sail to join battle. He placed him under arrest.[73] Johnstone then humiliated Sutton by appointing the master and commander of the *Oporto*, a Mr Lumley, to acting command of the *Isis*, with Sutton still on board. Despite Sutton's increasingly anguished pleas to be brought to a court martial it was not until December 1783, upon his return to England having sailed to the Indian Ocean as a prisoner on his own ship, that Sutton faced a court martial on board *HMS Princess Royal* in Portsmouth Harbour over his action at Porto Praya, 32 months earlier. Although Johnstone had captured some valuable prizes in Saldanha Bay, an act which itself would give rise to considerable litigation, his failure to take the Cape still stung and he persisted in blaming Sutton. The court martial, however, acquitted Sutton.

Sutton felt aggrieved and sued Johnstone for malicious prosecution.[74] Sutton's action succeeded at trial, and at a re-trial where a jury awarded him substantial damages in the sum of £6,000. He could not, however, keep hold of his judgment on appeal and ultimately he failed in his claim. In the course of the proceedings there was a lively debate about whether the courts could interfere with military discipline. A number of the judgments suggested that there might be an absolute immunity for naval discipline. They did so notwithstanding that an earlier unreported case of Swinton v Molloy in 1783 the King's Bench was cited to them in which an action for false imprisonment by a purser against the captain of his ship had been entertained. The suggested immunity was, therefore, far from established in law or accepted by the courts.

Amongst the views expressed in the judgments on appeal, however, the most famous has become that of Lord Mansfield that a right to damages was not needed as the proper remedy was the satisfaction of an acquittal and of an unjust accuser being 'blasted forever' and losing his reputation.[75] This, and other views on the matter, were, however, obiter dicta. That is to say they were comment rather than the binding reasons essential to the decision that was reached. Sutton lost because the court held that there was insufficient evidence of malice on Johnstone's part and so the jury could not find that the prosecution was malicious. The appeal was not

[73] Johnstone's letter book, 22.4.1781, TNA ADM 1/54
[74] For an analysis of the complex litigation see JP van Niekerk, 'Of Naval Courts Martial and Prize Claims: Some Legal Consequences of Commodore Johnstone's Secret Mission to the Cape of Good Hope and the "Battle" of Saldanha Bay, 1781 (Part 1)', *Fundamina, A Journal of Legal History* 21, no. 2 (2015): 392–456.
[75] Sutton v Johnstone (1786) 1 TR 510, 550.

allowed on the basis that Johnstone was entitled to immunity from suit even if he had acted maliciously. Any comments to that effect therefore offered no binding precedent on the issue, and the fact that there was a debate reveals that the point was not a settled one.

Our view of this litigation has been coloured, however, by events a century later when the courts came to consider the issue of military immunity again.[76] The Victorian courts treated Sutton v Johnstone as having established a doctrine of absolute immunity for naval discipline despite strong views expressed in the judgments to the contrary. The eminence of Lord Mansfield may have blinded later courts to the true status of his comments, or his comments, taken out of context, may have been convenient support for views that had risen to popularity a century later. This Victorian view of what Sutton v Johnstone decided has persisted until today.[77] It fits into a narrative that the eighteenth-century English courts were ready to leave the navy alone and to overlook injustices committed in the name of naval discipline. That narrative needs to be questioned, however. As the cases explored in the following chapters reveal, the courts were only too willing and able to resolve questions of naval discipline and regulation. That they did so benefited the navy and added authority and respectability to the system of prize payments that they enjoyed. As Roscoe expressed it in 1924:

'To speak of the [prize] court merely as a distributor of prize money is to create the wrong impression. It regarded itself as the corrector of the misdeeds of privateers and ships of war. It censured some conduct, approved of other conduct.'[78]

The role of neutrals and their cargoes as prize would remain an important issue in the wars to come, creating the tensions that would lead to a renewed Armed Neutrality in the Baltic in 1801 and the arm wrestle between Britain and France after 1806 over the Continental System, as well as contributing to the tensions that led to war with America in 1812. It was against this setting that the courts came to consider issues of prize law, their independence from the executive and the role of the 'law of nations' in dictating what prize courts should do when sitting in judgment of the actions of the Royal Navy.

[76] Dawkins v Lord Rokeby (1866) 4 F & F 806 and Dawkins v Lord Paulet (1869) LR 5 QB 94.
[77] M. A. Jones et al., eds., *Clerk & Lindsell on Torts*, Twenty-first edition, (London: Sweet & Maxwell, 2014), 16–58, 22-91.
[78] Roscoe, *History of the English Prize Court*, 52.

Conclusion

Thus, by 1793 the payment of prize money was an established method of rewarding the officers and men of the Royal Navy for the capture of enemy shipping. Britain was beginning to enjoy its position of naval supremacy, but also to understand the difficulties that that could create when dealing with neutral states. The courts were willing to intervene in order to apply the rule of law to the operations of the Royal Navy, but they did so with the understanding of how important the Royal Navy was in time of war.

Chapters 6 -8 will consider the way in which prize money was distributed, and the dynamics of the changes that were introduced under the pressures of war. Chapter 9 will consider the particular significance of the changes in 1808. Before that, however, the next two chapters will consider the role of the law of nations in English law and prize courts, and whether those courts were really administering some form of international law when applying the rule of law to prize money cases.

Chapter 4, The role of international law in English law

Due to the international nature of the disputes, the Admiralty Court looked to a growing body of ideas that there was, or should be, an international law of the sea referred to as the 'Law of Nations'. It did so, however, within the context of English common law. What this meant has been obscured by later events, so that still today Halsbury's Laws of England declares confidently that 'The law administered by the Prize Court is international law which originates in the practice and usage long observed by civilised nations in their relations with each other or in express international agreement'.[1] In order to see clearly the true role of international law in the prize courts of Admiralty during the Georgian golden age of prize law it is necessary to unpick the embroidery that was applied over the eighteenth century framework during the Victorian era. As the research set out below demonstrates, a rather different picture emerges from under the later layers.

The idea of a Law of Nations looked back to Greek and Roman jurisprudence as a foundation for established principles of maritime nations.[2] The ancient kings of Aragon gathered together the ordinances of the Greek and Roman emperors and of the kings of France and Spain as well as the laws of the Mediterranean islands and of Venice and Genoa. Although the resultant work was reputedly originally written in the dialect of Catalonia it was translated into many European language and became known as the *Consolato del Mare*. Its original date is not certain, but it was referred to as a code of maritime law in the course of the eleventh, twelfth and thirteenth centuries. It was still being translated and referred to as a source of the law of nations at the end of the eighteenth century.[3]

In the eighteenth century the ancient tradition of prize taking would be relied on both to support its right by usage and custom, and as proof through experience of its efficacy and political acceptability.[4] By the eighteenth century there were also plenty of jurists who had been willing to go into writing to express their view of what the law was, or should be, governing international trade by sea, both in war and peace. Where the views expressed found favour,

[1] *Halsbury's Laws of England*, vol. 85 (London: Butterworths, 2012) The Law of Prize, Introduction, Para. 606.
[2] See e.g. Duckworth v Tucker (1809) 2 Taunt. 7, 22, 34.
[3] Christopher Robinson, *Collectanea Maritima*, iii.
[4] Christopher Robinson, ii.

they would be cited by the English courts to justify their opinions. Foremost among these was the Dutch jurist Grotius, widely regarded as the father of international law.

Hugo Grotius

Grotius became involved with prize law when he was engaged to provide a jurisprudential justification for retaining prizes seized by ships of the Amsterdam East India Company.[5] By the time he provided his work the Amsterdam Company had become part of the powerful combined Dutch East India Company (VOC). Grotius' work was not a mere academic exercise. In February 1603 a Dutch captain Jakob van Heemskerck had captured a Portuguese carrack *Santa Caterina* filled with valuable trade goods. This was neither the first nor the last such capture. Only the previous year the Dutch had seized the Portuguese carrack *San Iago*.[6] What set the *Santa Caterina* apart was the value of her cargo. When sold in Amsterdam the goods made 3 million Guilders, just less than the annual revenue of the English government at the time and double the capital of the English East India Company.[7] Grotius was not just the VOC's legal counsel of choice, the rising legal genius of the Dutch legal profession, he also had a family interest as van Heemskerck was his cousin.[8] His work was also part of a wider context. The conflict with the Iberian maritime powers of Spain and Portugal was not merely commercial. It occurred in the context of the Dutch struggle for independence from the rule of the Spanish throne. The new Dutch republic was still experiencing the internal conflict of working out what sort of a nation it would be.[9] As with Britain, the Dutch United Provinces felt tensions at times between the rural and commercial worlds. It also experienced conflict over the true meaning of the protestant faith. Grotius was part of these debates and would eventually fall foul of those in power. He favoured a version of liberty, stability and virtue, but allied with prosperity. He concluded that this combination was best achieved through a closed

[5] Petrie, *The Prize Game*, 41.
[6] Timothy Brook, *Vermeer's Hat: The Seventeenth Century and the Dawn of the Global World* (London: Profile, 2009), 63.
[7] Hugo Grotius et al., *The Free Sea*, Natural Law and Enlightenment Classics (Indianapolis, Ind: Liberty Fund, 2004), xii.
[8] Oona Anne Hathaway and Scott Shapiro, *The Internationalists and Their Plan to Outlaw War* (London: Allen Lane, 2017) 8.
[9] Andrew Lambert, *Seapower States: Maritime Culture, Continental Empires and the Conflict That Made the Modern World* (New Haven, CT: Yale University Press, 2018), 157ff.

oligarchy offering a patrician version of a republic.[10] The commercial success of the VOC would assist his vision of the new republic.

In 1604 Grotius produced his justification as instructed in what is now called *De Jure Praedae*.[11] He went beyond a mere justification, however, and attempted a synthesis and codification of the law of the sea as understood and accepted by European and Mediterranean nations, using Greek, Roman and Christian theological sources to justify his conclusions. Grotius rejected the Portuguese claim to exclusive rights to trade with the East Indies, either by 'discovery', as the islands had already been occupied, or by alleged right devolving from the Pope, which he considered to be beyond any legitimate papal authority. He set out a general statement of the rights to freedom of trade, freedom of navigation and freedom of possession, the so-called freedoms of the sea. These rights, he said, were limited by the right to self-defence and self-preservation. The rights required others to harm no-one and not to seize the possessions of others. He also set out two laws of justice, however. They were that evil deeds should be punished and that good deeds should be rewarded. The Portuguese, he contended, had committed evil deeds in the East Indies and deserved to be punished by just acts of war, such as seizing the *Santa Caterina*. This claim was at the least somewhat one-sided. The Dutch had, along with all the other European states who had attempted to seize the spice trade in the East Indies, committed terrible atrocities from time to time.[12] So far as Grotius was concerned, however, in punishing an evil act van Heemskerck had been undertaking a good deed in seizing the carrack and his good deed deserved to be rewarded. This, he said, was achieved by vesting the goods seized in the VOC, in whose name van Heemskerck had been acting.

In his original work, Grotius went so far as to assert that "even if the war were a private war, it would be just and the prize would be justly acquired" by the VOC. This was an awkward position for a company whose existence was to depend on global trade, and the original work was not published in Grotius' lifetime. Only a version of his chapter on the freedom of the sea, *Mare Liberum* was published in his lifetime, although in 1625 he published further selected ideas as they had developed in exile in Paris after escaping (concealed in a chest) imprisonment

[10] Jonathan I. Israel, *The Dutch Republic: Its Rise, Greatness, and Fall, 1477 - 1806* (Oxford: Clarendon Press, 1998), 421–22.
[11] This name by which the work is generally known was given to it by its later editor when the text re-appeared in the nineteenth century, Grotius (or Groot as he was known to the Dutch) called his work *De Rebus Indicis*, or *On The Affairs of the Indies*.
[12] For an accessible account, see Milton, *Nathaniel's Nutmeg* (New York: Picador, 1999).

by his political enemies in the Netherlands: *De Jure Belli ac Pacis*.[13] *Mare Liberum*, as the name suggests, set out the case for freedom of trade at sea, and it was to support that concept that the courts of other trading nations referred to Grotius. In the longer term followers of Grotius took up the notion in his name that mankind could create a 'law of nations' by general agreement or specific treaties rather than being limited to a natural law.[14] In the shorter term what the nation states tempted to rely on his work took from it was that the power to seize prizes in war was legitimate and came from the state in whose name war was declared and reprisals and captures made. Thus all such prizes were the property of the captor state, and they were entitled to determine who should take the proceeds.

Grotius has entered the pantheon of law-givers.[15] His original work, however, only came into the public domain when his papers reappeared at auction in The Hague in 1864, and were subsequently transcribed and published. Further research since then has revealed more of the context and the background to the work Grotius produced for the VOC. [16] As a result it is only recently that greater emphasis has been given to the role Grotius had as legal counsel for a private company, the VOC. As a result of the interest Grotius had in justifying private as well as public war, at least one commentator has suggested that the attention that has been given to this period in public international law is to be regretted.[17] Be that as it may, however, the fact is that attention was given to Grotius in the eighteenth century, or to the version of Grotius that was then understood, and that is reflected in the judgments of the Georgian Admiralty Court as will be seen below. Although we may have a better understanding now as to the true origins of Grotius' work than did the eighteenth-century courts, it may matter little in relation to their conclusions. Grotius's perceived views were cited because they were thought to justify the courts' conclusions. As persuasive as Grotius might have been, the English courts did not reach their conclusions because they were persuaded by Grotius, they cited him when he could be used to support their conclusions when it suited them.

[13] Hugo Grotius and Stephen C. Neff (ed.), *Hugo Grotius on the Law of War and Peace* (Cambridge: Cambridge University Press, 2012).
[14] Neff, *Justice among Nations*, 164, 170.
[15] Grotius is included in the mural depicting great historical law-givers that surrounds the US Supreme Court in Washington DC, in the curious company of King John and Napoleon.
[16] Martine Julia van Ittersum, 'Hugo Grotius in Context: Van Heemskerk's Capture of the "Santa Caterina" and Its Justificationnin "De Jure Pradae" (1604-1606)', *Asian Journal of Social Science* 31, no. 3 (2003): 511–48; Peter Borschberg, 'The Seizure of the Sta. Catarina Revisited: The Portuguese Empire in Asia, VIC Politica and the Origins of the Dutch-Johor Alliance (1602-1616)', *Journal of Southeast Asian Studies* 33, no. 1 (February 2002): 31–62.
[17] Martti Koskenniemi, Walter Rech, and Manuel Jiménez Fonseca, eds., *International Law and Empire: Historical Explorations* (Oxford, United Kingdom: Oxford University Press, 2017), 10.

The views Grotius advanced were far from uncontested in his own time, especially in England.[18] Having once controlled both sides of what it called the English Channel, the English crown claimed sovereignty of those waters. *Sovereign of the Seas* was more than the name of a ship, it was an expression of a political claim.[19] Nevertheless, Grotian ideas were influential in developing the concept of a 'Law of Nations' that could be prayed in aid to justify municipal law. A number of commentators adopted and adapted the work of Grotius. Cornelius Van Bynkershoek a century later considered it axiomatic that there was a right to confiscate or destroy all property belonging to an enemy wherever found and that the right to destroy enemy personnel included the right to enslave.[20] The Swiss commentator Emer de Vattel, writing during the Seven Years' War considered that the right should only be exercised for the purposes of war.[21]

Vattel and others who followed Grotius even called their works 'The Law of Nations', or some variant thereof. [22] The full title of Vattel's work, however, reveals that it, in common with others like it, was not a statement of extant law, but an attempt to find such a law by the application of supposed laws of nature to international trade. The short title, often used on its own, can be misleading. The concepts of 'international law' that emerged from the commentaries were simply useful concepts that could be adopted where it suited the purposes of an individual state jurisdiction to do so.[23] Care needs to be taken, therefore, when referring to 'international law' or the 'law of nations' in the eighteenth century as if they were established legal systems in their own right.

In the 1930s the American academic Carl J. Kulsrud attempted to disentangle the mass of treaties and opinions that were said to amount to a body of law on the rights of neutrals during

[18] See, Monica Brito Vieira, 'Mare Liberum v Mare Clausum. Grotius, Freitas, and Seldon's Debate on Dominion over the Seas.', *Journal of the History of Ideas* 64, no. 3 (July 2003): 361–77.
[19] Benjamin Redding, 'A Ship "For Which Neptune Raves": The Sovereign of the Seas, La Couronne and Seventeenth-Century International Competition over Warship Design', *The Mariner's Mirror* 104, no. 4 (2018): 402–22.
[20] Cornelius Van Bynkershoek, *Quaest. Juris Publici, L. i. c 3.*, 1737; Corbett and Lambert, *21st Century Corbett*, 74.
[21] Corbett and Lambert, *21st Century Corbett*, 74.
[22] Emer de Vattel, *The Law of Nations; or the Principles of the Law of Nature: Applied to the Conduct and Affairs of Nations and Sovereigns.*, 1758. See also *The Law of Nature and Nations: or, A General System of the most Important Principles of Morality, Jurisprudence, and Politics*, 1672, written in Latin by Baron Samuel Von Pufendorf, Counsellor of State to His Swedish Majesty, and the King of Prussia, translated into English, 1703, by Basil Kennet DD and reprinted in a number of editions during the eighteenth century, Book 8, Ch. 6 s. 8 p. 842 'of the right of war'.
[23] This remains the position today in some maritime affairs, see Davidsson v Hill [1901] 2 KB 606, The Esso Malaysia [1975] 1 QB 198 and Cox v Ergo Versicherung AG [2014] UKSC 22,30 per Lord Sumption JSC.

wars at sea before 1780. It is an impressive work due to the detailed study of numerous treaty provisions. His description of the status of this body of 'law' is perceptive:

'..the European society of nations, composed as it was of a number of independent states whose existence was contingent upon the fostering of a spirit of self-glorification in the several peoples, and upon the adherence of the several governments to a policy of self-interest, was without a universally recognised system of rules to govern the conduct of its sovereign members toward each other, and without an authority or tribunal to compose individual dissensions when they occurred. A confusion in international affairs, a clash of interests among the dynastic states, with a resort to arms as the final arbiter, were inevitable consequences of the existing conditions'[24]

The Law of Nations in the 18th Century: Blackstone and the Oxford Dons

Sir William Blackstone in his Commentaries on the Laws of England in 1769 concluded that:

'The law of nations is a system of rules, deducible by natural reason, and established universal consent among the civilised inhabitants of the world; In order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance of justice and good faith, in that intercourse which must frequently occur between two or more independent states, and the individuals belonging to each. This general law is founded upon this principle, that different nations ought in time of peace to do one another the good they can; and in time of war, as little harm as possible, without prejudice to their own real interests. And, as none of these states will allow a superiority in the other, therefore neither can dictate or prescribe the rules of this law to the rest; but such rules must necessarily result from the principles of natural justice, in which all the learned of every nation agree; they depend upon mutual compacts or treaties between the respective communities; in the construction of which there is also no judge to resort to, but the law of nature and reason, being the only one in which all the contracting parties are equally conversant, and to which they are equally subject.

In arbitrary states this law, wherever it contradicts or is not provided for by the municipal law of the country, is enforced by the royal power; but since in England no royal power can introduce new law, or suspend the execution of the old, therefore the law of nations (wherever

[24] Carl J. Kulsrud, *Maritime Neutrality To 1780*, 107.

a question arises which is properly the object of its jurisdiction) is here adopted in its full extent by the common law, and is held to be a part of the law of the land.'[25]

Blackstone's conclusion that the law of nations formed part of the law of the land was oft quoted thereafter. Although Blackstone remains a highly regarded jurist, this conclusion proved controversial and was ultimately abandoned, but its influence over the following two centuries was nevertheless considerable, as will be explored below.[26]

Blackstone was a lecturer in English law at Oxford when the future Admiralty judge Sir William Scott, later Lord Stowell, arrived there in 1761, four years before the first of the commentaries was published. Blackstone's lectures helped instil the respect for the common law that Scott later demonstrated.[27] Scott would have learned ideas about the Law of Nations from Blackstone and others. Also lecturing at Oxford during Scott's time there was Thomas Bever, a fellow of All Souls, a doctor of civil law and a member of the body to which Admiralty advocates belonged at the time, known as Doctors' Commons.[28] Bever's notes of both Blackstone's and his own lectures on jurisprudence and the civil law survive at All Souls.[29] Bever included the history of Roman law and the classical natural law school of Grotius and those who followed in his wake. As Scott's modern biographer has put it 'We can probably safely assume that Scott faithfully attended the entire course of more than thirty mind-numbing lectures'.[30] Bever, like Blackstone, introduced his students to the law of nations as it was understood in the eighteenth century, deriving 'from the same law of nature which God in the act of creation had engraved in the minds and hearts of men'.[31] According to this view the relations between 'civilised', i.e. Christian, nations must be regulated by fixed rules derived from natural reason.

A similar approach was advocated by another contemporary advocate for a 'natural' law of nations. John Taylor in his 1755 work '*Elements of Civil Law'*, published in Cambridge, had described the law of nations as 'That unwritten, general reasonable and clear Obligation, which

[25] Sir William Blackstone, *Commentaries on the Laws of England*, (1769) Book Four, Ch,5 Offences Against the Law of Nations.
[26] Blackstone also features in the pantheon of lawgivers depicted in the US Supreme Court.
[27] Bourguignon, *Sir William Scott, Lord Stowell*, 2004, 35.
[28] They enjoyed exclusive rights to appear in the Admiralty Court until 1859, see Edward Stanley Roscoe, *Studies in the History of the Admiralty and Prize Courts* (London: Stevens & Sons, 1932), 3.
[29] Codrington Library, Oxford, MS 300 and 109 respectively.
[30] Bourguignon, *Sir William Scott, Lord Stowell*, 2004, 36.
[31] Bourguignon, 36.

links separate Communities together, like Individuals. It is still the Dictate of Right Reason, applied to the Wants and Services, the Exigencies and Necessities of Societies'.[32]

Scott, who joined Doctors' Commons as an Admiralty Court advocate in 1779, deployed such ideas when it suited the outcome he thought appropriate. In 1799, for example, shortly after he had been appointed as the Admiralty Court Judge, Scott had to determine whether a British ship had been validly sold as a prize to new owners so that they acquired title to the ship against the original British owners.[33] A British ship, *The Favourite*, had been captured by French privateers who sailed her into Bergen, a neutral port in Norway. There she was condemned by the French Consul and sold at auction, but without a formal sentence of condemnation. The circumstances of the sale were suspicious. Although supposedly sold to a neutral Danish merchant, she was bought by the same General Agent who had put her up for sale acting for the French. Further, there had been no other bids. The colourable nature of the transaction was compounded by evidence that the ship was loaded and sent to sea with written instructions to sail to St Maartens, but oral instructions to try and put into the blockaded French port of Le Havre and only to sail to St Maartens if she could not do so. Although a formal sentence of condemnation was officially required by British law, there was evidence that the sale accorded with the practice carried out by a number of countries, including on occasion the British. It was argued that the general practice was sufficient for the court to recognise the sale as in accordance with the law of nations. The colourable nature of the transaction did not make the submission an attractive one. Scott's view of the law of nations could in this case be prayed in aid of a result that reflected the merits of the case. Scott, in his judgment, considered that a habit of irregularity was insufficient to establish a practice 'conformable to the usage and practice of nations'. In doing so he said of the usage and practice of nations that:

'A great part of the law of nations stands on no other foundation: it is introduced, indeed, by general principles; but it travels with those general principles only to a certain extent: and, if it stops there, you are not at liberty to go further, and to say, that mere general speculations would bear you out in a further progress: thus, for instance, on mere general principles it is lawful to destroy your enemy; and mere general principles make no difference as to the manner in which it is to be effected; but the conventional law of mankind, which is evidenced in their practice, does make a distinction, and allows some, and prohibits other, modes of destruction; and a

[32] Cited Bourguignon, 38.
[33] The Flad Oyen (Martenson) (1799) 1 Rob. 135.

belligerent is bound to confine himself to those modes which the common practice has not brought within the ordinary exercise of war, however, sanctioned by its principles and purposes.'[34]

For Scott, the law of nations was 'a law made up of a good deal of complex reasoning, though derived from very simple rules, and altogether composing a pretty artificial system.'[35] As Bourguignon has said 'Reason, of course, has never spoken with a single voice. Scott knew the conflicting conclusions, all purportedly derived from reason, expressed by various writers on the law of nations. But he also knew that some basic propositions were widely accepted.'[36] Where he found propositions that were widely accepted then Scott would give effect to them, if he saw fit, in forming the English law.

Those on the receiving end of British policy and Scott's judgments could be less charitable. A later Lord Chancellor arguing unsuccessfully in favour of a Liberal government's attempt at giving up Britain's traditional right to take prizes in the build up to the Great War of 1914-18 summarised their view of the traditional British stance as 'a Machiavellian policy', arguing that 'from the time of Lord Stowell we have stored up a quiver full of legal quibbles and precedents by which we can recover whatever we profess to concede'.[37] In making use of concepts of international law Scott looked to them as principles that could be used as a source, rather than as rules automatically incorporated into English law. Scott's robust dicta on the topic sometimes suggested the opposite, however. As will be seen below, his comments need to be seen in context in order to understand his approach.

Scott and the Admiralty court were not alone in considering the role of international law in the English courts. Sir William Holdsworth identified a number of examples in 1942 when considering the relationship between English law and international law.[38] In 1805 in the Court of Chancery Lord Eldon, Lord Chancellor and brother of Sir William Scott, considered that the courts should look to the principles of international law for guidance where English law precedents did not provide an answer to a problem to which international law applied.[39] The question that had arisen was whether a new government in Switzerland that had taken over

[34] The Flad Oyen (1799) 1 Rob. 135, 139-40.
[35] The Hurtige Hane (Dahl) (1801) 3 Rob. 324, 326. 'artificial' here denotes man-made as opposed to natural rather than anything more pejorative.
[36] Bourguignon, *Sir William Scott, Lord Stowell*, 2004, 258.
[37] Earl Loreburn, *Capture at Sea* (London: Methuen & Co. Ltd., 1913), 155.
[38] William S. Holdsworth, 'The Relation of English Law to International Law', 142.
[39] Dolder v Huntingfield (1805) 11 Ves. 283, 294

government by revolution and was as yet unrecognised by Britain was entitled to stock held by trustees for the Swiss government. Eldon had earlier dealt with a claim to property that had belonged to the state of Maryland before the war of independence where he held that the colony had been a corporation under the great seal that had been dissolved by means 'which a court of justice was obliged to consider rebellious'.[40] Eldon distinguished that result in the Swiss claim on the basis that the latter did not involve rebellion against the British crown. The Swiss claim, he considered, fell to be 'discussed upon the great principles of the law of nations.' Although obiter dicta rather than essential to his reasoning, his comment was consistent with the common law approach of looking to the law of nations for inspiration where appropriate, rather than the court being bound by a separate and discrete body of law.

In 1817, in the Court of King's Bench, Lord Ellenborough had to consider whether the English courts would recognise a receipt from Danish commissioners as a valid discharge of a debt owed to an English subject.[41] The commissioners had been paid monies under a Danish ordinance sequestrating the assets of English subjects pending hostilities with Britain. The court heard detailed submissions founded on Grotius, Vattel, Bynkershook and the rights of sovereignty exercised by Alexander when he conquered Thebes, all designed to show that the ordinance was 'grounded upon and conformable to the law of nations'. Having done so Ellenborough decided that there was no precedent in the law of nations to justify the ordinance. The unsurprising result was that, having considered the law of nations, the English court would not deprive an English merchant of the benefit of a debt that had been paid to an enemy state under an ordinance made by that country pending hostilities. Clearly, the court was prepared to consider the help that could be obtained from the law of nations, but the municipal law found its own way on the merits of the case.

In 1823 the Court of King's Bench considered whether the immunity from legal process enjoyed by ambassadors benefited an English servant of an ambassador.[42] The servant did not reside with the ambassador, but when his goods were seized under a writ of distraint for unpaid poor rates he sued in trespass on the basis of the alleged immunity. The court held that the statutory immunity under an act passed in the time of Queen Anne was declaratory of the common law and, per Abbott C.J., 'It must, therefore, be construed according to the common law, of which the law of nations must be deemed a part'. Taken on its own this passage seems

[40] Barclay v Russell (1797) 3 Ves. 424.
[41] Wolff v Oxholm (1817) 6 M. & S. 92, 100-106
[42] Novello v Toogood (1823) 1 B. & C. 554, 562, 2 Dow & Ry. K.B. 833, 1 LJ (O.S.) K.B. 181

to be a strong statement that the law of nations formed a part of the common law. In context, however, the meaning is more subtle. The court was engaged in a task of construing a statute and it therefore looked to the mischief that the statute was designed to prevent. That mischief originated in the diplomatic custom as between nations, referred to here as the law of nations. The immunity had originally been recognised at common law and then in statute to give effect to the mutual protection of ambassadors from and to other states. The aim was to protect ambassadors and their servants from being threatened with legal process against goods in their houses that were necessary for the convenience of the ambassador. The goods in the present case did not fall within that mischief and so were not covered by the act. It was not that the court was bound by a law of nations as part of the English law, it was looking to the law of nations in construing its own municipal law.

The following year, giving judgment in the Court of King's Bench in a case concerning the sovereign rights of other states, Best C.J. said '…it occurred to me at the trial that it was contrary to the law of nations (which in all cases of international law is adopted into the municipal code of every civilized country) for persons in England to enter into engagements to raise money to support the subjects of a government in amity with our own, in hostilities against their government, and that no right of action would arise out of such a transaction'.[43] Once more this appears to be a strong statement that international law, or the law of nations, is incorporated into English law, but again the context provides a more subtle explanation.

The plaintiff had been a party to a fraudulent attempt to raise funds, purportedly to assist Greek nationalist efforts, by falsely pledging the Greek government for repayment of the funds. The action was to recover damages for detention of documents that had been deposited as part of the fraud. Best C.J. took it upon himself to raise the issue of whether, as a matter of public policy, the English court would support efforts to undermine countries that Britain had no hostility with. He decided that it would not. In doing so he was not incorporating the law of nations into English law, he was deciding to give effect to the concept of international amity as a matter of English law public policy.

The examples cited by Holdsworth were far from the only ones where English courts in the eighteenth century made reference to a law of nations as a basis for their decisions, or where quoting from other judgments that did so gave the impression that there really was a law of nations. In Lindo v Rodney, for example, Lord Mansfield considered the nature of the

[43] De Wutz v Hendricks (1824) 2 Bing. 314, 315-6

Admiralty Court's prize jurisdiction in a claim against Admiral Rodney for goods seized by him in 1781 on the Caribbean island of St Eustatius, rather than at sea. Lord Mansfield is commonly regarded as a founder of modern commercial law. He 'enfolded into the ancient common law of England the customs and usages of the merchants and industrialists'.[44] Applying this process to the practical issue of the prize jurisdiction of the Admiralty Court he declared that 'By the law of nations, and treaties, every nation is answerable to the other for all injuries done, by sea or land, or in fresh waters, or in port. Mutual convenience, eternal principles of justice, the wisest regulations of policy, and the consent of nations, have established a system of procedure, a code of law, and a court for the trial of prize. Every country sues in these courts of the others, which are all governed by one and the same law, equally known to each.'[45]

On its face this once more appears to be a clear representation that there existed an established code of law that governed the courts of all nations. In fact, however, Mansfield was simply acknowledging that prize disputes inevitably ended up in the courts of the captors and that by custom and usage there were mutual interests in affording access to those courts. He was also recognising that the English courts had an interest in promoting their rules and procedures as fair to all, especially the neutral merchants whose governments Britain did not wish to antagonise, in order to gain recognition of English law as the preferred law of international trade.

The international nature of prizes meant that the English courts would even recognise the prize judgments of enemy courts as conclusive in transferring title.[46] It could thus appear that the English courts were enforcing the orders of enemy courts as a result of some international rule applicable even in war. In fact, however, they were not enforcing the orders of foreign courts, but were determining issues of title before their own courts as they saw fit in accordance with English municipal law. The municipal law that they were applying was subject to the control of parliament, not international law. Thus, in 1808, as economic warfare with Napoleon intensified, parliament acted to change English law to reduce the market for ships taken by the French as prizes. The Prize Act 1808 provided that British ships captured by the enemy but which afterwards became the property of British subjects again would no longer be entitled to

[44] Poser, *Lord Mansfield*, 4.
[45] Lindo v Rodney (1781) 2 Doug. 613, 615.
[46] See: Oddy v Bovill (1802) 2 East 473, Baring v The Royal Exchange Assurance Co. (1804) 5 East 99 and Bolton v Gladstone (1804) 5 East 155.

the privileges of British ships.[47] Although French privateers did not disappear completely, the financial incentive to equip a privateer was reduced, so reducing the main French weapon against British trade though financial pressure. Thus, although the English courts might recognise title to ships obtained through sales under the authority of foreign courts, that did not mean that they were doing so under a discrete body of international law. They did so under, and subject to the control of, English municipal law. As this change demonstrates, Britain applied its own law as it chose in its own interests

'The Law of Nations' is a useful shorthand, but used loosely it can cause confusion.[48] Our modern idea of International Law is a later construct that obscures what was happening in the long eighteenth century, so that statements such as Jourdan's that Napoleon's continental blockade 'would be legitimate in positive law even though it was not entirely legal or legalized' make little sense by the standards of the time.[49] Mansfield's reference to 'the law of nations and treaties' reveals the problem. Unlike later multi-national law-making treaties, a network of bilateral treaties did not create a body of international law that existed apart from those treaty provisions. If there existed a body of international law apart from the treaties then the treaties would have been unnecessary, or exceptions to the rule rather than proof of them. Although treaties may have sought to justify their provisions by reference to the law of nations no attempt was made internationally to define the supposed law, or to find a common formula for the conflicting principles of various treaties.[50] Compliance with any principles established by treaty often lasted only until a party became involved in war.[51] Britain's interest in the enforcement of a claimed 'international' law through its naval policy was limited to cases where to do so served to advance Britain's immediate commercial interests, an approach that the courts were prepared to support.[52]

There was no international legal means of compulsion to respect any 'law of nations' as there were no international courts. The way in which the courts of each country gave effect to the inchoate ideas of the law of nations was much affected by the edicts of their particular sovereigns.[53] Then even more than now, 'international law' was largely aspirational rather than being a coherent, enforceable system of law. That limitation was fully appreciated in the

[47] 48 Geo.3 c.70.
[48] Carl J. Kulsrud, *Maritime Neutrality To 1780*, 29.
[49] Annie Jourdan, in Aaslestad, *Revisiting Napoleon's Continental System*, 50.
[50] Carl J. Kulsrud, *Maritime Neutrality To 1780*, 315.
[51] Carl J. Kulsrud, 336–37.
[52] Carl J. Kulsrud, 316.
[53] See, Richard Pares, *Colonial Blockade and Neutral Rights 1739-1763* p. 152.

eighteenth century. Writing in 1801 the Admiralty Court lawyer Dr Christopher Robinson, amanuensis of the Admiralty judge Sir William Scott and himself a future Admiralty Court judge, confided that 'the great defect' of the 'public law of nations' was 'the want of some coercive authority to compel the performance of the most acknowledged duties'.[54]

The concern that prompted Robinson into print related to renewed attempts to claim a neutrality of the seas so as to prevent belligerent parties from searching neutral ships and seizing enemy goods as prize. These attempts either sought to remove the right of search completely, or asserted that a declaration of neutrality by a convoying power should itself be a sufficient assurance that the convoyed property was neutral. These attempts brought Britain into dangerous conflict with neutrals and led to the armed neutrality in 1801, the year Robinson's work was published. Robinson was dismissive of the promises of governments when a law of nations capable of being enforced did not exist. He considered the idea of respecting government assertions about the validity of cargoes as 'holding out little more than the word of honour of governments, instead of the oath of the affected proprietor, to which we are entitled now together with other securities'. He considered it obvious that 'neither a few professions of moral rectitude, nor a few sophistical distinctions, have ever been found sufficient to keep even the scales of justice between independent states: Gratuitous acts of justice are not much relied on in any system of laws; least of all can they claim our confidence on matters arising out of the public law of nations'.

As Kulsrud concluded in his 1936 study of treaties relating to maritime neutrality before 1780:

'At the time when the neutral governments commenced to base their demand for exemption upon a right allegedly inherent in the convoy system, and set about to enforce the recognition of that demand by means of naval forces, the controversy between them and the belligerent governments no longer centred mainly in points of law or in legal principles. It had become then primarily the manifestation of a clash between conflicting commercial interests, of which one side was strengthened by a widespread belief that the struggle was one for self-preservation, the other by the knowledge that with the end of the war there would vanish an extraordinary opportunity for trade.'[55]

[54] Christopher Robinson, *Collectanea Maritima*, ii.
[55] Carl J. Kulsrud, *Maritime Neutrality To 1780*, 186.

The claim by neutrals that their vessels were immune from the right of search when under convoy by their own armed vessels had come before Scott for determination, and issues of neutral rights would do so again. The outcomes were essentially pragmatic, but gave rise to considerable debate about the relationship between the Prize Court and the executive, as will be seen in the next chapter.[56]

The Rise of International Law in the Nineteenth Century

The Victorian interest in eighteenth century prize law went beyond considering Lord Mansfield's views in Sutton v Johnstone.[57] The Victorians tried to look to eighteenth century decisions as a basis for asserting that international law had a direct role in determining the outcome of actions before the English courts. What we now call Public International Law, the law of states and their relationships with each other, became an academic legal subject during the nineteenth century. Study of 'Natural Law' and 'The Law of Nations' moved away from philosophy towards the study of law during that century. Sir Travers Twiss QC, the complier and translator of the Black Book of Admiralty had taught international law at King's College London before becoming Regius Professor of Civil Law in Oxford in 1855, but Oxford only created its first chair in International Law in 1859, Cambridge in 1866, 200 years after the first chair in international law, said to be that of Samuel Pufendorf at Heidelberg in 1660.[58] This mid-nineteenth century academic activity was part of a renewed effort to 'move from the banal facts of legal positivity –the making and applying of rules by authoritative institutions- to something larger that would unify those rules, and the totality of legal subjects, under some ethos or teleology'.[59] The ambiguity of this effort down the years continues to be debated. The idealism of a pure concept of an overarching unity in the law is difficult to disentangle from the coercive nature of international law as an instrument of power used by a series of dominant powers.[60] As the Finnish academic Martti Koskenniemi has put it:

'…it is impossible to miss the utopian urge in the relevant texts and events. International lawyers celebrate that urge but have also been enchanted by it and in the process become blind

[56] The Maria (1799) 1 Rob. 340, The Recovery (1807) 6 Rob. 348, The Fox [1811] Edw. 311.
[57] See Ch. 3 above.
[58] Arthur Nussbaum, *A Concide History of the Law of Nations* (New York: The Macmillan Company, 1947), 237; Scott Andrew Keefer, *The Law of Nations and Britain's Quest for Naval Security: International Law and Arms Control, 1898-1914*, (Basingstoke: Palgrave Macmillan, 2016), 63.Neff, *Justice among Nations*, 175.
[59] Koskenniemi, Rech, and Jiménez Fonseca, *International Law and Empire*, 2.
[60] Cf. Ronald M. Dworkin, *Law's Empire*, 9. print (Cambridge, Mass: Belknap Press of Harvard Univ. Press, 1995); Wilhelm Georg Grewe and Michael Byers, *The Epochs of International Law* (Berlin ; New York: Walter de Gruyter, 2000).

to its hegemonic dimensions. The operation of international legal principles is a fundamentally contested datum so that what is viewed by one as humanitarian mission appears for another as an exercise of naked power. Law is one of the vocabularies –perhaps the leading vocabulary- through which we seek to persuade audiences about the justice of our views and the injustice of those put forward by our adversaries.'[61]

Even by 1913 Lord Loreburn, an active Liberal advocate for doomed attempts to use international law to abolish capture at sea, wondered whether the phrase international law was 'a proper appellation for a mass of customs, precedents and conventions, a great part of which are by no means uniform and some of which are the subject of vehement dispute'.[62] He identified the issue as a lack of a legislature: 'There is no Parliament of nations in which a predominant opinion may be imposed upon the minority'.

Advocates of 'International Law' have never been put off by the argument that without an international means of enforcement a body of contentious principles struggles to be a 'proper' legal system. As Keefer has put it:

'What the layman seeks in courts and cops, the international lawyer metes out in prose (*sic*) and cons. Beneath the florid language of treaties lay assumptions of political costs and power relationships. By going to the trouble of formalising an agreement in a treaty, vested with symbolic significance and an aura of permanence, statesmen increased the political costs of violations, making breaches less likely. Yet violations remained possible and good lawyers anticipated them. While law could not eliminate the possibility of violations, it could make behaviour more predictable.'[63]

Lemnitzer, when considering the role of the Paris Declaration in establishing a practice of multinational law-making, attempted to resolve this problem:

'The problem begins with the name because, without a central authority setting and enforcing the rules, international law is not actually law. 'International law' as a composite term was popularised by Jeremy Bentham in the late 18th century, replacing the older term 'laws of nations'. International law is not law as applied to international affairs but the set of rules and conventions that has been established between nations as legally independent entities in

[61] Koskenniemi, Rech, and Jiménez Fonseca, *International Law and Empire*, 4.
[62] Earl Loreburn, *Capture at Sea*, 15.
[63] Scott Keefer, *The Law of Nations and Britain's Quest for Naval Security 1898-1914*, 2.

frequent discourse with each other. Hence 'laws of nations' is arguably the more accurate term – it makes it clearer that if the rules set by the nations for themselves are not respected, this is a failure on the part of the nations and not a failure of 'the law'.'[64]

That concepts of international law, or a law of nations, have played a role in both international affairs and in the formation of the municipal law of states is beyond dispute. The contentious issue is what the nature of that role has been. It is easy for any analysis to be affected by the ambiguities in the historical origins that are relied on. Even the Roman law of Justinian could be viewed in differing ways. For some it was a natural law based on instinct or reason. For others it was a kind of positive law in force among all civilised nations. 'This ambiguity would extend to later understandings of the meaning of the 'law of nations' as well, giving it flexibility and normative power that would consecrate the policies of European rules while assuming the unity of humankind under the principles of Christian ethics.'[65]

The ambiguity can be seen both in the judgments of the English courts in the eighteenth century and the efforts of nineteenth century jurists to make use of them to establish the existence of 'international law'. In 1854 Sir Robert Phillimore wrote that:

'International Law is not a body of rules which lawyers have evolved out of their own inner consciousness…. It is a living body of practical rules and principles which have gradually come into being by the custom of nations and international agreements.'[66]

The same could have been said of the common law a century earlier when Lord Mansfield was extracting the common law rules out of the commercial customs of the age to create a body of rules. By 1854 the common law was a body of rules in a way that international law was not. At that stage, at least, Phillimore's assertion was an aspiration rather than a reality, but he, Twiss and others were, by their writing, attempting to encourage the realisation of the aspiration. In the eighteenth century international law was certainly not 'a body of laws' in the way that Phillimore was still aspiring to a century later.

A supposed 'principle' of incorporation of international law into domestic law was picked up and re-stated in the mid-nineteenth century as part of the process of creating the concept of

[64] Jan Martin Lemnitzer, *Power, Law and the End of Privateering* (Basingstoke, Hampshire: Palgrave Macmillan, 2014), 2.
[65] Koskenniemi, Rech, and Jiménez Fonseca, *International Law and Empire*, 5.
[66] Sir Robert Phillimore, *Commentaries Upon International Law*, vol. 1 (Philadelphia: T & J.W. Johnson Law Booksellers, 1854), 56, Vol. I.

international law. It led to a new attempt to establish that international law did indeed have direct effect in English law. In 1853 the former Lord Chancellor, Lord Lyndhurst, addressed the House of Lords in a debate about the asylum given by Britain to Austrian refugees who conspired to encourage revolt against their own country. In doing so he declared that 'the offence of endeavouring to excite revolt against a neighbouring State is an offence against the law of nations. No writer on the law of nations says otherwise. But the law of nations, according to the decision of our greatest judges, is part of the laws of England'.[67] He could easily have quoted Blackstone to support this claim.

Lyndhurst's assertion was extra-judicial, but in 1861 Vice-Chancellor Stuart held that the Chancery courts could protect the rights of foreign sovereigns by injunction on the basis that international law was part of English law. He granted the Austrian emperor, as King of Hungary, an injunction for delivery up of notes printed by Hungarian nationalists, that whilst not forgeries of genuine Austrian notes nevertheless falsely claimed to be valid Austrian tender. His decision on the grounds of the law of nations was overturned by the Court of Appeal, where it was conceded that the injunction was sustainable only on grounds of preventing damage to property rather than invasion of a sovereign prerogative of a friendly state under international law.[68] Nevertheless, Stuart's judgment represented a view of the role of international law in English law that was gathering support.

The concept of international law that it was suggested that the English courts could apply was remarkably flexible. Given its supposed roots in the ancient concept of natural law, which was said to be created by reason and remain constant and unchangeable, this appears surprising. In 1876 Sir Robert Phillimore, Mr Montague Bernard and Sir Henry Maine offered their joint opinion on international law to the Royal Commission on Fugitive Slaves, as three of its commissioners. Having noted that slavery was 'regarded by nearly the whole of Christendom as repugnant to justice' they offered the opinion that:

'International Law, it is to be observed, is not stationary; it admits of progressive improvement, though the improvement is more difficult and slower than that of municipal law, and though the agencies by which change is effected are different. It varies with the progress of opinion and the growth of usage; and there is no subject on which so great a change of opinion has

[67] *Hansard* HL Deb. 4 March 1853 Vol. 1 124 cc 148-9
[68] The Emperor of Austria v Day (1861) 3 De G. F. and J. 217, 244, 30 L.J. Ch. (N.S.) 690 see further, William S. Holdsworth, 'The Relation of English Law to International Law', 143.

taken place as slavery and the slave trade. Bynkershoek, in one of his latest works, published in 1737, maintains that, as a conqueror may in the exercise of an extreme right to do as he pleases with his captive, he may, though the practice has fallen into desuetude, put him to death, or, as a consequence of that right, may sell him into slavery.[69] Such a doctrine would now be held not merely unlawful, but atrocious; and the trade in negro slaves, which was formerly competed for as a legitimate source of profit, has in a great number of treaties been assimilated to the crime of piracy.'

These considerations, they opined, were sufficient to justify British officers of a man of war refusing to give up a slave who had taken refuge on a British vessel in the territorial waters of a country where slavery was recognised. This was so even though the government was at that same time still attempting to achieve a multi-lateral treaty as an international solution to such issues.[70]

The Franconia: R v Keyn

The issue of how English law should embrace international law came to a head in 1876 in a decision of thirteen judges sitting in the court of Crown Cases reserved. They split seven against six.[71] The German captain of *The Franconia* was charged with manslaughter of a passenger after negligently running down *The Strathclyde* and causing a fatal collision within the British three-mile territorial limit. The question that arose was whether the English court had jurisdiction to try him on the basis that the English courts would recognise a rule of international law that was 'established as solidly as any proposition of international law can be' that the sea within the limit was for all purposes part of the territory to which it was adjacent.[72]

Lord Coleridge, with the minority and having quoted Blackstone, concluded that international law formed part of English law:

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[69] Cornelius Van Bynkershoek, Quaest. Juris Publici, L. i. c 3.
[70] Hersch Lauterpacht and Elihu Lauterpacht, *International Law:: Being the Collected Papers of Hersch Lauterpacht. Pt. 1: The Law of Peace International Law in General* (London: Cambridge Univ. Press, 1975), 102.
[71] R v Keyn (1876) 1 Ex. Div. 63 Cockburn C.J., Kelly C. B., Bramwell J. A., Lush and Field JJ., Sir Robert Phillimore and Pollock B. in the majority and Lord Coleridge C. J., Brett and Amphlett JJ.A., Grove, Denman and Lindley JJ. In the minority.
[72] The three-mile limit was notionally based on the distance that a cannon ball could be fired so as to exercise control over the seas visible from land.

‘Law implies a law giver, and a tribunal capable of enforcing it and coercing its transgressors. But there is no common law-giver to sovereign states; and no tribunal has power to bind them by decrees or coerce them if they transgress. The law of nations is that collection of usages which civilised states have agreed to observe in their dealings with one another. What these usages are, whether a particular one has or has not been agreed to, must be a matter of evidence. Treaties and acts of state are but evidence of the agreement of nations, and do not in this country at least per se bind the tribunals. Neither, certainly, does a consensus of jurists; but it is evidence of the agreement of nations on international points; and on such points, when they arise, the English courts give effect, as part of English law, to such agreement.’

Coleridge and the other judges in the minority would thus have followed Blackstone and held that international law could form part of English law where it was adequately evidenced. The majority, including Cockburn C.J. and Sir Robert Phillimore who had both been commissioners on the Royal Commission on Fugitive Slaves which had just reported, disagreed. Cockburn and Phillimore had expressed different views in the non-judicial setting of the commission, but agreed as part of the majority in the court of Crown Cases reserved. They held that only those rules of international law that could be proved to have been received into English law could be regarded as part of that law. They might be received by statute incorporating a rule of international law, or it might be proved by the assent of the nations who were bound by international law to the particular rule, but in that case:

‘This assent may be express as by treaty, or the acknowledged concurrence of governments, or may be implied from established usage - an instance of which is to be found in the fact that merchant vessels on the high seas are held to be subject only to the law of the nation under whose flag they sail, while in ports of a foreign state they are subject to the local law as well as to that of their own country. In the absence of proof of assent derived from one or other of these sources, no unanimity on the part of theoretical writers would warrant the judicial application of the law on the sole authority of their views and statements.’

As the jurist Sir William Holdsworth summarised the view of the majority in an article for the Journal of the Minnesota State Bar Association in January 1942, a time of renewed US interest in the meaning of international law under the common law:

‘In other words, it is not true to say that all rules of international law, as and when they are evolved by the jurists, become part of English law; but only those parts which, by legislation, judicial decision, or established practice, have been received into English law. The mere fact

that there was a unanimous consensus of jurists in favour of a particular rule did not make that rule a rule of international law, which must, without more, be enforced as part of the law of England. Since there was no evidence that all the states bound by international law had assented to the rule that the state had jurisdiction over territorial waters, this was not a rule which could be enforced as part of the law of England.'[73]

Agreement amongst recognised jurists in international law might make it politically acceptable internationally for parliament to legislate in line with their views. Indeed, the Territorial Waters Jurisdiction Act 1878 later gave the English courts the jurisdiction that the majority in R v Keyn had said they could not exercise without such an Act. As the majority view expressed it, however:

'it is obviously one thing to say that the legislature of a nation may, from the common assent of other nations, have acquired the full right to legislate over a part of that which was before high sea, and as such common to all the world; another and a very different thing to say that the law of the local state becomes thereby at once, without anything more, applicable to foreigners within such part, or that, independently of legislation, the courts of the local state can proprio vigore [*by its own force or vigour*] so apply it.'[74]

Thus international law could be a source of English law if adopted municipally, but it was not part of English law per se. This view, as expressed by Cockburn C.J. and the majority in R v Keyn, prevailed thereafter. It was explained further in 1905 by Lord Alverstone C.J.. The occasion arose in a case arising out of the British annexation of the areas of Transvaal and Orange Free State from the Boer South African Republic in 1900 and their subsequent incorporation into the Union of South Africa in 1902 under the Treaty of Vereeniging. The Boer government had requisitioned a shipment of gold during the war and the owners claimed the value of the gold from the new state as successors to the requisitioning state. The English court held that there was no principle of law that after annexation of conquered territory the conquering country became, in the absence of express stipulation, liable for the debts of the conquered state. In delivering his judgment in the Court of King's Bench, Alverstone confirmed the Cockburn view in the following terms:

[73] William S. Holdsworth, 'The Relation of English Law to International Law', 146.
[74] R v Keyn (1876) 2 Ex. Div. 63, 207.

'The proposition…that international law forms part of the law of England requires a word of explanation and comment. It is quite true that whatever has received the common consent of civilised nations must have received the consent of our country, and that to which we have assented along with other nations in general may properly be called international law, and as such will be acknowledged and applied by our municipal tribunals when legitimate occasion arises for those tribunals to decide questions to which doctrines of international law may be relevant. But any doctrine so invoked must be one really accepted as binding between nations, and the international law sought to be applied must, like anything else, be proved by satisfactory evidence, which must show either that the particular proposition put forward has been recognised and acted upon by our own country, or that it is of such a nature, and has been so widely and generally accepted, that it can hardly be supposed that any civilised state would repudiate it. The mere opinions of jurists, however eminent or learned, that it ought to be so recognised, are not in themselves sufficient. They must have received the express sanction of international agreement, or gradually have grown to be part of international law by their frequent practical recognition in dealings between various nations….the expressions used by Lord Mansfield when dealing with the particular and recognised rule of international law on this subject, that the law of nations forms part of the law of England, ought not to be construed so as to include as part of the law of England opinions of the text-writers upon a question as to which there is no evidence that Great Britain has ever assented, and a fortiori if they are contrary to the principles of her laws as declared by her Courts. The cases of Wolff v Oxholm and R v Keyn are only illustrations of the same rule – namely that questions of international law may arise, and may have to be considered in connection with the administration of municipal law.'[75]

Accordingly, the English court refused to give effect to the alleged position in international law that had been advanced when determining the English municipal law that should be applied in the claim for the value of gold taken by the Boers. Even if the court had been satisfied that the alleged principle existed in international law, the court would not have enforced that law directly, it would only have taken it into account in determining the approach that the municipal law of England should take.

[75] West Rand Central Gold Mining Co. v Rex [1905] 2 K.B. 391, 406-8.

The effect of these cases was that Blackstone's famous adage that international law was part of the law of England found no defence in common law practice.[76]

Holdsworth suggested that the failure to defend Blackstone's assertion was a change in attitude not only from the utterances of Blackstone, but from those of the eighteenth-century judges. He asserted that the principle of international law had only been introduced to the common law by the Statute of Queen Anne in 1708 dealing with immunities of ambassadors and that the courts in the eighteenth century were not so reliant on parliament giving effect to international law and were prepared to incorporate it themselves. Even in the Middle Ages, however, long before international law was considered any sort of a definite system, there had been legislation against breakers of truces and safe-conducts.[77] The courts were used at an early stage to the idea that parliament gave effect in municipal law to the obligations that the king had taken on to other states.

Holdsworth suggested that the purported Victorian change in attitude reflected three factors: 'the manner in which these questions came before the courts, a growing perception of the differences in the character and ambit of the rules of international and municipal law, and the course of legislation.'[78] None of these reasons, however, support the idea that the Cockburn view of international law was a change, rather than a recognition of what the judges in the eighteenth century had really been saying about the role of international law. As has been seen above in examples that Holdsworth cited:

'though many judges and jurists had laid it down in broad terms that international law is part of the law of England, those broad statements were merely prefaces to the ruling in particular cases, which turned upon the application of a particular rule of international law to cases concerning the immunities of foreign sovereigns or ambassadors, questions as to the criminal liability of subjects for breaches of truces, or for raising subscriptions or doing other acts to help revolutions against friendly powers, or questions arising in civil actions in which the existence of some rule of international law was relevant to issues in the case. Thus the attention of the judges was concentrated upon the question whether a particular rule, alleged to be a rule of international law, and as such part of the law of England, was in fact a rule of international

[76] Koskenniemi, Rech, and Jiménez Fonseca, *International Law and Empire*, 8.
[77] William S. Holdsworth, 'The Relation of English Law to International Law', 149.
[78] William S. Holdsworth, 147.

law. They were obliged therefore to scrutinize the evidence as to whether that particular rule had been received as a rule of international law.'[79]

Conclusion

As has been seen, the courts of the eighteenth century understood the different characters of international and municipal law. They were aware that they were applying municipal law, whatever the rhetoric that was occasionally used. What changed was the growth of the idea in the nineteenth century that international law could have a greater role, and a more distinct presence, than the eighteenth-century courts had contemplated. Although parliament had shown an increasing inclination to commit international law obligations into municipal legislation in the nineteenth century, it had done so to some degree for a long time, and its effect had been recognised by the courts when it did so. In the eighteenth century, as was ultimately recognised in the nineteenth century, the law of nations was a source, rather than a part of English law, the municipal law that the courts gave effect to. The attempts to suggest that the dicta of the eighteenth century relating to the law of nations elevated that 'law' to a binding system of law had more to do with the nineteenth century desire to root the establishment of a concept of binding international law in the past as any real eighteenth century view that that was what they were dealing with.

But were the prize courts an exception so as to justify the description of prize courts as administrators of international law? That is the question that will be considered in the next chapter.

[79] William S. Holdsworth, 148.

Chapter 5, International law in the Prize Courts

Holdsworth granted one exception to the Cockburn doctrine that international law could be a source of English law, rather than being an established part of English law as such. That exception was, according to him, to be found in the Prize Court. 'Lastly it should be noted' he said in almost a postscript to his 1942 article 'that these doctrines as to the relation of English law to international law are the doctrines which are applied by the ordinary courts of law and equity. The position of the Prize Court, which administers international law, is different.'[1] Holdsworth accepted, however, that the Prize Court 'is bound by a statute; so that, if a statute compels a departure from the rules of international law, the court must decide in accordance with the statute'.[2]

This 'different' position of the Prize Court as the administrators of international law has hovered over any consideration of the Prize Court of Admiralty down the years without being explored in any great detail. It is certainly possible to find dicta that appear to support this proposition. It is a proposition, however, that needs to be treated with as much caution as the proposition, ultimately discarded, that international law formed part of the eighteenth-century common law of England. The reasoning that applies, and which Holdsworth identified as applying, to the 'courts of law and equity' applies equally to the courts dealing with prizes, whether directly in the Admiralty Court or indirectly in the courts of Common Pleas, King's Bench, Exchequer or elsewhere. Focused on solving the issue that arose in each particular case, the courts treated the law of nations as a potential source of municipal law where they wished to, but were not bound by some external international law as such. They were neither blind to the policies of the British government, nor required to frustrate such policies by rigid application of some alien law. As the retired law lord, Patrick Devlin, put it in his 1968 Rede Lecture at Cambridge University:

'One great difficulty in the way of establishing a common law of the seas lay in the diversity of attitudes adopted by the prize courts of different nations. Prize law was accepted as international law, that is to say, it was based on treaties, customs or practices which were (or which in the opinion of the prize court hearing the case ought to be) adopted by all maritime

[1] William S. Holdsworth, 151.
[2] William S. Holdsworth, 151; William S. Holdsworth, *History of English Law*, Vol. 1. 565, 566, Vol. 12 653, 654, 670 & 693.

nations. But it is asking a great deal of even the most conscientious judicial mind to invite it to condemn as illegal the measures which its government is taking for the prosecution of a war in which the nation's life is at stake. It is not necessary to suppose that on such an issue a conflict of duty arises in the judge's mind; it is simply that he is predisposed to find the same sort of reasons for justifying the measure as his government has found.'[3]

Although he was considering the courts in the context of the First World War conflict with Germany, his comments are equally applicable to the conflicts of 1793-1815 and judgments from that era need to be read with the same caution.

One source of the idea that the Prize Court was bound by international law exists in the wording of the instruments that founded the jurisdiction of the court. The prize jurisdiction of the High Court of Admiralty was historically exercised by virtue of a commission issued by the Crown under the Great Seal at the commencement of each war. Each commission required and authorised the Court of Admiralty 'to proceed upon all and all manner of captures, seizures, prizes, and reprisals, of all ships and goods, that are, or shall be, taken; and to hear and determine, according to the course of the Admiralty and the law of nations.'[4]

When the ad hoc commissions were replaced by a permanent jurisdiction under the Naval Prize Act 1864, s. 55 of the Act specifically provided that 'Nothing in the Act shall…..take away, abridge, or control, further or otherwise than as expressly provided by this Act, the jurisdiction or authority of a prize court to take cognizance of and judicially proceed upon any capture, seizure, prize, or reprisal of any ship or goods, and to hear and determine the same, and, according to the course of Admiralty and the law of nations, to adjudge and condemn any ship or goods, or any other jurisdiction or authority of or exercisable by a prize court.'[5] That jurisdiction was then transferred to the newly constituted High Court by the Supreme Court of Judicature Act 1873, where it was exercised by the newly formed Probate, Divorce and Admiralty Division, known colloquially as 'Wills, Wives and Wrecks'. By the Administration of Justice Act 1970 the divisions of the High Court were reorganised and the Admiralty Court became a specialist part of the Queen's Bench Division. By that time, however, prize payments had ceased to be made by the British Crown to captors.

[3] Lord Devlin, *The House of Lords and the Naval Prize Bill 1911* (Cambridge University Press, 1968), 4.
[4] As quoted by Lord Mansfield in Lindo v Rodney (1782) 2 Doug. 612n, 614n, and The Zamora [1916] 2 AC 77, 91.
[5] Express reference to the jurisdiction including aircraft (either as captors or captured) as well as ships and goods was added by amendment by Prize Act 1939 Sch. Pt I.

The Zamora

Without further explanation the wording of the commissions, and then Act, vesting prize jurisdiction in the Admiralty Court might appear to require it to apply the law of nations. The position was, however, rather different when seen in context. A decision of the Judicial Committee of the Privy Council in 1916 sitting as the court of appeal from the Probate, Divorce and Admiralty Division of the High Court can assist in providing the context.[6] Frequently, however, both it and the cases it referred to have in the past proved more misunderstood than helpful.[7] In order to understand the context that was explored on Appeal in the case of The Zamora it is necessary to look at both what the issue in the case was, and what the earlier authorities being considered were about.

The dispute in The Zamora arose out of the tension between the courts and the executive arm of government attempting to govern by order-in-council under the pressures of the First World War. Ships captured as prizes had to be brought into port to be condemned as such by the Admiralty Court before they could be considered as legitimate prizes to be disposed of by the Crown. In the meantime the duty on the court was to preserve ships and their goods unless they needed to be sold to preserve their value from deterioration, in which case it preserved the proceeds of sale for whoever was found to be entitled. In response to the exigencies of war the British government then introduced a power to requisition goods within its territory for the war effort. By Prize Court Rules made by order-in-council under the Prize Court Act 1894, which gave power to make rules as to the procedure and practice of the Prize Courts, the King in Council created rules to govern the workings of the Prize Courts. Order 24 of the rules provided that 'where it is made to appear to the judge on the application of a proper officer of the Crown that it is desired to requisition, on behalf of His Majesty, a ship in respect of which no final decree of condemnation has been made, he shall order that the ship be appraised, and upon an undertaking being given…..the ship shall be released and delivered to the Crown.' That provision was all well and good where the ship was already within the jurisdiction, and therefore liable to be requisitioned. What was the position, however, where the ship could not have been requisitioned out of the jurisdiction at sea, and was only brought within the jurisdiction to be assessed by the court as to whether she should be condemned as prize or not?

[6] The Zamora [1916] 2 AC 77

[7] See e.g. Halsbury's Laws of England vol. 85, The Law of Prize, para. 606 and France Fenwick Tyne and Wear Co. v Procurator General, The Prins Knud [1942] AC 867, 678.

Could she be requisitioned when no determination had yet taken place, and therefore it had not been determined whether she had been brought within the jurisdiction lawfully or not?

On 8th April 1915 the *Zamora*, a neutral Swedish steamship, was bound from New York to Stockholm with a cargo of grain and copper. She had reached a point between the Faroes and the Shetland Isles when she was intercepted by the Royal Navy. At that point, as a neutral ship on the high seas, she could not have been requisitioned by the British. Suspicious of her real intentions, the Royal Navy escorted her first into the Orkney Isles and then to Barrow-in-Furness, where she was seized as prize and handed over into the custody of the Admiralty Marshall and the Prize Court. Whether the ship or the cargo were prize or not depended on whether the ship had a concealed or ulterior destination in an enemy country (i.e. Germany), or whether the copper (as potential contraband of war if destined for an enemy) was destined for the enemy, by way of transhipment or otherwise. If that had not yet been established then how should the courts deal with a claim by a neutral that might have serious international consequences?

The prize jurisdiction of courts had a special importance in international affairs and diplomacy. As reprisals between states were matters for the sovereigns of each state, where a citizen of one state had a grievance arising from the exercise, or purported exercise, of a right of reprisal by another state then it was for the sovereign of that citizen's state to take up the grievance by diplomatic means. In the absence of prize courts operating within belligerent states open to all parties and respecting an acceptable form of a law of nations no-one aggrieved by the acts of a belligerent power in times of war could obtain redress otherwise than through diplomatic channels. That brought with it a risk of disturbing international amity. As between belligerents the lack of amity was no problem, save the risk that the merchants of Britain and her friends might suffer equally before the courts of her enemies. The risk of placing stress on relationships with neutrals due to the lack of a reliable and appropriate court process for resolving disputes in an acceptable way, however, was very real. It risked alienating the neutrals into being uncooperative or outright hostile. The English courts recognised the sense of the idea that had been asserted by jurists that international law as between sovereigns required that every belligerent power should appoint and submit to the jurisdiction of a prize court to which every person had access, and which administered internationally acceptable laws, as opposed to an entirely partisan municipal law. In theory the international law would be the same whether the

court administering it was a court of the belligerent power or that of the person aggrieved, and equally binding on both parties to the litigation.[8] But what did that actually mean in practice?

The clearest statement of this ideal position appears in a judgment of Sir William Scott in 1799.[9] The *Maria* was part of a fleet of Swedish merchant ships, neutrals in the war between Britain and France, that had sailed for ports in France, Portugal and the Mediterranean under convoy by a Swedish frigate. Their cargoes included hemp, iron, pitch and tar; naval supplies, which if bound for an enemy port in France would be contraband goods liable to seizure. In the English Channel the fleet was intercepted by a British squadron under Commodore Lawford. Having sent an officer on board the Swedish frigate and ascertained the cargoes in the convoy, Lawford sent a message to the Admiralty for instructions and meanwhile kept the convoy in view. The Admiralty's orders when they arrived were to detain the merchant ships and take them into the nearest English port. Officers were sent on board the Swedish frigate to explain the Admiralty orders, but in response the Swedish officer showed them his instructions, which were to repel by force any attempt to board the convoy, and declared that he would defend them to the last. To back up his declaration, the Swedish crew were stood to quarters, with matches lighted, ready for battle. In response the British squadron was sent to quarters and readied for battle. It had overwhelming force compared with the single Swedish frigate guarding a disparate fleet of merchantmen, but wanted to exercise caution over how it used that force.

Night then intervened. During the night the Swedish frigate's 'many movements', were watched closely by Lawford on his larger, 50 gun flagship *HMS Romney* with her lower guns run out and every man at his quarters. Meanwhile the rest of the squadron took possession of most of the Swedish fleet in the night. In the morning the Swedish frigate, seeing what had happened, sent an armed boat to one of the merchantmen that had been seized and took the British officer from her by force onto the Swedish frigate. A Swedish officer was sent to Lawford on *Romney* to complain that he had taken advantage of the night to get possession of the convoy unobserved by its escort, and that had the Swedes been aware then they would assuredly have defended their convoy to the last.

In reality, however, there was little that could be done in the face of Lawford's overwhelming force, and so the captain of the Swedish escort agreed to sail with the convoy, which was now

[8] The Zamora [1916] 2 AC 85, 92, per Lord Parker.
[9] The Maria (Paulsen master) (1799) 1 Rob. 340, 350.

under British control, to Margate Roads, and returned the British officer who had been seized. In Margate Roads the Swedish officer lamented that he had not exchanged broadsides, that he did not consider his convoy as detained and would resist any further attempt to take possession of them. His protestations were, however, all in vain. The British had seized his convoy and there was nothing he could do about it. His complaints merely demonstrated a hostile intent in the face of a demand to submit to a search of the convoy, which added to the justification for seizing the ships rather than the opposite.

For much of the eighteenth century commentators on the law of nations had been suggesting that if neutral powers provided a naval escort for their convoys then belligerents should recognise that protection and accept the legality of the ships and cargoes protected by the sovereignty of the neutral state.[10] When the case of The Maria came before the Admiralty Court the arguments centred on whether the law of nations recognised the protection of neutrals by a convoy, or whether belligerents retained the right to search for contraband.

The right of protection under convoy had been supported by the European states which retained neutrality, and thus took trading advantage of that status, when the major powers were at war. English opinion, as one of the major powers who relied on naval power over trade at sea as an instrument of war, was against respecting the protection of ships under convoy and giving up the right to search. Indeed it was the temerity of the suggestion that the right to search should be curtailed by the mere promises of neutral states about their convoys that led Christopher Robinson, the admiralty lawyer and future Admiralty Judge in whose reports we read of Scott's judgment in The Maria, into print in 1801 to reassert the right of prize taking and search. The law report of The Maria contains a series of footnotes about the historic right to search that were reflected in Robinson's later work, but as Robinson was a follower of Scott's they represent Scott's thinking whether they originated with Scott or his amanuensis. It was to the right of search that Scott was applying his mind in the course of his judgment in The Maria. In forming that judgment, he said:

'I trust that it has not escaped my anxious recollection for one moment, what it is that the duty of my station calls for from me; namely, to consider myself as stationed here, not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference that justice which the law of nations holds out without distinction

[10] Christopher Robinson, *Collectanea Maritima; Being a Collection of Public Instruments Etc... Tending to Illustrate the History and Practice of Prize Law*. See Ch. 4 above.

to independent states, some happening to be neutral and some to be belligerent. The seat of judicial authority is, indeed, locally here, in the belligerent country, according to the known law and practice of nations; but the law itself has no locality. It is the duty of the person who sits here to determine this question exactly as he would determine the same question if sitting in Stockholm; - to assert no pretensions on the part of Great Britain, which he would not allow to Sweden in the same circumstances, and to impose no duties on Sweden, as a neutral country, which he would not admit to belong to Great Britain in the same character.'

Having set out this broad principle, the part of the judgment most quoted afterwards, Scott then went on to outline what he described as 'a special consideration':

'the nature of the present war does give this country [i.e. Britain] the rights of war, relatively to neutral states, in as large a measure as they have been regularly and legally exercised, at any period of modern and civilized times. Whether I estimate the nature of the war justly I leave to the judgment of Europe, when I declare that I consider this is a war in which neutral states themselves have an interest much more direct and substantial than they have in the ordinary, limited, and private quarrels, if I may so call them, of Great Britain and its great public enemy.'

Thus, Scott was declaring, this was no ordinary war, but a fight for the future civilisation of Europe and if the French were not defeated then neutrals such as Sweden would be among the first to suffer. For that reason, it was important to uphold the long existing right to search neutral shipping on the high seas. Scott described this as a special consideration in favour of Britain. Though he said that he would allow Sweden the same consideration in the same or similar circumstances, the fact was that Sweden was never going to undertake the role of world policeman that Britain was exercising at the end of the eighteenth century. Scott went on to dismiss the arguments for limiting the right to search and held that the ships resisting the right to search had been lawfully seized. The law of nations, as he saw it, did not require him to find otherwise. But did that mean that if he had thought that a law of nations did require him to find otherwise then he would be bound to do so?

The economic war increased after the Peace of Amiens, when war resumed against Napoleon. This brought increased conflict with neutrals, including the US, which the Admiralty Court had to try to deal with. In 1807 Scott had to deal with the case of the *Recovery*, an American ship which had been seized with her cargo. Her cargo had originally been loaded in India under an exemption from the British ban on such trade under the Navigation Acts. The exemption permitted such trade so long as the cargo was unloaded at a US port. The *Recovery* had sailed

to the US, but in breach of the Navigation Acts had not unloaded her cargo, sailing instead for Europe. An action by the American owners of the cargo for unlawful seizure was resisted on the ground that the Admiralty Court should not entertain the claim as the owners were in breach of the Navigation Acts. The Admiralty Court did not have jurisdiction over the breach of the Navigation Acts, but it had to consider whether any such breach affected the jurisdiction of the Admiralty Court over the cargo that had been seized. Scott rejected the argument that he should not restore the goods as neutral goods, leaving it to the proper court to take any action that was considered appropriate over the breach of the Navigation Acts. Whilst he may have considered that the objection would have had force in the case of a British subject who had disregarded the law of his own country, in the case of a foreigner, who could be dealt with in the proper court rather than the Admiralty Court he said:

'It has to be recollected that this is a court of the Law of Nations, though sitting here under the authority of the King of Great Britain. It belongs to other nations as well as to our own, and, what foreigners have a right to demand from it is administration of the Law of Nations simply, and exclusively of the introduction of principles borrowed from our own municipal jurisprudence, to which, it is well known, they have at all times expressed no inconsiderable repugnance.' [11]

On the face of it this is once again a strong expression of the independence of the Admiralty Court from municipal interference under the law of nations. In 1807, however, Scott clearly did not wish to trespass on the tricky issue of neutrality of American ships and the Navigation Acts, to which the Americans had 'at all times expressed no inconsiderable repugnance'.[12] By 1807 the US were already objecting in belligerent terms to what they saw as British assaults on the rights of neutrals. The former president, John Adams, in retirement at Quincey summarised the US debate about its relationship with Britain in 1807: 'War? or no War? That is the question.'[13] Although Britain considered that the US was benefiting at the expense of Britain, who by her considerable sacrifices was saving the world from Bonaparte, she did not want to have to deal with another war at that stage. No tea was to be spilt in Boston harbour in 1807 on Scott's account. Although war with the US would eventually come in 1812, it was not to be encouraged by the Admiralty Court in 1807.

[11] The Recovery (1807) 6 Rob. 348, 349.
[12] The Recovery (1807) 6 Rob. 348, 349.
[13] Letter, John Adams to Benjamin Rush, 1 September 1807, Founders on-line, National Archives, http://founders.archives.gov/documents/Adams/99-02-5211.

By 1811, however, the economic war had reached a new level. Just as Scott had been considering the case of the *Recovery*, Napoleon had begun his attempt to enforce his Continental System through the Berlin and Milan decrees, purporting to place the whole of the continent under blockade from British ships. Britain had then responded with reciprocal Orders-in-Council. As a result of one of the retaliatory Orders-in-Council of 26th April 1809, the American ship *Fox* was detained by the Royal Navy in November 1810 on a voyage from Boston to Cherbourg. Once again, the British sentiment was that while they fought to protect the world, neutrals such as the Americans were taking advantage of the British sacrifices to improve their own trading position, and weakening the effect of Britain's economic war.

The validity of the Orders-in-Council was challenged when the lawfulness of the seizure of the *Fox* came before Scott in the Admiralty Court in 1811.[14] Britain's interest had traditionally been to support the international view that a blockade must be actually enforced by ships at sea, rather than mere paper declaration, in order to be valid. As the major naval power she had the ability to impose such blockades, where others did not. Scott held that although the Orders-in-Council would not have complied with the generally accepted view of the law of nations as to a valid blockade had they been made without provocation, their retaliatory nature meant that they were not repugnant to the law of nations. In doing so, however, he made comments about the relationship between the law of nations and Orders-in-Council that would prove controversial. Understandably, he had been referred to his own comments in The Maria about the duty of the prize court in relation to the law of nations. In that case there had been no express Orders-in-Council:

'In the case of the Swedish convoy, which has been alluded to, no order or instruction whatever was issued, and the Court therefore was left to find its own way to that legal conclusion which its judgment of the principles of law led it to adopt.'[15]

Although Scott had held that there was no conflict between the order-in-council and the law of nations, he nevertheless sought to clarify his views on the role of the prize court:

'And therefore it is rather to correct possible misapprehension on the subject than from the sense of any obligation which the present discussion imposes on me, that I observe that this Court is bound to administer the Law of Nations to the subjects of other countries in the

[14] The Fox [1811] Edw. 311.
[15] The Fox [1811] Edw. 311, 315

different relations in which they may be placed towards this country and its government. This is what other countries have a right to demand for their subjects, and to complain if they receive it not. This is its unwritten law evidenced in the course of its decisions, and collected from the common usage of civilized states. At the same time it is strictly true, that by the constitution of this country, the King-in-Council possesses legislative rights over this court, and has power to issue orders and instructions which it is bound to obey and enforce; and these constitute the written law of this Court. These two propositions, that the Court is bound to administer the Law of Nations, and that it is bound to enforce the King's Orders-in-Council, are not at all inconsistent with each other; because these Orders and Instructions are presumed to conform themselves, under the given circumstances, to the principles of its unwritten law. They are either directory applications of those principles to the cases indicated in them – cases which, with all the facts and circumstances belonging to them, and which constitute their legal character, could be but imperfectly known to the Court itself; or they are positive Regulations consistent with those principles, applying to matters which require more exact and definite rules than those general principles are capable of furnishing.

The constitution of this Court, relatively to the legislative power of the King-in-Council, is analogous to that of the Courts of Common Law relatively to that of the Parliament of this kingdom. Those Courts have their own unwritten law, the approved principles of natural reason and justice – they have likewise the written or statute law of Acts of Parliament, which are directory applications of the same principles to particular subjects, or positive regulations consistent with them, upon matters which would remain too much at large if they were left to the imperfect information which the courts could extract from mere general speculations.'

This could be seen as a very naïve view of the relationship between the courts and the executive, but Scott was not a naïve judge. There was, is, and always will be, a tension between the courts and the executive. That tension has given rise to the whole body of law that we now call Judicial Review. The task of the courts is to decide when, and with what tools, to push back against the executive in pursuit of justice. Scott clearly took the view that the war was a fight for the survival of civilization, and he was not alone in that view. It was not the role of the court to decide how that war should be fought. The King-in-Council was in the best position to make that assessment and the court, i.e. he, should assist. The law of nations was useful where it gave a reason to find as the court wished to find, as in The Maria, but was of less significance where it was the basis of a submission that the court did not want to accept, as in The Fox.

To some, however, there was a clear conflict between the views that Scott had expressed in the two cases, separated by four years of war. It was that conflict that came before the courts in 1916 as a result of the seizure of the Swedish steamship Zamora.[16] The judgment of the Judicial Committee of the Privy Council on appeal from the Admiralty Court was delivered by Lord Parker of Waddington. The decision in The Zamora is generally remembered by the first half of the first sentence in the head note to the case in the main, Appeal Cases, law report, even though the head note is no part of the judgment in the case. The head note began: 'The Crown has no power by Order-in-Council to prescribe or alter the law which Prize Courts have to administer…'. This has been taken as a statement that the law of nations had supremacy over municipal law before the prize courts.[17] Holdsworth in his 1942 article for the Minnesota Law Review construed the judgment in The Zamora in this way.[18] He surmised that the decision, if correct, meant that the Prize Court 'is not bound by an Order-in-Council which purports to alter a rule of international law, whether or not it is a rule of international law which has been accepted by the common law'. In his view, however, the decision was doubtful in law and politically inexpedient.

Holdsworth's disdain for the decision in The Zamora would have been justified had his description of the decision been correct. The decision created excitement in the newspapers of 1916 in the same way that the decisions of the High Court and the Supreme Court on Gina Miller's challenge to the triggering of Article 50 to start the UK's withdrawal from the EU without parliamentary authority did a century later in 2016.[19] Much of it was, however, equally misconceived. As the *Harvard Law Review* of 1916 pointed out, the decision in The Zamora did not hold that the rule that had been included in the Prize Court Rules was invalid as repugnant to the law of nations or because of any 'dominant quality of the law of nations'. The Order was invalid because it was made without authority.[20] The King-in-Council had authority under the Prize Court Act 1894 to make rules as to the procedure and practice of the Prize Courts, but that did not give authority to dictate matters of substantive law that the Court had to decide.

[16] The Zamora [1916] 2 AC 77.
[17] See e.g. Stephen C. Neff, *The Rights and Duties of Neutrals: A General History*, Melland Schill Studies in International Law (Manchester, UK ; New York, NY: Manchester University Press : Juris Pub, 2000), 163.
[18] William S. Holdsworth, 'The Relation of English Law to International Law', 151–52.
[19] R (Miller and Dos Santos) v Sec. of State for Exiting the EU [2017] UKSC 5, 'Enemies of the People', Daily Mail 4th November 2016.
[20] 'The Case of the Zamora', *Harvard Law Review* 30, no. 1 (1916): 66–68.

Lord Parker considered the apparent conflict between the decisions of Sir William Scott (referred to by his later title of Lord Stowell) in The Maria and The Fox. He described Scott's reference in The Fox to the King-in-Council possessing 'legislative rights' over the Prize Court analogous to those possessed by Parliament over the courts of common law as non-binding dictum and, despite the great authority of Scott, erroneous and irreconcilable with the principles Scott had enunciated in The Maria.[21]

The court held that even where the law may be 'imperfectly ascertained and defined' the executive had no power to direct the court how it should interpret the law and the court should not subordinate its own opinion to that of the executive. It must determine for itself what the law is 'according to the best of its ability, and its view, with whatever hesitation it be arrived at, must prevail over any executive order. Only in this way can it fulfil its function as a Prize Court and justify the confidence which other nations have hitherto placed in its decisions.'[22]

Lord Parker was not, however, asserting that the Prize Court applied the law of nations over and above municipal law. Indeed he said in terms:

'It cannot, of course, be disputed that a Prize Court, like any other Court, is bound by the legislative enactments of its own sovereign State. A British Prize Court would certainly be bound by Acts of the Imperial Legislature [i.e. Parliament]. But it is none the less true that if the Imperial Legislature passed an Act the provisions of which were inconsistent with the law of nations, the Prize Court would no longer be administering international law.'[23]

For this reason the executive under the British constitution should not attempt to tell the judiciary how the law should be interpreted, even though Parliament was sovereign in creating the law that the courts were to administer. Where this left the Prize Courts was dealt with by Lord Parker:

'the law which the Prize Court is to administer is not the national, or as it is sometimes called, the municipal law, but the law of nations – in other words, international law. It is worthwhile dwelling for a moment on this distinction. Of course, the Prize Court is a municipal Court, and its decrees and orders owe their validity to municipal law. The law it enforces may therefore, in one sense, be considered a branch of municipal law. Nevertheless, the distinction between

[21] The Zamora [1916] 2 AC 77, 95.
[22] Ibid, 97
[23] Ibid, 93

municipal and international law is well defined. A Court which administers municipal law is bound by and gives effect to the law as laid down by the sovereign State which calls it into being. It need inquire only what that law is, but a Court which administers international law must ascertain and give effect to a law which is not laid down by any particular State, but originates in the practice and usage long observed by civilized nations in their relations towards each other or in express international agreement. It is obvious that, if and so far as a Court of Prize in this country is bound by and gives effect to Orders of the King-in-Council purporting to prescribe or alter the international law, it is administering not international but municipal law; for an exercise of the prerogative cannot impose legal obligation on any one outside the King's dominions who is not the King's subject. If an Order-in-Council were binding on the Prize Court, such Court might be compelled to act contrary to the express terms of the commission from which it derived its jurisdiction.'[24]

The desire to maintain the international status of the English Prize Court was significant. The judgment in The Zamora referred back to the mid eighteenth century for precedent, albeit non-judicial.[25] Their Lordships attached considerable importance to the Report in 1753 of a Committee appointed by King George II to consider complaints from Frederick II of Prussia about the British capture of Prussian ships during the war of Austrian Succession, which broke out in 1744 against France and Spain.[26] The report, having stated that the Prize Court administered the law of nations, modified in some cases by particular treaties, claimed that;

'If a subject of the King of Prussia is injured by, or has a demand upon any person here, he ought to apply to your Majesty's Courts of justice, which are equally open and indifferent to foreigner or native; so, vice versa, if a subject here is wronged by a person living in the dominions of His Prussian Majesty, he ought to apply for redress in the King of Prussia's Courts of justice. If the matter of complaint be a capture at sea during war, and the question relative to prize, he ought to apply to the judicatures established to try these questions. The law of nations, founded upon justice, equity, convenience, and the reason of the thing, and confirmed by long usage, does not allow of reprisals, except in case of violent injuries directed or supported by the State, and justice absolutely denied in re minime dubia [*i.e. beyond doubt]* by all the tribunals and afterwards by the Prince. Where the judges are left free, and give sentence according to their conscience, though it should be erroneous, that would be no grounds

[24] Ibid, 91-92
[25] Ibid, 93-4
[26] Francis Hargrave, *Collectanea Juridica*, 1:138, 147, 152., see chapter 3 above.

for reprisals. Upon doubtful questions different men think and judge differently; and all a friend can desire is, that justice should be impartially administered to him, as it is to the subjects of that Prince in whose courts the matter is tried.'

The Crown, maintained the report, 'never interferes with the course of justice. No order or intimation is ever given to any judge', and further:

'All captures at sea, as prize, in time of war, must be judged of in a Court of Admiralty, according to the law of nations and particular treaties, where there are any. There never existed a case where a Court, judging according to the laws of England only, took cognizance of prize….it never was imagined that the property of a foreign subject, taken as a prize on the high seas, could be affected by laws peculiar to England.'

According to Parker, their Lordships took the report of 1753 as 'conclusive that in 1753 any notion of a Prize Court being bound by the executive orders of the Crown, or having to administer municipal as opposed to international law, was contrary to the best advice of the day.'[27]

Once again, taken at face value that appears to be a statement that international law could trump municipal law in the Prize Court. Parker had already asserted, however, that parliament could legislate for what the Prize Court should do, but that there were sound reasons why it should not do so. The right to create the law by legislation, however, did not extend to executive orders that went beyond the scope of what parliament had authorised. For that reason the court held that as the King-in-Council had been authorized by parliament to provide rules of procedure but not to effect changes of substantive rights, then any rule that appeared to conflict with the 'law of nations' should either a) be construed so as to comply with the law of nations, in this case by limiting to power to requisition prizes to those recognised by the law of nations, or b) not be followed as being ultra vires, i.e. beyond the power of the rule maker. The Prize Court, whilst bound by parliament's laws should parliament choose to pass them, was not bound by the executive orders of the King-in-Council made without legislative power to do so.[28]

Thus, properly understood, the decision in The Zamora does not justify any assertion that the English Prize Court gave supremacy to international law over domestic law. It justifies the assertion that when construing municipal law the court took account of the international setting

[27] The Zamora [1916] 2 AC 77, 94.
[28] Ibid, 93.

when determining what specific legislative provisions were intended and authorised to do, and hence how they should be construed. In doing so they were acting just as any other court would where the question touched matters of international law and relations, as seen above.

Further, just because executive orders were not binding on the Prize Court that did not mean that they were of no effect. As Lord Parker expressed it:

'It does not follow that, because Orders-in-Council cannot prescribe or alter the law to be administered by the Prize Court, such Court will ignore them entirely. On the contrary, it will act on them in every case in which they amount to mitigation of the Crown's rights in favour of the enemy or neutral, as the case may be……Further, the Prize Court will take judicial notice of every Order-in-Council material to the consideration of matters with which it has to deal, and will give the utmost weight and importance to every such Order short of treating it as an authoritative and binding declaration of law. Thus an Order declaring a blockade will prima facie justify the capture and condemnation of vessels attempting to enter the blockaded ports, but will not preclude evidence to show that the blockade is ineffective and therefore unlawful. An Order authorising reprisals will be conclusive as to the facts which are recited as showing that a case for reprisals exists, and will have due weight as showing what, in the opinion of His Majesty's advisers, are the best or only means of meeting the emergency; but this will not preclude the right of any party aggrieved to contend, or the right of the Court to hold, that these means are unlawful, as entailing on neutrals a degree of inconvenience unreasonable, considering all the circumstances of the case.'[29]

The International Prize Court: The 2nd Hague Conference 1907 and the Declaration of London 1909

It is instructive to consider what happened when it was proposed that the English Prize Court should be subject to a right of appeal to an International Prize Court applying international law. Far from it being a proposal for a court to apply an established code of international law, it was a proposal to establish a court because of, or despite, the absence of such a code.

The seizure of prizes had caused international problems for Britain both in the Boer Wars in South Africa, when Britain was a belligerent with overwhelming naval strength, and in the

[29] Ibid, 98.

Russo-Japanese war, when Britain was a neutral.[30] During the Russo-Japanese war of 1904-5 the Foreign Office had been inundated with a number of complaints from British merchants that cargoes had been improperly seized as contraband during the hostilities and that as a result insurance rates had risen to a very high level. The merchants complained that the Russian courts had been ineffective at affording relief and that there needed to be greater certainty in the state of the law and its application. After the war the 2nd Hague Conference, which had been called by the US in 1904 to discuss the rules of war, but which had been suspended with the outbreak of actual war, resumed its work. The conference resulted in a treaty agreed in 1907. Article 12 of the treaty provided for the establishment of an International Prize Court that would sit automatically in the event of war to hear appeals from, or in some cases in lieu of, national courts. The court was to have 15 judges. Great Britain, whose empire owned half the mercantile marine of the world, would be a permanent member through its appointed judge, along with those of 7 other great naval powers. The remaining 7 judges would be drawn in turns from countries with either no, or very little naval presence, but all would have the same voting rights in the verdict.

As an additional response to the complaints arising out of the Russo-Japanese war, the British Foreign Secretary in the Liberal government, Sir Edward Grey, called a conference of naval powers to effect a codification of the laws of naval war. The following year the conference produced the London Declaration, an attempt to start the process by considering the concepts of blockade and contraband in prize captures. The British, who had not fought a major naval war for nearly a century, achieved a tightening of its traditional policy of choice, the close blockade. Britain had argued at the Hague for the abolition of the right to seize contraband, but had not succeeded. It had some success in the Declaration of London. Britain was aware that she might soon face a naval war against Germany and considered that success would lie in securing supplies for herself rather than in seeking to cut off supplies from other more self-sufficient nations which had land as well as sea access. Against this background 'in exchange for what she considered a satisfactory statement of the law on blockade she agreed to, and indeed advocated, severe restrictions on seizure in the law of contraband'.[31] The effect was to take away the unrestricted right that belligerents had previously enjoyed to determine what counted as contraband.

[30] Alan Anderson, *'The Laws of War and Naval Strategy in Great Britain and the United States 1899-1909*' (PhD thesis King's College London, 2016), 267.
[31] Lord Devlin, *The House of Lords and the Naval Prize Bill 1911*, 6.

Both the idea of an International Prize Court and the provisions of the Declaration of London proved controversial in Britain. Some pressed acceptance of their terms as an act of international humanity, others on pragmatic grounds contending that Britain, with the world's greatest merchant fleet, had more to gain than to lose from limiting the right to capture.[32] Sir Robert Reid, shortly before becoming Lord Chancellor as the ennobled Lord Loreburn, wrote to *The Times* on 14th October 1905 advocating the abolition of capture at sea, but accepted that 'no operation of war inflicts less suffering than the capture of unarmed vessels at sea'. Cited by Sir Julian Corbett in his 1907 rebuttal of Loreburn's argument,[33] Loreburn omitted the passage when he later published his newspaper correspondence in the form of a book.[34]

Many regarded the reforms as giving away Britain's maritime supremacy. The Imperial Maritime League said of the proposed court that it would make the exercise of Britain's traditional naval rights 'subject to the consent of a board, composed mainly of foreign jurists, at the Hague. Conceive, if you can, what would have been the contempt of British ministers a hundred years ago, if such a proposal as this had been put before them. But they were men.'[35] *The Times* declared that "We cannot give any foreigners carte blanche to make laws for our fleet, and to shorten at their discretion our arms upon the seas".[36] Taking a similar line, Admiral Lord Charles Beresford complained to *The Times* that 'it is proposed to hand over those maritime rights which we have preserved for centuries to the decision of a foreign Court'.[37] Lord Ellenborough, whose ancestor as Lord Chief Justice had given judgments on prize matters during the Napoleonic wars that are littered through this thesis, considered the Naval Prize Bill of 1911 that attempted to implement the right of appeal to an International Prize Court to be 'a Bill to benefit foreign lawyers at the expense of British shipowners.'[38] The Declaration of London, so the former Lord Chancellor the Earl of Halsbury told the House of Lords, 'appears to have been conceived in the spirit of increasing the powers of the nations with large Armies and decreasing the powers of those who are in a great measure dependent upon their Navy.'[39] The President of the Steamowners' Association spoke in favour of ratification of the Declaration of London in the Port of Liverpool, but the President of the Association of

[32] Earl Loreburn, *Capture at Sea*, 16.
[33] Corbett and Lambert, *21st Century Corbett*, 77.
[34] Earl Loreburn, *Capture at Sea*.
[35] Lord Devlin, *The House of Lords and the Naval Prize Bill 1911*, 7.
[36] *The Times*, 30th September 1907.
[37] Quoted by the Earl Beauchamp, *Hansard*, HL Debate 12 December 1911, vol. 10, c809.
[38] *Hansard*, HL Debate 12 December 1911, vol. 10, cc 809-95
[39] *Hansard*, HL Debate 12 December 1911, vol. 10, cc 809-95

Chambers of Commerce reported that the majority of its members were opposed.[40] In a prescient speech, Lord Ellenborough pointed out that 'when we are fighting in real earnest, with our daily bread at stake, we shall be obliged to disregard the Declaration and some of the Conventions, and that when we do so neutral Powers will consider that we are doing them a grievous wrong, and that we shall irritate them more than if, being bound by no Treaty, we only insist on the minimum of belligerent rights, leaving others unused'.[41]

One of the problems was not just the idea of an international Court, but the absence of agreement as to the law that it should apply. Without such agreement it would, according to Thomas Gibson Bowles MP, an active opponent, be "A Court without a Law". As a result "The International Prize Court was left too palpably arbitrary and unprovided. There is not a rag either of law or principle, much less tradition, to cover its shocking nakedness".[42]

Despite considerable opposition to implementation of the International Prize Court and the Declaration of London, the Liberal Government whipped the Naval Prize Bill through the House of Commons to implement them in English law. Against an available majority of 120 it achieved only majorities of 70 on the second reading and 47 on the third.[43] Within a week, however, the Bill had been defeated in the House of Lords, despite the Liberal Government's attempts earlier in the year to bring the House of Lords to heel with the Parliament Act 1911. The House of Lords voted to postpone consideration of the Bill for three months, and it never came back. The International Prize Court never materialised and the Declaration of London was never ratified. When war came in 1914 both the British and the Germans ignored the Declaration. The US objected to the breaches, but in the absence of an International Prize Court, it was the attitude of Germany that finally provoked the US to take up arms for the allies. A claim that the House of Lords had saved Britain from defeat in the First World War by opposing the Bill, adopting Lord Ellenborough's view of its potential effect on aggrieved neutrals, would later be used as evidence to support the revising role of the House.[44]

What is of note for present purposes, however, is the way in which the objections were phrased in the House of Lords. Had the English Prize Court really been a purveyor of a law of nations independent of municipal law then there could have been very little objection to an appeal to

[40] Earl Brassey *Hansard*, HL Debate 12 December 1911, vol. 10, cc 809-95
[41] Ibid.
[42] Thomas Gibson Bowles, *Sea Law and Sea Power; As the Would Be Affected by Recent Proposals; with Reasons against These Proposals* (London: John Murray, 1910), 138–39.
[43] Per the Marquess of Lansdowne, *Hansard*, HL Debate 12 December 1911, vol. 10, cc 809-95
[44] Lord Devlin, *The House of Lords and the Naval Prize Bill 1911*, 20–28.

an International Court applying those self-same settled and ascertainable principles of international law. That, however, was far from the position. The comments in the House of Lords from both those in favour and those against the Bill revealed as much. The drive for reform had come about not because there was an accepted law of nations, but because there was none such.

Speakers both for and against the Bill complained that 'in naval matters international law was in a state of complete uncertainty and chaos'. The British courts had sought to create some order out of the chaos, and the American courts had largely followed that lead due in large part to their respect for the views of Lord Stowell. The rest of the world had not embraced such ideas of a law of nations, however. When the First Commissioner of Works, the Earl Beauchamp, presented the Bill to the Lords for second reading on 12th December 1911 he quoted the view of the Lord Chief Justice, Lord Alverstone, that 'British prize law was practically the prize law of the world', but continued 'it is sufficient to point out that although British prize law figures largely in the text-books and although it has a very real importance in deciding what international prize law may be, other countries do not accept the same view of British prize law as we do ourselves. It is unfortunate it should be so, but there it is; and, therefore, it is impossible for us to expect, without a convention or some negotiation, that we should get our rules and principles universally accepted throughout the world.'[45] Lord Alverstone later added in person that 'The prize law of the civilised world has been built up by the Courts of this country, and subsequently followed by the Courts of America, particularly the United States, and…the judgments of Lord Stowell and Dr Lushington, and of all the distinguished Judges of the Prize Courts, have been treated as forming the foundation of the principles of international law.'[46] A similar point was made by the Earl of Halsbury 'Sir William Scott [Lord Stowell], and more recently Dr. Lushington and Sir Robert Phillimore and a great many very learned persons, have established, gradually established, a system and a code of international law which has commanded respect in every country in the world.'[47] It was not so much that the English Prize Court was following an established law of nations, it was the English Prize Court establishing what it thought the law of nations should be and expecting it to be followed by others.

[45] *Hansard*, HL Debate 12 December 1911, vol. 10, cc 809-95
[46] Ibid.
[47] Ibid.

Conclusion

Decisions in the Prize Court had an inevitably international flavour given the subject matter of the disputes. The Prize Court had a role that was recognised by other nations as the court of remedy for alleged wrongs in the name of prize seizure. There was a public interest in being able to claim that the Prize Court performed that task independently of the executive and respecting the international norms accepted by 'civilised' nations. By the late eighteenth century the court protected its independence more vigorously than might have been the case in earlier periods, but ultimately it was an English court of law and applied English law, where the law was within the powers given to those who made them. In so far as 'international' law was applied, it was applied because the court chose to incorporate such ideas into English law, not because it was bound to do so, nor because it was functioning as some form of 'international' court beyond the power of the British constitution. In coming to its decisions, the Prize Court and the common law courts looked to what they perceived to be the national interest. In time of war, that included the effective pursuit of the war against the enemy and the maintenance of peace with neutrals. It was not as sometimes portrayed 'a type of fledgling international law'.[48] How the English courts struck the balance between the competing national interests varied with the course of the war, and with national and international events. That was a feature not only of the Prize Courts, but of the English judicial system as a whole.

The next chapter will begin to consider how the English courts applied the rules for the distribution of prize monies arising from seizures by the Royal Navy.

[48] Brinkman, '*The Court of Prize Appeal as an Agent of British Wartime Foreign Policy: The Maintenance of Dutch and Spanish Neutrality During the Seven Years War*', 9.

Chapter 6, Prize Distribution: Captains, Officers and Crew

Introduction

Until the eighteenth century the crown shared in the profits from prizes captured under its authority. The Cruizers and Convoys Act 1708 granted the whole proceeds of prizes captures to the captors, laying the path for prize apportionments throughout the eighteenth century and beyond.[1]

During the eighteenth century a series of Prize Acts and Proclamations at the start of hostilities granted the proceeds of all prizes to those involved in their capture. This award of 'prize money' was expressed in each Act of Parliament to be 'for the encouragement of the officers and seamen of his Majesty's ships of war'.[2] The division of prize money as between these officers and seamen was set out in the Royal Proclamations issued by the King-in-Council, and varied with time.

By the outbreak of war in 1793 the division of the proceeds from prizes into eighths, distributed more thinly as they went down the seniority of those involved, had become settled practice. With the open declaration of war against France, George III in Council ordered his ships to commence 'General Reprizals' against the ships, goods and subjects of France on 11th February 1793. This permitted the seizure of any French ship or cargoes. The division of the resulting prize captures was specified in a further Royal Proclamation by the King-in-Council on 17th April 1793. These proclamations preceded the Prize Act that was to govern the hostilities, which was passed by Parliament on 17th June 1793 and implemented the proclamations already passed.

The proclamation in April 1793 largely replicated the provisions that had applied during the previous war against the rebel American colonies and their French, Spanish and eventually Dutch allies.[3] Two small amendments to the previous provisions reflected the increasing complexity of naval fleets. For the first time express provision was made for a physician to a fleet or squadron, who would henceforth be entitled to a share ranking as a sea lieutenant so

[1] 6 Anne c. 65.
[2] See e.g. Prize Act 1793, 33 Geo3 c.66.
[3] Respectively, Orders-in-Council dated 22nd December 1775, 16th September 1778, 25th June 1799 and 27th December 1780.

long as he was actually on board at the time the prize was taken. For the first time also, flag captains to flag-officers in command of significant fleets or squadrons were to be treated as junior flag-officers for prize share purposes, as will be considered further below.

The April 1793 proclamation divided the proceeds of prizes among the officers and crew of HM ships of war as follows:

The Captain	Three Eighths
Flag-officers where ship under their command	One of the Captain's three eighths divided between them
Navy, or "sea" lieutenants, Captains of marines and land forces, the Master, and physicians to a fleet or squadron, who counted as equal to a sea lieutenant if actually on board	One Eighth equally between them
Lieutenants and Quarter-Masters of marines, lieutenants, Ensigns and Quarter-Masters of Land Forces. Secretaries of Flag-officers (Admirals or Commodores with a captain under them) Warrant officers: Boatswains, Gunners, Carpenters, Pursers, Chaplains on board, Ship's Chirurgeons (i.e. surgeons), Master's mates and Pilots.	One Eighth equally between them
Petty officers: midshipmen, Captain's clerks and Master Sailmakers, and	One Eighth equally between them

Assistants to warrant officers: Carpenter's mates Boatswain's mates Gunner's mates Master at Arms Corporals Yeomen of the sheets Coxswain Quarter-Masters Quarter-Master's mates Chirurgeon's mates Yeoman of the Powder Room Serjeants of Marines and Land Forces on board	
All the rest: Trumpeters Quarter Gunners Carpenter's crew Steward Cook Armourer Steward's mate Cook's mate Gunsmith Cooper Swabber Ordinary Trumpeter Barber Able Seamen Ordinary seamen Marines and other soldiers All other persons doing duty and assisting on board	Two Eighths equally between them

Captains Officers and crew 'On board'

To qualify for the prize share attributable to a particular role the person had to be performing that role as part of the ship's crew. During Anson's voyage round the world in 1743 he had to abandon the ships *Gloucester* and *Tryal* as unseaworthy and take their remaining officers and men on board on his own ship, *Centurion*, as supernumeraries. While on board their commander-in-chief's ship the men were involved in the capture of the Spanish Acapulca treasure ship, the *Nostra Signora de Cabadonga*. Carrying 1,313,843 pieces of eight and 35,682 ounces of silver she was perhaps the richest prize ever captured, and became the stuff of sailor's dreams. In March 1745 the Admiralty Court decreed that the officers from *Gloucester* and *Tryal* were 'officers in His Majesty's service on board the *Centurion* at the time of capture' and were entitled to share respectively according to their ranks with the officers of the *Centurion*.[4] The officers of the *Centurion* appealed, however, and in May 1747 the Lords Commissioners of Appeals in Prize Causes reversed the decision of the Admiralty Court. They held that being 'on board' as an officer entitled to share as such within the royal proclamation meant 'belonging to the ship' and that being 'corporally on board' was not sufficient. Thus the officers from the abandoned ships who were on board *Centurion*, but not part of her complement, shared only in the residual category with ordinary sailors as persons 'doing duty and assisting on board', receiving a much lower share of the prize money.[5]

William Murray, later Lord Mansfield, the famous and highly regarded eighteenth century Lord Chief Justice, appeared as counsel on the appeal. In 1779, when he came to try a similar case of Wemys v Linzee in the Court of Common Pleas, he expressed the view that he had always thought that the outcome on the appeal was a very hard one.[6] Wemys was a captain of marines who was carried as a supernumerary on board the frigate *Surprise* to join his own ship when the *Surprise* took a prize, a French merchant ship *Les Deux Freres.* Wemys sought a share of the prize as a captain of marines rather than as a passenger 'doing duty and assisting on board'. The ship's own marines had been under their own lieutenant of marines. Although as a supernumerary captain of marines he was senior to the lieutenant, he had not taken command of the ship's marines. Indeed there was no regulation that permitted a frigate such as the *Surprise* to carry a captain, rather than a lieutenant, of marines as part of her complement.

[4] (1808) 6 Rob. Adm. Rep. 305n
[5] Ibid, and see Wemys v Linzee (1780) 1 Doug. 324, 327 per Lord Mansfield
[6] Wemys v Linzee (1780) 1 Doug. 324, 327. The report gives the trial date as 1769, but from the context that is an error.

Although Mansfield considered the decision in the case of the *Centurion* to be a hard one, he also considered it to have been 'solemnly decided' and summed the matter up to the jury indicating that they should find for the defendant, against Wemys's claim. The jury, however, decided in favour of Wemys, presumably agreeing with Mansfield that the previous decision was a hard one, and thinking that they should not follow it. Matters did not end there, however.

In January 1780 the Solicitor General obtained an order for the matter to be reheard by the Court of King's Bench. The basis for doing so was evidence from Lord Amherst that when he and his brother had been on board *HMS Dublin* on their way from England to America to fight the French, they had shared in a prize that was taken only as passengers rather than in their ranks as officers. Evidence was also produced from the Admiralty that no captain of marines could be appointed to a ship of under 50 guns, such as the *Surprise*. A month later the case was considered by the Court of King's Bench, with Mansfield again sitting in judgment. It was argued that if Wemys's claim was overturned then an admiral could prevent a captain of marines ever claiming as such by forever sending him on expeditions on ships other than his own, as had happened to Wemys. It was further argued that the stranded officers taken on board the *Centurion* had no longer been officers entitled to claim as such as their appointments were to ships that had ceased to exist and so their appointments ceased with their ship and they were truly passengers only. Mansfield considered the matter was one of considerable public consequence and ordered that the case should be re-heard. In May 1780 the matter was re-heard by a jury, with Mansfield presiding once again. The defendants called evidence of cases in which claimants such as Wemys had shared only as passengers, and that Wemys had not in fact acted as commanding the marines on board. Finally judgment was entered against Wemys and for the defendants.

These decisions were followed in two later disputes during the Napoleonic wars, both arising from events in December 1804. They were both therefor determined under the royal proclamation of 1803, and they were also both determined in the Admiralty Court by Sir William Scott. In December 1804 Lt Robert Nicholas of *HMS Niger* was sailing home, having taken passage on board of *HMS Tribune* courtesy of her captain, Capt. Bennett. Bennett, according to his evidence, had sought and obtained the consent of his officers before agreeing to give Nicholas passage home. While en-route the *Tribune* had lost her master, the senior navigating officer on board. A Lt Box was detailed to carry out the master's navigating functions, but he was not appointed as master, even in an acting role. Box's extra duties, however left the officers stretched, even though the ship still had its full complement of

lieutenants. Bennett therefore sought the help of Nicholas with the words 'Mr Nicholas, your services are now become necessary, you will therefore keep watch'. In February 1805, at the end of the voyage, Bennett provided Nicholas with a certificate of his service in order that Nicholas should get the credit of it. The certificate read 'These are to certify that Lieutenant Robert Nicholas of his Majesty's ship *Niger,* served by my order as Lieutenant on board His Majesty's ship under my command, from 28th December 1804 unto the date hereof. The certificate was addressed to 'Lieutenant Robert Nicholas of *HMS Niger'* and signed by Capt. Bennett on 12th February 1805. Whilst Nicholas had been standing watches in the absence of a master, the *Tribune* captured the prize *Nostra Signora Del Carmen* (otherwise known as *Le Metis*). To the dismay of the lieutenants belonging to the *Tribune,* who had consented to the hospitality shown to Nicholas, Nicholas claimed a share of the prize as a lieutenant, thus reducing their shares, rather than as a passenger assisting on board. Applying the previous cases, Scott found against Nicholas's claim in May 1806.[7]

In December 1804 the *Agamemnon,* Captain Harvey, was serving in Sir John Orde's squadron off Cadiz, reaping the 'golden harvest' of prizes that Nelson thought should have been his as commander-in-chief of the Mediterranean fleet.[8] Britain was just about to declare war on Spain, but hostilities had already started. On 5th October 1804 a British squadron led by Captain Graham Moore and sent out by the Admiralty for the purpose, had intercepted a Spanish treasure fleet off the same cape.[9] Although one of the Spanish ships exploded and was lost, the remaining three ships and their treasure were seized and taken to England; to the value of some £900,000. As war had not been declared the seizure was not technically prize, but when war was finally declared on 14th December the seized ships and their cargo became Droits of the Admiralty. The Admiralty eventually agreed to make ex gratia payments to the captors, although not for the full value of the seizures. Clearly, however, there was the potential for rich pickings once war was declared against Spain, and Orde was determined to benefit. On 8th December Orde sent the *Agamemnon* on a two week cruise off Cape St Mary in Southern Portugal. On the day before *Agamemnon* left, however, Orde took two lieutenants from her and sent only one replacement in return, leaving a vacancy for a lieutenant that he had not filled. Under the Admiralty Instructions in force at the time Harvey had authority to appoint someone

[7] The Nostra Signora Del Carmen (1808) 6 Rob. Adm. Rep 302.
[8] Nelson to Sir Alexander Ball 5.12.1804, Sir Nicholas Harris Nicholas, *The Dispatches and Letters of Lord Nelson* (London, 1844), 285 Vol. VI.
[9] Wareham, *Frigate Commander,* 250ff.

as an acting lieutenant in the event of a death, but not merely because there was a vacancy.[10] Only a commander in chief could make temporary appointments to fill vacancies and then only pending an appointment to be made by the Admiralty. Nevertheless, once Harvey had sailed out of sight of Orde he took it upon himself to appoint Samuel Whiteway as an acting lieutenant. He did so on the basis that he was entitled to do so as the commander in chief of a detached force of one ship, an imaginative interpretation of the rules. The *Agamemnon* then captured the prize *Nostra Signora Del Coro*. When *Agamemnon* finished her cruise, Orde approved of Whiteway's appointment, but did not ratify it or confirm it permanently. Instead he took Whiteway into his own ship and sent someone else to take his place.

Whiteway claimed a lieutenant's share of the prize. Two of the undisputed lieutenants contested his claim. It was objected that Harvey had no authority to appoint a lieutenant. Even Sir Edward Berry, it was said at the trial in March 1808, had gone into battle at Trafalgar without his full complement of lieutenants made up, and in any event Harvey had not been on detached duty but was only temporarily absent from the admiral, who had seen fit to make the arrangements he had chosen. Whiteway claimed that as he had done the duty of a lieutenant, messed and been paid as a lieutenant, all under the authority of his captain he should receive a lieutenant's share. Scott held, however, that Harvey had not had authority to appoint Whiteway as a lieutenant and that the appointment as acting lieutenant where there was no power to make an appointment as a full lieutenant could not make Whiteway a lieutenant for the purposes of the royal proclamation. Whiteway was not entitled to a lieutenant's share as he had not officially held that position on the ship.

Conversely, however, a person who did hold a position on a ship could be entitled to the share that went with that position even if he was not able to perform the duty that went with it. If a captain of a ship was on board at the time of capture then he was entitled to the captain's prize money even if he was under arrest at the time pending a court martial and another officer had been sent aboard to command as acting captain. This issue arose as part of the tortuous litigation following the failure of Commodore Johnstone and his fleet in 1781 to engage the French fleet under Admiral Suffren properly at Porto Praya, in the Cape Verde Islands, in the race for the Cape during the war with France over the American War of Independence. Johnstone blamed the failure to engage on Captain Evelyn Sutton of *HMS Isis* and in the days after the battle ordered Sutton to be placed under arrest on his own ship. To compound the insult, the mere

[10] Naval Instructions S. 4 c. 2 art. 24 and 2, recited at (1808) 6 Rob. Adm. Rep. 310.

master and commander of the *Oporto*, a Mr Lumley was sent on board the *Isis* as a supernumerary to take acting command as the ship sailed on with the fleet towards the Cape. When Johnstone's fleet reached the Cape Suffren had beaten them to it, but they took four rich prizes in Saldhana Bay. Sutton remained on *Isis* until 2nd June 1782, when he was superseded by Sir Edward Hughes and returned home for his court martial. Sutton was acquitted, but he could not forgive Johnstone's actions and attempted, unsuccessfully, to sue him for lost prize money. Sutton then claimed the prize share as captain of the *Isis* on the basis that he was still the commissioned Captain on board, even if he was under arrest and with an acting captain in command. After 17 years of dispute and litigation Sutton's claim to the prize share was upheld.[11] It was not Johnstone or his estate who lost out, however, but Captain Lumley and his estate, as Lumley, like Johnstone, had died by then.[12]

Where someone was validly appointed to acting command of a ship following the dismissal of her commanding officer, however, then the acting commander became entitled to the commander's share even if the original commander was subsequently re-instated. In 1803 the revenue cutter *Hinde*, under an acting commander, captured some prizes on the resumption of war after the Peace of Amiens. Her original commander, J. M. Allen, had been dismissed by the Commissioners of Customs for inactivity and inattention to the service on the basis of information that they had been given by a third party. The Commissioners had cancelled Allen's commission and had ordered the mate, Mr Pill, to assume command until a new commander was appointed, paying Pill the commander's allowance for victualling. Allen challenged the dismissal and when his answers to the allegations were heard he was re-instated. In the meantime, however, the *Hinde* had captured prizes in his absence. Applying the principles that had been applied to the Royal Navy in cases such as Lumley v Sutton, the Court of King's Bench held that Pill was entitled to the commander's share of the prizes.[13]

Where an officer was promoted into a command by the commanding officer on a station, the command could only be sure of attracting the benefits of a captain's prize share where the promotion was valid and within the powers granted to the commanding officer, see further the

[11] Lumley v Sutton (1799) 8 TR 224

[12] Johnstone had died on 24th May 1787, but his estate would still have been entitled to retain the flag-share of the prize money as a commodore with a captain under him, whichever captain was entitled to the captain's share.

[13] Pill v Taylor (1809) 11 East 414, Lord Ellenborough C.J. presiding, see below for prize distribution for revenue cutters.

problems experienced by William King's appointment to command by Commodore Popham in Chapter 8 below.

Whether a member of a ship's company could ever be entitled if he was not actually on board the ship was a potential moot point. When the *Guillaume Tell* was captured off Malta in 1800, after her escape from the defeat at the Battle of the Nile in 1798, one of the officers who first sighted her was a Lt Oliver of the *Northumberland*, one of the ships blockading Malta. Oliver had been sent ashore to a signal post known, appropriately, as Belvidere, from where he sent rockets up to alert the fleet that *Guillaume Tell* was at sea. Although *Northumberland* was slow to react and was not present at the time of capture she was held to be entitled as a joint captor. Lt Oliver benefited from the prize as he was able to get back on board *Northumberland* by the time the capture was made by *Foudroyant*. Whether he would have been entitled had he not made it back on board, merely on account of the intelligence he had conveyed was described by Sir William Scott as a difficult question of 'some nicety'.[14]

Cutters, Schooners and other armed vessels

The crew of Cutters, Schooners and other armed vessels commanded by lieutenants shared in the same proportion as allowed to persons of like rank on board HM ships if they were involved in a capture where they were present or within sight of a ship or vessel of war and aiding to the encouragement of the captors and terror of the enemy. If they were party to a capture where no ships of war were present then special rules applied and the crew shared from 1793 as follows:

Lieutenant in Command	3 eighths
Flag-officers where vessel under their command	One of the above eighths
Master or other person second in command and the pilot if one on board	1 eighth, if pilot on board then divided: Master; 2 thirds Pilot; 1 third

[14] The Guillaume Tell, (1808) Edw. Adm. Rep. 6, 7.

chirurgeon or chirurgeon's mate if no chirurgeon, midshipmen clerk and steward	1 eighth between them
Boatswain's mate Gunner's mate Carpenter's mate Yeoman of the sheets Sailmaker Quartermaster Quarter-Master's mate	1 eighth between them
Seamen Marines Other persons on board assisting in the capture	2 eighths between them

Proclamations 1795-1803

As the war expanded in scope to embrace additional hostile countries further proclamations were added. When France subsumed the Netherlands as a subject state the prize provisions were extended to the ships, goods and subjects of the United Provinces by a proclamation dated 25th November 1795.[15] A proclamation dated 25th January 1797 brought Spanish prizes under a similar regime. A proclamation of 12th February 1800 dealt with prizes seized from Genoa, the Papal territories and the Ligurian and Roman Republics. Each proclamation mirrored the provisions of the 1793 proclamation concerning France.

[15] *London Gazette* 1795 No. 13836 p. 1255.

With the resumption of war against Napoleon in 1803 after the Peace of Amiens a Royal Proclamation of the King-in-Council made new provision for the distribution of the proceeds of prizes seized from both France and the Batavian Republic, as the Dutch Republic was known in this period when it had become a Napoleonic client republic. The new proclamation made by the King-in-Council of 7th July 1803 contained a number of changes from those of 1793. As set out here, the changes reflect, and reveal, the changes that were happening in the Royal Navy and the way that it operated.

Conjoint Captures with Land Forces

One such change was that the earlier proclamations of 1793, 1797 and 1800 did not expressly exclude conjoint expeditions between the Royal Navy and Land Forces, but where major joint expeditions were planned the distribution of the spoils was generally provided for separately in the orders given to those leading the expedition on the basis that the proclamations did not apply. The proclamations after 1803 expressly excluded conjoint expeditions with the army, reserving the division and distribution of all prize and booty taken to the king (see Chapter 10).

Hired Armed Vessels

A further such change was prompted by the fact that many smaller vessels, that were not ships of war, were brought into service as part of the war effort. It was by no means a new thing for armed private vessels, that might otherwise be sent to sea by their owners as privateers, to be used by the crown. In 1759, during the Seven Years' War, the Admiralty had used a combination of available frigates and hired privateers to cruise the north coast of Brittany to disrupt the French trade supplying the French invasion force that was being assembled.[16] Hired armed vessels were particularly useful for detaining slow moving, unarmed, lightly manned merchant ships, particularly where they were unaware of hostile intent at the outbreak of war.[17]

As a result of the increased use of hired armed vessels, the 1803 proclamation dealt expressly with their prize shares. The distribution of prize shares to them and their crew depended on whether the vessel had a commissioned officer on board in command.

Where there was a commissioned officer on board in command then the division was:

[16] Baugh, *The Global Seven Years War*, 427.
[17] E.g. the capture of the Danish ship *Knud Terkelson* by *HM Hired Armed Ship The Duchess of Bedford* in September 1807, the subject matter of Routh v Thompson (1809) 11 East 428.

Commissioned commanding officer on board	3 eighths
Flag-officers where vessel under their command	One of the commanding officer's 3 eighths
Any commissioned sea Lieutenant in king's pay	1 eighth
Master Mate Unless there are midshipmen or those classed above with midshipmen in the pay of the king in which case: Master Mate Midshipmen etc	1 eighth divided: 2 thirds 1 third Master 1 half of the eighth)Share equally the remaining half) of the eighth
Other officers and the rest of the crew	3 eighths between them

If there was no commissioned officer on board in command then the division was different:

Flag-officers if under command of a flag	1 eighth
Master Mate	2 eighths divided: 2 thirds to Master 1 third to Mate
Other officers and crew	3 eighths between them

Any surplus	Remained at King's disposal and if not disposed of within 1 year after final adjudication then to the Greenwich Hospital

In the event that hired armed vessels were involved in joint captures with HM ships of war then the officers and crew of the hired vessel would share as follows:

Commissioned officers on board hired vessel	Share with commissioned officers of same rank on HM ships as joint captors
Master of hired vessel	Share with warrant officers of HM ships
Mate of hired vessel	Share with petty officers of HM ships
Seamen of hired vessel	Share with the seamen on HM ships
Unless the vessel is commanded by a commissioned Master and Commander with no commissioned Lieutenants on board, or by the Master, then the Master and Mate would share as follows:	
Master	Share with Lieutenants of HM ship
Mate	Share with warrant officers of HM ships

The proclamation anticipated that even this provision had not covered all eventualities involving hired armed vessels and so provided that in case of dispute then it was to be referred to the Lords of the Admiralty. Their direction was to be final as if inserted in the proclamation. No such provision was applied to HM ships.

Revenue Cutters

The royal proclamations expressly excluded 'the produce of such prizes as are or shall be taken by ships or vessels belonging to or hired by or in the service of the Commissioners of Customs or Excise'. The distribution of such prizes was reserved to the King's 'further pleasure'. In practice this meant that distribution took place under the terms of warrants issued by the King, or in his name. The prize position was complicated where revenue cutters were specifically co-opted to prize-taking service and Royal Navy officers and sailors were sent on board to assist both in prize-taking and providing prize crews. In anticipation of a return to war after the Peace of Amiens, for example, Lt Senhouse RN was sent on board the Revenue Cutter *Hinde* from *HMS Conqueror* in Plymouth in March 1803 with a selection of *Conqueror's* sailors, to assist in capturing prizes when war resumed. With the resumption of war in May 1803 the *Hinde*, under the command at the time of her own acting commander appointed by orders from the Commissioners of Customs, captured a number of prizes that were condemned by the Admiralty Court. The distribution of such prizes was provided for by King's Warrants of 4th July and 26th November 1803.[18] Had there been no Royal Navy personnel on board then the distribution would have been:

The Commander	One Half
The Mate	One Quarter
The Remaining Mariners	One Quarter between them

Had there been Royal Navy sailors sent on board but no Royal Navy Officer then the proceeds would have been divided into 32 parts and the distribution would have been:

The Commander	14 Parts
The Mate	7 Parts
The Deputed Mariners	3 Parts between them
The Other Mariners	8 Parts between them

[18] Set out in Pill v Taylor (1805) 11 East 414. The King's Warrant of 4th July 1803 was issued 3 days before the 7th July 1803 royal proclamation of the King-in-Council dealing with other prizes.

As there was a Royal Navy Officer on board, the proceeds were divided into eighths and the distribution was as follows:

To the Port Admiral Plymouth, under whose orders the men from *Conqueror* had been sent on board *Hinde*	One Eighth
To the Captain, Officers and Crew of *Conqueror*, incl. Lt Senhouse and the men put on board *Hinde*	Three Eighths divided between them as prize money
To the Commander of *Hinde*	Two Eighths
To the Mate of *Hinde*	One Eighth
To the other Mariners of *Hinde*	One Eighth between them

Thus the half remaining after the Royal Navy had taken its half was distributed to the men from *Hinde* in the same shares as if they had been sailing without the assistance of men from the Royal Navy and had taken the prize without assistance.

Line of Battle Ships: Second Masters

A small addition to the provisions for distribution among the crew of line of battle ships indicates the increasing sophistication of such vessels. For the first time the 1803 proclamation included the Second Masters of line of battle ships as entitled to share in the one eighth apportioned to warrant officers, junior marine and land forces officers and flag-officer secretaries.

Conjoint captures with allied ships:

The 1803 proclamation also dealt expressly with another problem that had caused difficulties in practice, namely captures that the Royal Navy had made together with the ships of friendly countries, such as the Portuguese Navy. In such cases the proclamation provided that allied ships would have an equal share with Royal Navy ships. Their share would be set apart and

disposed according to the King's direction. As will be seen in chapter 7, this did not deal with potential claims by a flag-officer in an allied fleet attached to a British fleet to a flag-officer's share even when not present at the capture.

1805 and 1807 Proclamations

When war with Spain resumed in 1805 the King-in-Council authorised reprisals against Spain on 11th January 1805 and then by a proclamation on 31st January 1805 provided for the distribution of the proceeds of Spanish prizes, as well as those seized from the Italian and Ligurian Republics under reprisals authorised on 17th August 1803. The distribution was on the same terms as the proclamation against France and Batavia of 1803, thus maintaining the same approach whoever the enemy might be.

One small change was made, however, in respect of smaller vessels in the King's service and made the change was retrospective to the 1803 proclamation as well. Where a cutter, schooner or other armed vessel belonging to the crown had a Sub-Lieutenant on board as well as a Master then if he could claim to be the second-in-command he took the Master's share of the eighth intended for the second-in-command under the 1803 provisions. If the Master could argue to be the second in command then he took to the exclusion of the Sub-Lieutenant. The 1805 proclamation did not wholly resolve this difficulty, but it did ameliorate its effect by introducing an arrangement for sharing the eighth, albeit with an underlying assumption of superiority of the Royal Navy officer. Where there was a Sub-Lieutenant, a Master and a pilot on board then the one eighth apportioned to them was divided one half to the Sub-Lieutenant and a quarter each to the Master and the Pilot. If there were only two such people on board rather than all three then two-thirds of the one eighth went to the second-in-command and one-third to the other. If there was only a Sub-Lieutenant or a Master on board then the whole eighth went to them.

When war came in the Baltic in 1807 the King ordered reprisals against Denmark and Russia by Orders-in-Council of 4th November and 18th December 1807 respectively. The war in the Baltic was largely an economic war to break the continental system that Napoleon had sought to impose on Russia and the Baltic states. The orders for reprisals expressly excluded vessels under licence from the British. To follow up the economic impact of the orders for reprisals, proclamations apportioning the proceeds of prizes followed soon after, on 11th November and 23rd December 1807. In the haste to draft the proclamations for the King to make in Council

at the Queen's Palace the wording of the 1803 declaration was used, overlooking the 1805 amendment relating to those who were second-in-command of cutters, schooners or other small ships of war.

1808

The most significant change to the pattern of distribution of prize money came in June 1808 when all the previous proclamations were revoked and replaced with a new distribution. The new rules were not retrospective and did not affect captures made before the date of the proclamation, the 15th June 1808. As it would take time for the news of the proclamation to arrive at the Vice-Admiralty courts around the world where prizes were being taken to be condemned, the proclamation expressly provided that even if a prize was captured after the date of the proclamation the new rules would not apply if the prize had been condemned by a Vice-Admiralty Court abroad before news of the new proclamation had arrived at that court.

The 1808 proclamation introduced a significant shift in the rewards away from Captains and Admirals in favour of the Petty Officers who formed the middle management of ships of war. The Captain's share was reduced from three to two-eighths. Where Flag-officers took a share of the Captain's share, that was reduced from one of the three-eighths previously taken to a one-third share of the Captain's two-eighths. Thus the proportions as between the Captains and the Flag-officers remained the same, but the shares of each were reduced. The redistribution was deliberate, and the reasoning behind it will be considered in more detail in chapter 9. The proclamation recorded the reason for its passing as:

> "Whereas it has been represented to Us by our Commissioners for executing the Office of the Lord High Admiral, that it will be productive of beneficial Effects to the Service, if instead of the Three Eighth Parts of the neat Produce of Prizes, which have hitherto been granted to the Captains and Flag-Officers serving in Our Fleet, Two Eighth Parts only shall be allocated to them, and the remaining Eighth Part distributed amongst the Petty Officers, Seamen, and Marines, in addition to their present shares."

The categories of petty officers were also redefined, introducing for the first time two separate classes of petty officer, petty officers first and second class. The increasing sophistication of ships of war was also recognised with the first express mention of men such as schoolmasters and captains of the forecastle (both first class) and captains of the foretop, maintop, afterguard and mast (all second class). Thus the new allocation of the proceeds of prizes was as follows:

The Captain actually on board	Two Eighths instead of Three
Flag-officers where the ship was "under the command of a Flag or Flags, the Flag-officer or Officers actually on Board, or directing and assisting in the Capture	One third of the Captain's two-eighths (i.e. one Twelfth of the whole)
[Navy, or] "Sea" lieutenants, Captains of Marines and Land Forces the Master A Physician to a Fleet or Squadron if actually on Board at the time of taking N.B. it was expressly provided that officers acting by Order were to receive the share of that rank in which they are acting	One Eighth between them, as before
Lieutenants and Quarter Masters of marines Lieutenants, Ensigns and Quarter Masters of Land Forces Secretaries of Admirals or commodores with captains under them Second Masters of line of battle ships Warrant officers: Ship's Surgeons Boatswains Gunners Pursers, Carpenters Master's mates Pilots Chaplains on Board,	One Eighth between them, as before
	The remaining half of the proceeds was then divided into shares as follows:

Petty officers first class: Midshipmen Surgeon's assistants Secretaries-clerks Captain's clerk Schoolmasters Masters at Arms Captain's Coxswain Gunners' mates Yeoman of the Powder-Room Boatswains' mates Yeomen of the sheets Carpenters' mates Quartermaster Quartermaster's mates Ships Corporals Captains of the forecastle Master sailmakers Master caulkers Master ropemakers Armourers Serjeants of Marines and Land Forces	4 ½ shares each of the remaining half of the proceeds
Petty Officers second class: Midshipmen, ordinary Captains of the foretop Captains of the Maintop Captains of the After Guard Captains of the Mast Sailmaker's Mates Caulker's Mates Armourer's Mates Ship's Cook	3 shares each of the remaining half of the proceeds

Corporals of Marines and of Land forces	
Quarter Gunners Carpenters' crew Sailmakers' crew Coxswains' mates Yeomen of the Boatswain's store room Gunsmiths Coopers Trumpeters Able Seamen Ordinary seamen Drummers Private Marines Other soldiers if doing duty on board in place of Marines	1 ½ shares each of the remaining half of the proceeds
Landsmen Admiral's domestics All other Ratings not enumerated above, together with all passengers and other persons borne as supernumeraries and doing duty and assisting on board	1 share each of the remaining half of the proceeds
Young gentlemen volunteers by order and boys of every description	½ a share each of the remaining half of the proceeds

After 1808 Cutters, Schooners and other armed vessels commanded by lieutenants involved in a capture where a Royal Navy ship or vessel of war was 'present or within sight and aiding to the encouragement of the captors and terror of the enemy' once again shared in the same, amended, proportion as allowed to persons of like rank on board HM ships, but did not in respect of such captures 'convey any interest or share in the Flag eighth to the Flag-officer'. Where no other ship was in sight then the amended shares were:

Lieutenants in Command	Two Eighths, instead of three
Flag-officers	One third of the Captain's two eighths share
Sub-Lieutenant, Master and the pilot if one on board	1 eighth, divided if all: 2 fourths 1 fourth 1 fourth If only 2 then: 2 thirds to person second in command and 1 third to the other If only a sub-Lt or Master then the whole eighth to them If there be only a pilot then the pilot to have one half of the eighth and the remainder to go to the Greenwich Hospital
surgeon or surgeon's assistant if no surgeon midshipmen clerk and steward	1 eighth
	The remaining half of the proceeds was then divided into shares as follows:
Boatswain's mate Gunner's mate Carpenter's mate Yeoman of the sheets Sailmaker	4 ½ shares each of the remaining half of the proceeds

Quartermaster Quartermaster's mate Serjeant of Marines	
Corporals of marines	3 shares each of the remaining half of the proceeds
Able Seamen Ordinary seamen Marines	1 ½ shares each of the remaining half of the proceeds
Landsmen together with passengers and other persons borne as supernumeraries doing Duty and assisting on board	1 share each of the remaining half of the proceeds
Boys of all descriptions	½ share each of the remaining half of the proceeds

Hired Armed vessels

Commissioned commanding officer on board	2 eighths instead of the previous 3
Flag-officers where applicable	1/3 of the commanding officer's Two-eighths share
Any commissioned 'sea' Lieutenants in King's pay	1 eighth
Master Mate	1 eighth divided: 2 thirds 1 third

Unless there are midshipmen or those classed above with midshipmen in the pay of the King in which case: Master Mate Midshipmen etc..	 Master 1 half of the eighth Share equally the remaining half of the eighth
Other officers and the rest of the crew	4 eighths distributed as above

If no commissioned officer in command:

Flag-officers if under command of a flag	1 eighth
Master Mate	1 eighths divided: 2 thirds 1 third
Other officers and crew	4 eighths divided as above
Any surplus	Remain at the King's disposal and if not disposed of within 1 year after final adjudication then to the Greenwich Hospital

If joint capture of Hired vessel and HM ships of war then:

Commissioned officers on board hired vessel	Share with commissioned officers of same rank on HM ships as joint captors
Master of hired vessel	Share with warrant officers of HM ships
Mate of hired vessel	Share with first class of petty officers of HM ships

Seamen, landsmen and boys of hired vessel	Share with persons of the same description on HM ships
Unless the vessel is commanded by a commissioned Master and Commander with no commissioned Lieutenants on board or by the Master, then:	
Master	Share with Lieutenants of HM ship
Mate	Share with warrant officers of HM ships

In 1812, when war broke out with the United States of America, the same provisions were applied to prize captures in that dispute by a proclamation of the Prince Regent at Carlton House on 26th October 1812, thirteen days after reprisals against the ships, goods and citizens of the USA had been ordered.

When Napoleon escaped from Elba and resumed his war against Britain until Waterloo, reprisals against the ships, goods and subjects of France were ordered on 21st June 1815 and the previous provisions for the distribution of the proceeds of French prizes were re-introduced for the remainder of the war by a further proclamation of the Prince Regent at Carlton House on 29th June 1815.

Conclusion

This analysis shows that the rules for the distribution of prize money were not a static system. The Admiralty had no qualms about changing the rules, and it is possible to follow the reasoning behind the changes. Having set out the schemes as they changed in various proclamations during the wars, the next chapter will consider the detailed provisions that applied to claims to the flag-officers' share. The changes to these provisions reveal more insights into the custom and usage of the Royal Navy, and the relationship between the Admiralty and its senior officers.

Chapter 7, The 'Flag-share'

Introduction: Bitterness and Dispute

As the ink was drying on the armistice signed with the Danes after the Battle of Copenhagen Nelson returned on board his flagship *HMS St George* to write to the First Lord of the Admiralty. Far from expressing joy at the victory, however, Nelson complained that he was 'tired to death' and begged to be allowed to retire.[1] It was not just the stress of battle, or worry about his wife, his mistress or their young child that weighed him down. The First Lord of the Admiralty was The Earl St Vincent, who had been a mentor to Nelson and lauded him for his actions at the battle from which his earldom took its name. Yet just a month before Nelson's letter the two men had been adversaries in a trial in the Court of Common Pleas at the Guildhall in Westminster. They were litigating over who was entitled to prize money from Spanish treasure ships captured in 1799. Even that trial had not resolved the dispute, which would rumble on until a final ruling of the King's Bench in November 1803, over two years later.

That Nelson resented St Vincent's disputing of his claim to the prize money is clear. In his letters to Emma Hamilton at the time it is plain that Nelson thought he was entitled to justice from the courts and 'not to be overpowered by weight of interest and money'.[2] St Vincent was equally incensed at the way that Nelson's cause was pursued by his friend and agent Alexander Davison.[3] There is no doubt, as Sir John Knox Laughton observed in 1887 in his *Studies in Naval History*, that 'the friendly relations between Lord St Vincent and Nelson, which led to such glorious results, were interrupted by a lawsuit on their rival claims for prize money.'[4] For four key years the two leading British naval commanders were locked in a bitter legal dispute over the share of the spoils. Indeed such disputes, and the bitterness they could create, were, as this chapter will show, far from unusual at the time. Knox Laughton concluded that 'the bitterness which frequently arose out of considerations of prize-money was undoubtedly increased by the disproportionate share of the senior officers'.[5] Yet despite their ongoing litigation and the ill-disguised irritation that it induced, the professional relations between

[1] Nicolas, *The Dispatches and Letters* Vol. IV p. 341., 9th April 1801 Nelson to St Vincent.
[2] letter 8th Feb. 1801 Nelson to Emma Hamilton Nicolas Vol. IV, p. 285.
[3] See e.g. Letter of 5th January 1801 St Vincent to Booth & Haslewood, Nelson's lawyers, NMM CRK 3/128.
[4] John Knox Laughton, *Studies in Naval History*, 196.
[5] John Knox Laughton, 197.

Nelson and St Vincent remained intact.[6] St. Vincent rejected Nelson's plea to retire after Copenhagen, recalled Sir Hyde Parker who had nominally been in command of the Baltic fleet and appointed Nelson in his place. Whatever system was in place for determining disputes between flag-officers over prize money appears to have allowed the Royal Navy to carry on functioning with great success. What was that system, and how did it manage to operate and survive?

The 'disproportionate share' of prize money for flag-officers that Knox Laughton referred to, and how it was distributed between them is the subject matter of this chapter. It will consider the origins of the rules that governed the 'flag-share' and the twelve rules that were set out in royal proclamations at the time to govern the distribution of that share.

Prize Money and the 'Flag-share'

Where a captain was operating under the command of a flag-officer he did not take the entire share allocated to him. He had to account for part of his share to the flag-officer, or officers, under whom he served. Where two or more flag-officers were serving on a station then the flag-officers' share was divided between them, although with a larger share to the commander-in-chief than to the junior flag-officers. The details of the rules for allocation of a prize share to, and between, flag-officers changed and developed over time and gave rise to some of the most bitter and prolonged prize money disputes.

The Flag-share Rules

Until June 1744 a flag-officer's entitlement to share in prizes began as soon as he was appointed to a command regardless of when he actually arrived on station to take up the command.[7] That simplistic approach caused disputes between flag-officers and so a new set of rules was proclaimed during the Wars of Austrian Succession by George II, on 14th June 1744.[8] They were expressed to have been made 'in order to prevent disputes arising among the Flag-officers,

[6] Lambert, *Admirals*, 80.
[7] Per Lord Mansfield, *Pigot v White*, Easter 25 Geo. 3 B.R., noted in *Johnstone v Margetson* (1789) 1 H. Bl. 265n.
[8] *London Gazette* 12-16th June 1744, No. 8336 p. 6, the history of the provisions was considered during counsel's submissions recorded in *Johnstone v Margetson* (1789) 1 H. Bl. 261, 264. Cf. the proclamation of 9th March 1744 without the flag provisions at *London Gazette* 27th March 1744, No. 8314 p. 7-9.

who have been, or may hereafter be employed in our service'[9]. It was a vain hope. The seven rules introduced in 1744 were amended in 1756[10] and in that form they were the basis for the rules included in the 1793 proclamation, which will be considered below. The rules in the proclamation were 'the title deeds of flag-officers' to their share, and were treated by the courts as 'the only rule for regulating [a court's] judgment'.[11]

Even the post-1808 flag-share, which was reduced from an eighth to a twelfth, gave a disproportionate amount to those in command and could amount to a considerable fortune. Both before and after 1808 detailed rules determined who was entitled to this valuable benefit.

The 1793 Royal Proclamation contained eight separate provisions setting out the rules for allocating shares to, and between, flag-officers. By 1808 this had risen to twelve provisions in an effort to deal with the issues that arose in disputes, and to try and restrict the scope for further disputes. A number of the provisions dealt with the problems that arose with the exercise of command in remote places round the world with poor and seriously delayed communications. An appointment to a command signed in the Admiralty may have taken months or even years to be carried into effect, if ever. A sign of the change to a global naval establishment during the years that this study covers appears in the changing wording that the proclamations adopted. In 1793 references to flag-officers sent to command overseas still appeared as 'at Jamaica or elsewhere', but by 1803 had become 'any station'. Britain was now a global naval power all year round.

All of the proclamations dealing with prize shares for prizes taken by ships under the command of flag-officers referred to flag-officers 'being actually on board, or directing and assisting in the Capture'.[12] This wording was given a wide interpretation and where a ship was sailing under the orders of a flag-officer then that was regarded as sufficient to amount to the flag-officer directing or assisting in the capture. Some captains may have been tempted to disagree with the idea that their remote flag-officer was directing or assisting in captures made by their hard efforts. Indeed it may seem a generous interpretation of the proclamation. It was, however, in line with the view in English law at the time of the authority that servants had from their

[9] The proclamation by the King's Lords Justices, dated 19th June 1740, made in the absence of King George II, who was in the habit of spending his summers in Hanover; *London Gazette* 21-24 June 1740, No. 7921 p. 1, and for explanation see *London Gazette* 12-16 June 1744 No. 8336 p.6.
[10] Royal Proclamation of King George II 7th July 1756, *London Gazette* 6th -10th July No. 9598 p. 1.
[11] Per Sir William Scott, quoted by Lord Ellenborough in Harvey v Cooke (1805) 6 East 220, 235.
[12] Such wording pre-dated even the 1740 and 1744 proclamations referred to above, see Proclamation of George I 19th March 1718, *London Gazette* 21-24 March 1718 No. 5731 pp. 1-2. It persisted even after 1808, the view expressed by Hill to the contrary is wrong and not supported by his references. Hill, *The Prizes of War*, 206.

masters. In a leading authority from 1698 it had been held that a master could be found liable for a fire set by his servant which had got out of control and damaged a neighbour's property even though the master had not given express authority for the fire to be set. Chief Justice Holt said of the fire "it shall be intended that the servant had authority from his master, it being for his benefit".[13]

Even where a ship was sailing under the orders of a flag-officer who had been superseded then that was enough for the ship to be under the command of the new flag-officer and for that new flag-officer to be directing and assisting in the capture.[14] Where a captain was sailing under direct orders from the Admiralty then no flag-officer was entitled to share in prizes, although disputes could arise about whether a ship was under Admiralty orders or not.[15]

The Flag-officer Articles

The express articles in the proclamations between 1793 and 1815 will be considered below in the order that the twelve articles appeared after 1808.

1st Article: When was a captain under the command of a flag-officer?

The 1793 proclamation attempted no general express definition of when a captain came under the command of a flag-officer for these purposes. It, like its predecessors, simply awarded to a flag-officer a flag-share of 'Prizes taken by Ships and Vessels under his Command' without defining what that meant. Even by 1793, however, disputes had arisen over when a ship was under the command of a flag-officer that set the scene for the period of this study.

Pre-1793 decisions of the courts

In 1758, during the Seven Years War, Captain Lane Falkner of *HMS Windsor* captured a prize while sailing under Admiralty orders.[16] Unbeknown to him, by the time of the capture Sir Edward Hawke had been appointed by the Admiralty to command a squadron, including the *Windsor*. Hawke claimed the flag-officer's share of the prize.

[13] Turberville v Stampe (1698) 1 Ld Raym. 264,265; 91 ER 1072, 1073.
[14] Pigot v White, Easter 25 Geo. 3 B.R., noted in Johnstone v Margetson (1789) 1 H. Bl. 265n, see below.
[15] E.g. The Orion (1803) 4 Rob. Adm. Rep. 362, see 9th Article, below.
[16] The royal proclamation in force at the time was dated 7th July 1756, *London Gazette* July 1756 No. 9598.

In 1761 the Admiralty Judge, Sir Thomas Salusbury, allowed Hawke's claim on the basis that at the time of capture *Windsor* had been under Hawke's command. Falkner appealed and in 1764 the decision was reversed on the basis that at the time of capture Falkner had been acting solely under the orders of the Admiralty and so did not have to account to a flag-officer.[17] Despite the controversy, it would not be until after the war with revolutionary France that was to follow in 1793 that the Admiralty would attempt to clarify the royal proclamation wording, as will be seen below.

In 1759 another dispute had come to court over the flag-share of a prize taken by a Captain Taylor while sailing from the Downs under orders from Lord Harry Powlett. By the time the prize was taken, however, Powlett had been superseded in command of the station by Admiral Smith. Nevertheless, the flag-share was paid to Powlett. Taylor claimed that as Powlett had been superseded he was no longer entitled to it and so he, Taylor, was entitled to it as the captain of the capturing ship. The court held that Taylor had always been under the command of a flag-officer, whoever that flag-officer may have been. That, the court held, was enough to defeat Taylor's claim.[18]

In December 1780, during the American War of Independence, Commodore George Johnstone was the flag-officer in command of the Lisbon station entitled to the flag-share of prizes taken by the ships on the station, which included *HMS Cerberus*. In February 1781 *Cerberus* captured the Spanish frigate, *Grana*. In January 1781, however, the Admiralty had appointed Johnstone to command of a fleet, which did not include the *Cerberus*, to attempt to capture the Dutch settlement at the Cape. Even though no new commander was appointed to supersede him, the Admiralty treated Johnstone's appointment to command the Lisbon station as over. Nevertheless, Johnstone claimed the flag-share of the *Grana* prize on the basis that he had not been superseded and *Cerberus* had been acting under his order at the time of the capture.

The court held that the normal assumption was that a new appointment terminated a previous one. At the time, therefore, Johnstone was not the commander on the station and he was not entitled to the flag-share.[19]

[17] La Pacifique (1764) Burrell 158, English Reports 167, 518.
[18] Taylor v Lord H. Paulett (1789) 1 H. Bl. 264n, per Lord Mansfield.
[19] *Johnstone v Margetson* (1789) 1 H. Bl. 261, 268.

Developments Post 1793

Problems could arise where a captain received orders from flag-officers on two different stations. Whose orders would he be regarded as acting under at the time of a capture? In 1797 Captain Linzee was serving on *HMS L'Oiseau* under Admiral Pringle at the Cape of Good Hope. *L'Oiseau* needed repairs that required her to be sent to India to use the facilities of the East India Company. In June 1797 Pringle sent her to India for repair. As India was within the East Indies station under the command of Admiral Rainier, Pringle wrote to Rainier requesting that *L'Oiseau* be repaired at Bombay. The precise chain of command between the officers appointed to the Cape and India had at times been unclear and confused, placing Rainier at times in a difficult position.[20] Nothing of this is to be detected in the law report, however. *L'Oiseau* arrived in Madras in August 1797 and Linzee reported to Rainier. The report recites that Rainier placed Linzee under his orders and then ordered him to Calcutta, rather than Bombay, for repairs. Rainier then ordered Linzee to accompany a convoy to the Cape when he had finished his repairs and was ready to sail back to Pringle. While following Rainier's order to escort a convoy back to the Cape in July 1798, *L'Oiseau* became detached from the convoy and bore away for Prince of Wales Island. When near the island, and still within the limits of Rainier's station, *L'Oiseau* captured the *Angelique* as a prize worth £21,600. By the time of the capture Admiral Christian had superseded Pringle in command at the Cape. Christian and his executors claimed the flag-share on the basis that Linzee was still under the command of the Cape flag-officer.

What the law report does not recite is that Prince of Wales Island was the name then given to Penang, an island in the Malacca straits that is part of modern Malaysia.[21] Thus it would appear that Rainier was doing more than just sending *L'Oiseau* back to the Cape. Constantly short of ships for the protection of trade and having to cater for a threat of invasion by the French via Egypt, he had taken the opportunity to use her for the protection of trade from the Far East. Rainier's occasional practice of 'borrowing' ships from the Cape to protect the Canton trade appears to have had the tacit acceptance of Christian's successor, Sir Roger Curtis.[22] Such

[20] Peter A. Ward, *British Naval Power in the East, 1794-1805: The Command of Admiral Peter Rainier*, (Woodbridge, Suffolk ; Rochester, NY: The Boydell Press, 2013), 4.
[21] Ward, 131.
[22] Ward, 187.

acceptance was not always forthcoming, however, and at times flag officers would resort to subterfuge to keep their ships out of the clutches of nearby rivals.[23]

If Linzee was still acting under Pringle's orders as commander-in-chief at the Cape when he captured the prize then Christian, as Pringle's successor, was entitled to the flag-share. The action did not come to court, however, until 1807, when the Court of Common Pleas decided that by being sent out of the limits of the Cape station into the limits of the East Indies station and under the command o)f Admiral Rainier, the command of the Cape station over *L'Oiseau* had been suspended and the commander-in-chief of that station was not entitled to the flag-share. [24]

Further definition of when a ship was under the command of a flag-officer appeared in the 1803 proclamation. It attempted to deal with ships joining and leaving a station where a flag-officer was in command, rather than a station where the ships were on station but the flag-officers were changing.

The first part of the 1803 provision was that a captain was deemed to be under the command of a flag 'when he shall actually have received some order directly from, or be acting in the execution of some order issued by a flag-officer'. This was supplemented in 1808 by additional wording that provided that in the event of a captain 'being directed to join a flag-officer on any station he shall be deemed to be under the Command of such flag-officer from the time he arrives within the limits of the station', thus no orders from the flag-officer had to be received, either directly or indirectly, for the captain to be deemed under their command.

The second part of the 1803 provision was that a captain was deemed to:

'continue under the command of such Flag so long as the Flag-officer by whom the Order was issued, or any other Flag-officer acting upon the same station shall continue upon such station or until such Captain shall have received some Order issued by some other Flag-officer or the Admiralty'.

[23] See e.g. Nelson/Orde on the Mediteraenean station in 1804; Captain A. T. Mahan, *The Life of Nelson: The Embodiment of the Sea Power of Great Britain* (London: Sampson Low, Marston & Co., 1897), 261–63; Sir Augustus Phillimore, *The Last of Nelson's Captains*, (1906), 125–29.
[24] Holmes v Rainier (1807) 8 East 502, Lord Ellenborough, Grose J., Lawrence J. and Le Blanc J..

Since after the 1808 amendment a captain could be deemed to be under the command of a flag-officer by arriving within the limits of the station having been directed to join the flag-officer there, even without actually receiving an order from the flag-officer on the station, the second part of the provision dealing with continuing under a command was simplified so as to provide simply that a captain would 'continue under the command of the flag-officer of such station until [he] received some Order issued by some other Flag-officer or the Admiralty'.

The reasoning in Holmes v Rainier presupposed that the flag-officer providing the new orders was entitled to do so. Rainier had been entitled to give orders to Linzee by the implied suspension of Pringle's authority by sending *L'Oiseau* to Rainier. The decision in Holmes v Rainier did not mean that flag-officers could assume command of a ship from another station without authority and thereby acquire a right to share in the prizes that the ship might take. That did not stop them trying, however.

In 1805 the Admiralty appointed Admiral Lord Gardner to temporary command of the Channel fleet for the months of May and June. To take up the appointment he handed over his previous command of the Irish station at Cork to Rear Admiral Drury.[25] On 3rd May, as commander-in-chief of the Irish station, Drury ordered Captain Maitland of the frigate *Loire*, one the ships under his command on the station, to sail with Cork's Newfoundland trade to Falmouth to join a convoy leaving there on 10th May. Once he had delivered his convoy to Falmouth then he was to undertake a cruise for a month in the western channel 'for the protection of the trade of his Majesty's subjects, and the annoyance of the enemy'.[26] This was the standard wording of an order for a month of hunting for prizes. Once the month was over he was to return to Cork. In the event, however, that Maitland should fall in with the enemy fleet from Brest or elsewhere, or should obtain any certain intelligence of their being at sea, he was to return to Cork to report it to Drury unless he felt it best to report it to the admiral with the fleet off Brest. If he took the latter course then as soon as he had communicated his intelligence to the admiral off Brest he was to return to Cork 'without loss of time'.

[25] Admiralty orders to Gardner dated 25th February 1805 to shift his flag into one of his frigates at Cork and sail to Plymouth to await further orders, handing over command to Drury in Cork, Admiralty to Drury dated 27th February 1805 to take up the command, Gardner to Drury dated 5th March 1805 handing over command of the station and its frigates, including *Topaze*, and Admiralty to Gardner dated 20th March 1805 to assume command of the Channel fleet, cited in Lady Gardner v Lyne (1811) 13 East 574 and Drury v Lady Gardner (1813) 2 M&S 150.

[26] 'between lat. 48N and 53N and Long. 10 to 25 W'.

The Falmouth trade in Cork, however, refused to accept convoy instructions to sail to Falmouth and so by a further order on the same day Maitland was sent off for his month's cruise without having to go to Falmouth. Whilst on his cruise Maitland did receive intelligence that the enemy were at sea and pursuant to his orders from Drury he sailed to meet Admiral Gardner off Ushant to tell him, falling in with him to do so on 25th May 1805. On 28th May 1805, three days later, Gardner ordered Maitland to take Captain William Brown and his followers from *HMS Polyphemus* to join *HMS Ajax* off Ferrol, northern Spain, where he was also to deliver Gardner's despatches to Vice-Admiral Sir Robert Calder. Ferrol was outside of the limits of both the Irish and the Channel stations. Meanwhile, a convoy accompanied by *HMS Desiree* had left Jamaica on 20th April and was expected in the channel. Accordingly Gardner gave Maitland the private signals for the convoy and directed him 'while in the execution of the order you have already received from Rear Admiral Drury, to keep a good look out for the convoy'. Should he fall in with it then he was 'to afford it every protection and assistance' in his power to see the ships safely bound up the St George's and the Bristol Channels.

While supposedly on his way back from Ferrol to Cork on 1st June 1805, having delivered Captain Brown and the despatches, Maitland captured one French and two Spanish prizes worth £3,000 in Muros Bay.

The flag-share of the Muros Bay prizes was paid to Edward Lyne, Drury's prize agent in Plymouth, but Gardner laid claim to it. Gardner had himself been a tenacious frigate captain used to hunting down prizes and he did not want to let these prizes slip out of his grasp. His fighting spirit had received hard-earned praise from St Vincent, who described him as 'a zealous and brave man'.[27] Gardner had felt slighted in the spring of 1800 when command of the Channel fleet had been given to St Vincent as successor to Lord Bridport. St Vincent had returned from the Mediterranean fleet supposedly for reasons of his health.[28] He then picked up the plum job in the channel. Spencer, the First Lord of the Admiralty, tried to make amends by offering Gardner the Irish station in August 1800, and Gardner was made an Irish baron in December 1800. The two months in command of the Channel fleet in 1805 must have had the taste of a sweet fruit previously denied to him. He was not going to let prizes go without a fight,

[27] ODNB/ 10371, J.K. Laughton, rev. Christopher Doorne, 9.8.2016. This entry does not include Gardner's brief spell in command of the Channel fleet in 1805 recorded in the law report.
[28] See Nelson v Tucker, below.

especially where the rival claim was from the station that he had given up in order to take the temporary position with the Channel fleet.

As the prize dispute rumbled on Gardner was reappointed to the Channel fleet in 1807, but ill health forced him to resign in 1808 and he died at the end of that year before the legal action over the Muros Bay prizes was heard. Gardner's widow, Susannah, as tenacious as her late husband in pursuing his outstanding prize claims, took this and other claims to court after his death. Susannah was used to handling the reins of wealth. She had been the sole heir of her father's Jamaican fortune at the age of 14 and had been widowed in her first marriage at the age of 17.[29] At the age of 20 she remarried, this time to 27-year-old Captain Alan Gardner. Thus, when the claim over the captures by Captain Maitland in the *Loire* came to court on 27th May 1811 after her husband had died it was her name that appeared as the widowed plaintiff.[30]

Lady Gardner did not succeed in her late husband's claim. The court held that Gardner's order should not be understood as having been intended to keep the *Loire* under his command after the delivery of his despatches off Ferrol. Rather, the orders were to be considered as a modification of, or addition to, Drury's orders, for the purpose of the more beneficial execution of them and not as 'a supercession or abrogation' of them. They required, it was held, 'a coincident and not a contradictory service'. That disposed of the claim. The court went on, however, to consider whether Gardner would have been entitled to the prize share if he had intended to oust Drury's orders and replace them with orders putting the *Loire* under his own command. The court decided that in those circumstances a flag-officer cannot create for himself an entitlement to a flag-share. They doubted whether a commander on one station could annex a ship from another station to his own command, but if it could be done then he could not create a right to prizes taken outside of the limits of his station, unless the chase began within the limits. The idea, said Lord Ellenborough, of a station:

'implies that the limits of that station are to be under the superintendence and control of the commander of that station, and that he may place his cruizers within the limits of that station, wherever, in his judgment, the interest of the service may require: but to allow him to place his cruizers beyond his own station, for the purpose of cruising out of that station, is inconsistent

[29] http://gale-gaylefamilies.com/gale-gayle-families-of-the-west-indies.html, June 2016.
[30] Lady Gardner v Lyne (1811) 13 East 574.

with the idea of a station, and is making the whole ocean from one extremity to the other eventually within the limits of any one particular station'.[31]

Ellenborough and the Court of Common Pleas developed the territorial theory in a further claim arising out of the departure of Gardner from the Irish station in 1805.[32] Although it concerned events just before the Muros Bay captures, it came to court two years after it, in November 1813.

Whilst still in command of the Irish station, Gardner had ordered the frigate *HMS Topaze* under Captain Willoughby Lake to cruise the same hunting ground to which Drury would later send Captain Maitland and the *Loire*. On her way, however, she had captured a prize, which she took into Cork on 22nd February 1805. There was no dispute that Gardner was entitled to the flag-share of that prize as it was taken under his orders, within the territory of the Cork station and while he was still in command of that station. Instead of continuing on her cruise as originally ordered, however, *Topaze* set sail from Cork on 15th March 1805 with Gardner flying his flag on board having handed over command to Drury. They arrived in Plymouth on 17th. Gardner then received his appointment to the Channel fleet on 20th March. Then came the controversial order from Gardner to Lake, dated 30th March 1805. It came about because the Admiralty had received a letter from the merchants at Lloyd's Coffee House about the unprotected state of the homeward bound convoy from Surinam in South America.[33] Having told Lake about the Lloyd's letter, Gardner gave Lake an order that:

'you are hereby required and directed in obedience to their Lordships' directions, to proceed to sea, and cruise for one week to the westward for the protection of the said convoy, and at the expiration of that time it is their Lordships' directions that you proceed in execution of the former orders which you received from me, and at the expiration thereof you are to return to your former station at Cork, and follow the orders of Rear Admiral Drury'.[34]

The terms of the order suggest that Gardner had orders from the Admiralty to send *Topaze* on the voyage that he prescribed, but no evidence of such an order was before the court, which

[31] Lady Gardner v Lyne (1811) 13 East 574, 585.
[32] Drury v Lady Gardner (1813) 2 M&S 150
[33] Drury v Lady Gardner (1813) 2 M&S 150, 152.
[34] The reference to former orders is to the orders dated 21st January 1805 to start a 6 week cruise.

was critical of the state of the evidence and disinclined to fill in any gaps by judicial inferences.[35]

Topaze left Plymouth again on 1st April 1805 as a result of Gardner's order, and arrived within the cruising ground that he had prescribed on 21st April. On 7th May 1805, *Topaze* captured a Spanish prize, the *Napoleon* within the limits of the Cork station and the area prescribed by Gardner in his order of 21st January 1805, but, as the court found, outside of the six week period covered by his orders. On 20th May 1805 *Topaze* captured a second prize, the Spanish privateer *El Fenix*.[36] Once again, her capture was treated as having been made outside the six week period covered by Gardner's order for a cruise. Her capture was also made just outside the limits of the Cork station and the area prescribed by Gardner's order of 21st January 1805. The ship's log book did not reveal whether the chase had begun within the limits of the Cork station, and Captain Lake was abroad and unavailable to give evidence. It had been argued on behalf of Drury's estate that the court should infer that the chase began within the limits of Drury's command rather than presume that the captain was guilty of a breach of his orders in straying out of his stipulated limits. Once again, however, the court declined to assist and refused to make such an inference.

The Spanish ships were condemned as prizes and the flag eighth was paid to Lord Gardner; the sum of £1,961 17s. As Drury had taken over command of the Cork station, including the *Topaze*, at the time of the captures he claimed the flag-share from Gardner and the action between their respective estates eventually came on for hearing before the full Court of Common Pleas in November 1813.

The court held that Drury's claims to the flag-share relied on his having succeeded Gardner as commander of the Cork station. As the *Napoleon* had been taken as a prize by a ship attached to the Cork station at a time when it was under the command of Admiral Drury, and within the limits of the station, Drury and his estate were entitled to the flag-share of that prize.

Further, once he had handed over command to Drury, Gardner's authority over the *Topaze* had been limited to ordering her to take him to Plymouth. The court refused to infer any further

[35] Per Lord Ellenborough, Drury v Lady Gardner (1813) 2 M&S 150, 161.
[36] *London Gazette* 11th June 1805, No. 15815, p. 773, Letter 20th May 1805 Lake to Gardner copied to the Admiralty, the law report adopts the Anglo-Greek version of her name, '*Phoenix*'.

authority from the Admiralty without proof of an order. When the *Topaze* sailed from Plymouth, therefore, she had been a ship of the Cork station returning to Drury as her commander-in-chief in Cork, despite Gardner's order of 30th March 1805. *El Fenix*, however, had been taken outside the limits of that station, and there was no evidence that the chase began within the limits of the station. The court held, therefore, that Drury's appointment to the Cork station gave him no right to that capture as his rights were 'coextensive with the limits of the station'.

Prizes while Acting Contrary to a Flag-officer's Orders

There were limits to the extent to which a commander-in-chief could claim that a captain was acting under his direction. Where a captain was acting inconsistently with his orders, because his actions were outside the orders he had received, he had been ordered to do something else, or even not to do the things that he was doing, then his commander-in-chief was not entitled to a share of prizes taken in the course of such actions.

In July 1796 Captain Milne of the frigate *HMS La Pique* was attached to the Leeward Island station with orders to lay off Demerara for the protection of the colony.[37] French depredation of the British trade in the area was a real problem and British merchant ships had insurance that was only valid if they sailed in convoy with a Royal Navy escort. On 1st June 1796 Admiral Christian, the then commander-in-chief of the station, had written to the Governor of Demerara that he would direct a Royal Navy ship to undertake a convoy to Europe on 15th July 1796 as the ships needed to sail then to make the rendezvous in St Kitts for the onward convoy to England.[38] He told the Governor to tell the merchants to load their ships and be ready to put to sea. By 21st July 1796 the merchant ships had responded to Christian's letter and were ready for sea, but no convoy ship had arrived in Demerara. Under pressure from the Governor and the merchants, Milne decided to convoy the ships to St Kitts, where they could join the convoy to England, anticipating that he would soon make a speedy return to Demerara.

While sailing to St Kitts, however, Milne received a letter from Admiral Christian dated 23rd June 1796 explaining that he had appointed the *Madras* to relieve Milne off Demerara. The

[37] A Dutch colony on the north coast of South America, now Guyana.
[38] Christian superseded Admiral Lefroy on 24th April 1796 and was in turn superseded by Admiral Harvey on 23rd June 1796, before sailing to England on 3rd October 1796, *Harvey v Cooke* (1805) 6 East 220.

letter was written on the day that Christian handed over command to Admiral Harvey and contained no further orders for Milne either releasing him from his previous orders or providing for what he was to do next. On 27th July, while off St Lucia, Milne dispatched a tender with a letter to Christian explaining why he was sailing for St Kitts, hoping that Christian would approve. Milne told Christian that should the convoy have left St Kitts before he arrived he would wait there for Christian's orders. Some of the convoyed ships were in need of repair, which might detain them in St Kitts for two days in any event. Milne arrived at St Kitts on 31st July 1796. His letter to Christian arrived in Martinique on the following day, although Milne feared that the tender had been captured or lost as he received no orders from either Christian or his replacement, Harvey.

The St Kitts convoy had in fact departed for England already and so the Demerara ships were in St Kitts without a convoy escort to England. Enemy ships were ready to prey upon them and the hurricane season was coming. The convoy captains again pressed Milne to act, this time to continue his escort of the convoy fleet all the way to Europe. Expecting orders at any time from his commander-in-chief, Milne held off until the 9th August. By then the weather was so threatening that it was unsafe for the merchant ships to remain at anchor and they had to get under way. Milne, therefore, sent an account of what he had done to Harvey, who he had heard had taken over the command. He explained the dangerous position of the merchant fleet and that, whilst he had no wish to leave the Leeward station, he had no orders. He added that if he had received none by the following morning he would take charge of the convoy again and sail with them for England. Milne stood over towards Guadeloupe and off Nevis Point on the morning of the 10th August in the hope of intercepting some orders for him, but orders came there none. Accordingly Milne sailed with the convoy on 10th August without orders and set off for England.

Unknown to Milne, Harvey had in fact ordered the *Ariadne* to St Kitts to convoy the Demerara ships to England, but she only sailed on 16th August, and arrived at St Kitts ten days after Milne had sailed. Writing to the Admiralty to explain what had happened Harvey confirmed that Milne had sailed for England out of anxiety for the safety of the convoy, but without his orders to do so. He regretted that Milne had not waited a few days longer, when the *Ariadne* would eventually have arrived.

On 8th October 1796 Milne, by now well out of the limits of the Leeward station, was approaching England when between Start Point and Portland Bill he captured prizes worth over

£34,000. He arrived at Spithead the following day. The day after that he sent his account to the Admiralty to explain his return to England without the orders of his commander-in-chief. Fortunately for Milne their lordships approved of his actions.[39]

Harvey claimed the flag eighth share of Milne's prizes, worth £4,261.4s.8d, but Milne contested his claim. Harvey claimed that even after his departure from his orders Milne remained under his command as commander-in-chief. As Grose J. pointed out, the real question was not whether Milne thought that he was acting wrong, or whether he acted in disobedience to the commands of his commander-in-chief, but whether he was acting under any orders at all. The court was not unsympathetic to Harvey. Le Blanc J. said that he 'should not have been sorry, on principles of public policy, if I could have found that the plaintiff [Harvey] was entitled to the flag-officer's share in this case, because it is not to be approved that an officer, however good his motives may have been, should derive any advantage from his disobedience of orders'. The court held, however, that the wording of the proclamation required a flag-officer to be 'directing' or 'assisting' in the capture and that that was not made out on the facts of the case.[40] Harvey was not entitled to claim the flag-share.

It would have been possible to argue that although Milne had no express orders to act as he did, he had implied authority to act as the exigencies of the situation required. Harvey's letter to the Admiralty confirming that Milne had sailed without orders posed a problem for that argument, but the fact that it was not raised at all is instructive. Even a flag-officer keen on obtaining £4,261 was not keen on arguing that his orders carried with them an implied authority to ignore them if the circumstances warranted it. The court had worried about giving a benefit to captains who disobeyed their orders, but the ruling provided a good reason for commanders to ensure that their captains always had up-to-date orders, and to draft their orders in such a way that they permitted useful activities that might lead to the taking of prizes.

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[39] When the proceedings were heard the court complained about the length and detail of the written case that was presented, *Harvey v Cooke* (1805) 6 East 220, 221. The law report contains a 'very much curtailed' account, but is still full of detail, upon which the above account is based.

[40] Lord Ellenborough C.J., Grose J., Lawrence J. and Le Blanc J., Harvey v Cooke (1805) 6 East 220.

Thompson and the *Hyaena*

Cases of captains sailing contrary to their orders were not quite as rare as one may suppose. Difficulties with communication might frequently place a captain who was bound by his orders in a difficult position and many examples of subordinate initiative can be found. 'For the system of command to work effectively, to use initiative did not mean to do what a captain thought best, but to do what was expected of him by his commanding officer within a recognised and respected hierarchical structure and a framework of detailed doctrine.'[41]

In 1779 the 24-gun frigate *Hyaena* had been in the West Indies during the War of American Independence under Captain Edward Thompson when he too was pressed by worried merchants to convoy a rich fleet home contrary to his orders. He was court martialled for his disobedience to his orders, but acquitted as the Admiralty approved of his action.[42]

In 1781 Thompson and the *Hyaena* were back in the West Indies and Thompson was awaiting written orders to escort a convoy home again. Thompson had received a verbal message relayed by a Lieutenant that Admiral Rodney intended him to escort the convoy and to take with him the admiral's despatches. Neither the written orders nor the despatches arrived, however, as Rodney, in ill health but buoyed by his plunder of St Eustatius, had already sailed for England. Thompson decided to sail with the convoy without orders and faced another court martial for his trouble. Once again he was acquitted.[43]

The tribulations and trials of the Thompsons of the Royal Navy helped to set the limits of initiative, and the doctrine within which it operated. It did so without career ending harm to able officers. Thompson, who had been made a Post-captain in 1772 died a Commodore on the coast of Guinea in January 1796, after a successful career despite his courts martial.[44] The lieutenant who had brought the verbal message from Rodney was a Lieutenant Home Riggs Popham, who had been a midshipman under Thompson in 1779.[45] His name reappears in the history of prize law. The example of Captain Thompson may have contributed to a somewhat

[41] Sam Willis, *Fighting at Sea in the Eighteenth Century: The Art of Sailing Warfare* (Woodbridge: Boydell & Brewer, 2008), 99.
[42] Popham, *A Damned Cunning Fellow*, 9.
[43] Popham, 12.
[44] Nicolas, *The Dispatches and Letters*, vol. 1, p. 62.
[45] Popham, *A Damned Cunning Fellow*, 12.

imaginative approach to compliance with orders on Popham's part, which was to fuel further litigation during a colourful career.[46] The temptation to sail without orders from the Cape to seek wealth and glory in the River Plate that Commodore George Johnstone had resisted in 1781would prove too great for Popham, as we shall see below.

2nd Article: What was the share of a single flag-officer?

From 1793 to 1808 the share of a single flag-officer as commander-in-chief where there were no other flag-officers on the station was one of the captain's three eighths. The Flag-share had been one eighth since the proclamation of 1744. If the captain was under direct Admiralty orders, or otherwise not under the command of a flag-officer, then the captain kept the full three-eighths share.

The single most significant change in this arrangement came in 1808[47], when the share received by captains and flag-officers was reduced in order to distribute a greater share to the crew, as discussed in Chapter 6 above. After 1808 the captain's share was two-eighths (i.e. a quarter), rather than three-eighths. Where he had to account to a flag-officer or flag-officers the captain still had to hand over one third of his share, but it was one third of his lower share of two-eighths. Thus after 1808 the share going to flag-officers went down from an eighth to a twelfth. The reasons for this distribution are considered in Chapter 9 below.

3rd Article: When does a new flag-officer take over?

The 1793 proclamation provided that a flag-officer 'sent to command at Jamaica or elsewhere, shall have no right to any share of Prizes taken by Ships or Vessels employed there before he arrives at the Place to which he is sent, and actually takes upon himself the Command'.

A commander-in-chief could be reluctant to hand over to a new flag-officer sent by the Admiralty to take over. If the new flag-officer was junior to his predecessor then this could

[46] Donnelly v Popham (1807) 1 Taunt. 1. See below Ch.8.
[47] Royal Proclamation of 15th June 1808, *London Gazette* 1808 No. 16155, 853.

cause real problems. Unless the departing flag-officer had a better station to go to, this provision relating to prize money was not going to help make it any easier.

A dispute had arisen during the American War of Independence over who was entitled to the flag-share of prizes on the North American Station after Admiral Pigot superseded Admiral Digby in 1782, where the prizes were taken by ships sent out by Digby before he was superseded but the captures were made afterwards. Lord Mansfield pointed out that it had formerly been the position (i.e. before the proclamation of June 1744) that the moment an admiral was appointed to a command he shared in all the prizes taken on that station, even before he actually joined the fleet.[48] The June 1744 proclamation wording, repeated in 1793, had changed that, however. Now a new commander-in-chief could not have a share of prizes until after they came within the limits of their command, but once there they were entitled to the flag-share of prizes from that time and it mattered not who had given the orders or sent the capturing ships out.

An attempt was made in 1803 to clarify matters further by stipulating that:

'a Flag-officer, sent to command on any station, shall have no Right to any Share of Prizes taken by Ships or Vessels employed there before he arrives within the limits of such station, and actually takes upon him the Command by communicating orders to the Flag-officer previously in command, save only that he shall be entitled to a share of prizes taken by those particular ships to which he shall actually have given some order and taken under his command within the limits of such station'.

If the Admiralty sent a new commander-in chief to take over, then they wanted that to happen. Seniority was, however, important in the service and the Admiralty respected that. This caused a tension when the new commander-in chief was junior to the departing commander. New wording adopted after 1808 came down in favour of deferring to the importance of seniority and stipulated that:

'a Flag-officer, sent to command on any station, shall have a Right to Share as Commander in Chief Prizes taken by Ships or Vessels employed there from the time he arrives within the

[48] *Pigot v White*, Easter 25 Geo. 3 B.R., noted in *Johnstone v Margetson* (1789) 1 H. Bl. 265n.

limits of such station, but if a junior Flag-officer be sent to relieve a senior, he shall not be entitled to share as Commander-in-Chief in any prizes taken by the squadron until the command shall be resigned to him but shall share only as a junior Flag-officer until he assumes the Command'.

It was not always the outgoing flag-officer who was reluctant to put the handover into force, however. When Rear-Admiral Robert Digby arrived in New York to take over command of the North American station from Admiral Graves in 1781 the situation was so poor that Digby refused to take over the command until Graves had sorted out the mess that he had created.[49]

4th Article: Passage through the station of another

By 1803 the Admiralty thought it appropriate to include a specific provision to try and reduce the 'turf wars' caused by flag-officers passing through another flag-officer's station.

On 14th September 1796 Vice-Admiral Sir Hyde Parker had arrived at Barbados on the Leeward Island station. Although he was senior in rank to Admiral Harvey, the commander-in-chief on the Leeward Island station at the time, Hyde Parker had no orders appointing him to take command of that station and did not do so. Hyde Parker waited in Barbados for Admiralty orders until 1st November 1796 when he sailed to Jamaica to take command of that station. Although he had simply been in transit through the station, Hyde Parker claimed that the chief command role had 'accidentally' devolved upon him as a senior officer happening to come within the station. When the action came before Lord Ellenborough, he held that Hyde Parker's presence in transit gave him no right to the commander-in-chief's share of prizes taken by ships of the station while he was on the station.[50]

The 1803 proclamation provided in terms that a right of passage gave no right to prizes unless it included the right to take command of the station and that right was exercised:

'a Commander-in-Chief or other Flag-officer, appointed or belonging to any station and passing through or into any other station shall not be entitled to share in any prize taken out of the limits of the station to which he is appointed or belongs, by any ship or vessel under the

[49] Willis, *The Struggle for Sea Power*, 455.
[50] Referred to in the course of argument before Lord Ellenborough in *Harvey v Cooke* (1805) 6 East 220, 228.

command of a Flag-officer of any other station, or under Admiralty orders [unless such Commander-in-Chief or Flag-officer is expressly authorised by the Lords Commissioners of the Admiralty to take upon him the command in that station in which the prize is taken and shall actually have taken upon him such command, in Manner aforesaid]'.

The exception at the end of this wording from '*unless*' onwards for a flag-officer being authorised to take command was unnecessary as such an officer would not be 'passing through or into any other station' in such circumstances. The wording therefore provided more confusion than clarity and was deleted in the 1808 proclamation.

5th Article: When a junior Flag-officer is sent to join a station

Two issues arose when a junior Flag-officer was sent out to join a superior Flag-officer on a station. The first was when did he have to share the prizes he captured en-route with the superior Flag-officer on the station? The second was when did that junior flag-officer become entitled to a share of the prizes being captured by the ships on the station?

The 1793 proclamation dealt with the first issue and stipulated that when a Flag-officer was 'sent out to reinforce a superior Flag-officer at Jamaica, or elsewhere, the superior Flag-officer shall have no right to any Share of Prizes taken by the inferior Flag-officer before the inferior Flag-officer shall arrive within the limits of the command of the superior Flag-officer, and actually receive some Order from him'.

In the summer of 1801 Admiral Sir James Saumarez was sent by the Admiralty with a squadron of ships 'to invigorate the blockade of Cadiz', which the Mediterranean fleet under Lord Keith was keeping up. His orders required him to cooperate with the allied fleet of Portugal, but 'to put himself under Lord Keith's command'.[51] Saumarez was required by his orders to 'use his best endeavours to prevent the enemy's ships [in Cadiz] from putting to sea, or to take and destroy them should they sail', but he was also 'to keep a good look-out for any French squadron which may attempt either to join the Spanish ships at Cadiz, or pass through the

[51] The San Antonio, (1804) 5 Rob. Adm. Rep. 209.

straits; and to use his best endeavours to intercept, and to take or destroy it'.[52] On his arrival off Cadiz Saumarez wrote to Keith telling him of his arrival and the vessels that he had taken under his command. Although he referred to his instructions from the Admiralty, Saumarez did not at that point send a copy of the instructions to Keith, and in his letter to Keith he did not expressly place himself under Keith's command.[53]

At the same time Rear-Admiral de Linois had sailed with a small squadron of three French ships from Toulon, hoping to combine at Cadiz with six ships of the line that Spain was transferring to France and five Spanish ships of the line. He was also expecting to be joined by five French ships of the line from Rochefort, but in the event they did not sail. The intention was for the combined fleets to prey on British convoys bound for Egypt and then to sail to join Ganteaume off Egypt to relieve the French army abandoned there by Bonaparte.[54] On learning that Cadiz was blockaded, and realising that his fleet had been seen by the 14 gun sloop *Calpe* at Gibraltar, which had sailed for Cadiz to warn the fleet off there, Linois had taken refuge at Algeciras, on the opposite side of the bay to Gibraltar. There he anchored under the protection of batteries on shore.

Saumarez, with a squadron of six ships of the line, found Linois on 6th July 1801 and attacked. As he did so, however, the wind died and the attack failed. One British ship, *Hannibal*, grounded under fire from shore guns and surrendered. The others made their way across the bay to Gibraltar, badly damaged. Keith had left Gibraltar before Saumarez's arrival to sail into the Mediterranean with Abercromby's forces bound for Egypt. He had, however, left orders at Gibraltar addressed to 'Sir Erasmus Gower, or any other flag-officer appointed to act on this station'. Sir John Borlase Warren had read the orders on his arrival on the station and had left them for others who might arrive thereafter. Saumarez had not called at Gibraltar or seen the orders from Keith before the first encounter with Linois at Algeciras. Although he was provided with Keith's orders when he arrived at Gibraltar, Saumarez later told the Admiralty Court that he had not read them and that he 'did not interfere with the Marine department', 'because he was otherwise employed'.[55]

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[52] Sir John Ross (ed), *Memoirs and Correspondence of Admiral Lord de Saumarez*, vol. 1 (London: Richard Bentley, 1838), I; 327–28.
[53] Letter 26th June 1801 Saumarez to Keith, Sir John Ross (ed), 1:338.
[54] N. A. M. Rodger, *The Command of the Ocean: 1649 - 1815*, (London: Allen Lane, 2004), 471; Jonathan R. Dull, *The Age of the Ship of the Line: British and French Navies, 1650-1815* (Barnsley: Seaforth Publ, 2009), 157; Musteen, *Nelson's Refuge*, 31–51.
[55] The San Antonio, (1804) 5 Rob. Adm. Rep. 209, 217.

He was certainly busy. It is clear from his letters that Saumarez felt the failure of his attack deeply, although he accepted that 'Divine Providence' had decreed the lack of wind that was its downfall.[56] He was determined to get his ships ready to have another attempt to defeat Linois if he could, and regarded it as important to his personal honour that he should do so on his own responsibility and consistently with his Admiralty orders. It took feverish activity at Gibraltar to get the British ships ready for battle again. Intelligence received in Gibraltar from Cadiz suggested that support for Linois was expected, and so on 9th July 1801 Saumarez wrote again to Keith. He made no reference to Keith's orders, nor did he place himself under Keith's command. Instead he sought help from Keith with his task of tackling Linois under, as he saw it, his orders from the Admiralty, 'I hope something may join me from your Lordship before they [the French] can put to sea'.[57] No such support arrived.

On 10th July Vice-Admiral Moreno arrived from Cadiz to escort Linois to safety. Had the combined allied fleet sailed for Cadiz that night then Saumarez would not have been ready to follow them. They did not sail, however, until the 12th, by which time Saumarez was just about ready. Fresh from their repairs, Saumarez and his squadron pursued the now larger allied fleet and attacked during the night. One French ship, the *San Antonio,* was captured and two Spanish ships blew up. Both sides claimed victory over the two encounters. By his efforts in Gibraltar, however, Saumarez had retrieved his reputation and inflicted a strategic blow to the alliance between France and Spain. Spain demanded its fleet back from Brest and relaxed its pressure on Britain's ally, Portugal. The battle contributed to the pressure for peace that lead to the end of the war against revolutionary France with the Peace of Amiens signed in October 1801. The Battles of Algeciras, or the Battle of the Gut of Gibraltar, as they became known, were the last naval battles of that war.

Saumarez wrote to Keith to tell him of his actions. Keith's response was to claim his share of the prize money as the commander-in-chief on the Mediterranean station where Saumarez's activities had taken place.

[56] Sir John Ross (ed), *Memoirs and Correspondence of Admiral Lord de Saumarez,* 1:390.
[57] Sir John Ross (ed), 1:387/8.

Keith's claim to the prize money was heard in the Admiralty Court by Sir William Scott, who gave judgment on 30th May 1804. Two issues arose: a) was Saumarez sent out 'to reinforce' Keith and b) had he actually received 'some order' from him?

Scott was unimpressed by Saumarez's evidence that he had not read Keith's orders. 'Certainly', he said, 'this Court can never admit an averment that the inferior officer had not read orders that were directed to him, and were delivered to him by his superior. Indeed I cannot but observe that Sir James Saumarez speaks with some uncertainty on this fact, which I am inclined to think did happen, though it may have escaped his recollection'. Scott considered that Saumarez's lack of interference with the Marine department, i.e. acting as Keith's subordinate in relation to the station as a whole, was because his other duties prevented him. It was not that Keith's orders did not apply to him, it was just that Saumarez had been too busy to attend to them. Scott's analysis rather begged the question, however. Saumarez's case was that he was not Keith's inferior officer because he was 'otherwise employed' under the direct orders of the Admiralty in attempting to intercept the enemy.

Scott held though that it was not necessary that the Admiralty orders should use the word 'reinforce' in order to fall within the proclamation. It was enough if the inferior officer was directed to put himself under the command of his superior for the purposes of general co-operation. Saumarez's submission that he had been sent 'to perform a special and distinct service under the orders of the Admiralty' was rejected. He had received the order from Keith and was held to have read it, but been too busy to remember having done so or to implement its terms. In holding as he did, Scott was attempting to give effect to the Admiralty's intention that Saumarez would be under Keith's command. Saumarez could have said that he had read the orders but that they did not apply to him so he ignored them as he was acting under direct Admiralty orders at the time, before he had placed himself under Keith's orders. He did not do so and that supported Scott's view that the Admiralty's orders were intended to mean that by arriving on the station and receiving Keith's order Saumarez had placed himself under Keith's command. That the capture was due to enormous effort on the part of Saumarez and his squadron, and none on the part of Keith, was irrelevant. Equity in relation to the effort applied did not enter into it. The court was simply determining the rights of the parties in accordance with the the proclamation and the Admiralty orders. Although the judgment did not refer to it, the decision was consistent with Scott's decision in the previous year that where the Admiralty

had intended 'a distinct and separate service' the flag-officer in command of the station would not be entitled to a share of prize money.[58]

Although Saumarez had to share his prize money with Keith, he had been rewarded by the Admiralty for his efforts. Already a baronet, he was made a knight of the Order of the Bath and awarded a pension of £1,200 p.a. by parliament for his efforts.[59]

When war resumed, the wording of the new proclamation in 1803 provided that the inferior Flag-officer joined the station when he arrived within the limits of the station and 'moreover' shall either have actually received some order from the superior officer or was 'acting in execution of some Order issued by' the superior Flag-officer. On its own this amendment makes little sense as a matter of drafting as it would be difficult to see how the inferior Flag-officer would be 'acting in the execution of some Order' without having received it by some means or other. In the context of the then still ongoing dispute between Keith and Saumarez it can be seen as an attempt to clarify the position in future, although the wording would not in fact have removed the scope for dispute.

The 1808 wording, four years after the judgment in the Algeciras claims, attempted a further clarification by stipulating that the inferior Flag-officer must either have arrived within the station or have received some order 'directly' from the superior Flag-officer or be 'acting in execution of some Order issued by him'. Thus the previously conjunctive requirements had become alternatives. The alternatives reflected the wording that had been introduced in 1803 in the 1st Article dealing with when a captain came under the command of a flag-officer. Although the share of all flag-officers was being reduced in 1808, the position of commanders-in-chief on a station was being marginally strengthened as against junior flag-officers sent to join them.

The 1808 proclamation also dealt with the second issue, which had not been addressed in either the 1793 or 1803 proclamations. From 1808 inferior Flag-officers were expressly entitled to their proportion of all captures made by the squadron they were joining from the time they arrived within the limits of the command of the superior Flag-officer.

[58] The Orion (1803) 4 Rob. Adm. Rep. 362, 372/3. See below under Art. 9.
[59] Annuity to Admiral Saumarez Act 1803, 43 Geo. 3 c. 37.

6th Article: When did a departing Commander-in-Chief lose his right to a share of prizes?

This provision was one of the most controversial and disputed provisions of them all. The 1793 proclamation provided simply that 'a Chief Flag-officer returning Home from Jamaica, or elsewhere, shall have no Share of the Prizes taken by the Ships or Vessels left behind to act under another command'.

The provision had a history behind it. The 1740 proclamation had referred simply to the well-worn, but flexible, phrase that a Flag-officer should be 'actually on board, or directing and assisting in the Capture'. As disputes arose among Flag-officers as to the meaning to be given to this wording, the 1744 proclamation introduced seven rules in the first edition of the rules now being considered. The fourth rule was that 'a Chief Flag-officer returning home from Jamaica, or elsewhere, shall have no Share in Prizes taken by the ships left at Jamaica, or elsewhere, after he has left the limits of his Command'. This wording, however, was still considered to be 'always disputable and uncertain' as it was not always possible to be certain when a ship passed a vague and hypothetical line at the edge of a station.[60] For this reason the wording used in the 1793 proclamation referring to the flag-officer having left the ships of the fleet acting under the command of another was adopted, and was extended by a proclamation of 25th January 1797 to Spanish prizes. When put to the test, however, even the 1793 and 1797 proclamations were found to be 'loosely, inaccurately, and ambiguously worded'.[61]

The St Anne

The 1793 wording was considered by the Admiralty Court in the case of The St Anne in 1800.[62] The *St Anne* was a prize taken on the Halifax station on 2nd December 1796 by *HMS La Raison*, commanded by Capt. John Beresford. Beresford was sailing under orders dated 5th November 1796 from Admiral George Murray. Murray was the only flag-officer on the Halifax station at the time and commanded the ships on the station as their commander-in-chief. By the time the

[60] Per Rooke J. Lord Nelson v Tucker (1802) 3 Bos. & Pull. 257 at 270.
[61] Per Heath J. Lord Nelson v Tucker (1802) 3 Bos. & Pull. 257 at 272.
[62] (1800) 3 C. Rob. 60

St Anne was captured, however, he had left the station due to ill-health. When the orders were issued Murray had already been suffering from the effects of a 'paralytic stroke', suffered on 22nd October 1796. Although his condition had not stopped him carrying out his duties while he remained on the station, he was clearly unwell. His own orders from the Admiralty permitted him to return home if he considered it necessary for is health and accordingly, he resolved to return to England.

He duly left the Halifax station on board *HMS Cleopatra* on 12th November 1796. Before doing so he gave orders to the senior captain on the station, Captain Henry Mowatt of *HMS Assistance,* to assume command during his absence. Although Murray intended only a temporary absence, he formally struck his flag on 2nd January 1797, and died on 17th October 1797 without having returned to the Halifax station. A dispute then arose as to whether Murray was entitled to a Flag-officer's share of the *St Anne*. The case came before Sir William Scott who decided that the only question in the case was whether Murray had abdicated his command or not. He held that he had not and thus his estate was entitled to the flag-share. Mowatt, who had assumed command of the fleet, was not a flag-officer, but that was not the basis of Scott's decision. Scott decided that Murray had not given up his command of the station as at the time of capture he still intended to return to the station and so he had not 'given up command' to anyone, be they a Flag-officer or otherwise.

The Santa Brigida

Scott's judgment in The St Anne featured prominently in a later dispute between Lord Nelson and the Earl St Vincent over the proceeds of two Spanish frigates loaded with treasure that were captured by British frigates off the coast of Spain in October 1799.

In October 1799 two Spanish 36 gun frigates, *Santa Brigida* and *El Thetis,* were off the coast of north-west Spain with cargoes of Spanish treasure when they were sighted by four Royal Navy frigates. *HMS Ethalion* pursued and captured *El Thetis*. *HMS Naiad, Alcmene* and *Triton,* meanwhile, pursued the *Santa Brigida* until she too surrendered.[63]

[63] For additional details of the capture and the subsequent litigation see Grahame Aldous, 'Lord Nelson and Earl St Vincent: Prize Fighters', *The Mariner's Mirror* 101:2 (2015): 135–55.

The Treasure

El Thetis had a cargo of 1,411,526 dollars and a valuable quantity of cocoa. *Santa Brigida* had 1,400,000 dollars and a valuable cargo of goods on board. The Spanish coinage was sent to London and sold to the Bank of England for £661,286 13s 9d[64].

The treasure, the other cargo, the ships themselves and their equipment were duly condemned as lawful prize by the Admiralty Court and, perhaps as a result of the ready sale of the treasure to the Bank of England, there was an unusually early pay out in January 1800. Benjamin Tucker, St Vincent's secretary and prize agent went on board *Alcmene* at Saltash on 6th January 1801 and paid out the shares of the prize money for the dollars sold to the Bank of England.[65] The share of the dollars alone for each sailor was £182 4s 9 ¾ d. It was a substantial sum representing over ten times the annual pay of an able seaman, which even after the post 1797 mutiny pay rises was still only about £18 per annum. Digby's share was a fortune; £40,750 18s 3 ¼ d.

The pay-out to the sailors, however, only marked the beginning of a dispute over who was entitled to the Commander-in-Chief's share that would end in High Court proceedings between two of the Navy's most prestigious Admirals.

At the time of the capture Digby was sailing under orders that had been issued to him by St Vincent as commander-in-chief of the Mediterranean station. St Vincent, however, was suffering ill health and the Admiralty had given him permission to return to England if he thought that the state of his health should absolutely require it.[66] The Admiralty's task of managing St Vincent as commander-in-chief of the Mediterranean station was already proving difficult. Nelson's victory at the Nile in August 1798 had been very welcome. It was St Vincent who had appointed Nelson to the command that has led to the victory. The captains of Nelson's fleet at the Nile were his 'Band of Brothers' in that he did not have a great deal of seniority over them, unlike other flag-officers on the station. The appointment had been made at a cost, however. Officers on the Mediterranean station with greater seniority than Nelson had felt that they had been snubbed by St Vincent when he made the appointment. The victory at Aboukir

[64] Statement of Account in the Digby family archive, Minterne House, Box 22a.
[65] Muster Book *Alcmene* TNA ADM 36/12613, Statement of Account in the Digby family archive, Box 22a, and Tucker's Account Book for 1800 in the Sim Comfort Collection.
[66] Admiralty to St Vincent 2nd November 1798 recited in Lord Nelson v Tucker (1802) 3 Bos. & Pull. 257, at 258

Bay had done nothing to quell the disquiet. Sir John Orde had even demanded that St Vincent be court-martialled over his failure to treat him in a manner suitable to his rank. It was a request that the Admiralty declined, but without approving of St Vincent's decision to send Orde home, an outcome that upset both men.[67] There was every reason for the Admiralty to try and avoid upsetting St Vincent even further. They certainly did nothing to clarify whether St Vincent would still be the commander-in-chief of the station if and when he were to avail himself of the opportunity for some sick leave.

St Vincent left Gibraltar on board *HMS Argo* on 31st July 1799. He arrived at Spithead on 16th August 1799 and went to Bath for his health. St Vincent remained in England until 26th November 1799 without having resigned or been superseded or replaced as commander-in-chief of the Mediterranean station. Before departing St Vincent had written to the next senior flag-officer on the station, Vice-Admiral Keith, directing him to take command of the Mediterranean fleet. By the time of the treasure ship captures, however, not only was St Vincent out of the station but so too was Keith and all the flag-officers who were senior to Nelson. Nelson was thus the senior flag-officer on the station and in de facto command. Nevertheless, St Vincent acted immediately to take control of the treasure and claim the flag-officers' share. He sent Tucker down to Saltash to secure the prize. The very next day after the *Santa Brigida* was brought in to Plymouth he was writing a hasty note from his home in Essex, to Digby in Plymouth congratulating Digby and his colleagues 'most heartily on the well-earned fruits of your labours'. 'There can no doubt', he continued. 'of the pretensions of the flag-officers on the Mediterranean station, to shares in everything you have been concerned in the capture of, & Mr Tucker, who is at Saltash will explain any doubts upon this subject much better than I can'.[68]

Nelson was in Sicily when he learned the news of the treasure ship captures. He immediately saw that he could claim the commander-in chief's share in the absence of St Vincent and any other more senior officer on the station. On 19th December 1799 Nelson wrote to his agent, Alexander Davison, authorising him to lay claim to the commander-in-chief's share, with the junior Flag-officers' share to go to Sir John Thomas Duckworth, the only other British Flag-officer on the station at the time. He reinforced his claim by praying in aid the supposed precedent of 'custom' based on Admiral Hotham having enjoyed the commander-in-chief's

[67] TNA ADM 1/398, 10th October 1798 Nepean to Orde and ff.
[68] Letter 25th October 1799, St Vincent to Digby, the Digby family archive, Minterne House, Box 22a,

share when Lord Hood had gone home on leave.[69] Nelson was outraged when he learned that St Vincent was claiming the flag-share as commander-in-chief. He considered that it would be dishonourable of St Vincent to pursue his claim and dispute Nelson's. Writing to Davison he asserted that 'No Admiral ever yet received Prize-money, going for the benefit of his health from a foreign station'.[70] His assertion had been disproved, however, only three days earlier when Scott had delivered his ruling in The St Anne in favour of the estate of Admiral Murray.

On the basis of Scott's judgment in The St Anne it could be expected that St Vincent remained entitled to the commander-in-chief's share of the prizes. If Murray had not resigned his command then neither had St Vincent. At any rate, so it seemed.

The Flag-Officers' share of the treasure ship prize money was paid out to St Vincent's secretary, Benjamin Tucker, but the question remained as to who he should pay the moneys over to; his employer St Vincent or to Nelson? Nelson, St Vincent and indeed Keith all petitioned the King through the Privy Council hoping for some intervention in their favour, but the King and the Admiralty sensibly preferred to leave it to the courts of law rather than be drawn into the dispute.[71] In order to establish his right to payment, and to prevent Nelson from suing him directly, St Vincent issued proceedings in the Court of Common Pleas against his own secretary, Benjamin Tucker, for payment of the money.[72] With Nelson as a party to the proceedings, they came on for trial before Lord Alvanley, the Chief Justice of the Court of Common Pleas, and a jury at the Guildhall in Westminster on 4th March 1801. The court heard evidence from Digby establishing the fact of the capture and Alvanley, who lamented being called upon to give an opinion in a dispute between two such august naval officers, directed the jury to enter a formal verdict for St Vincent and sent the matter to be considered by a full court of four judges.

The court heard arguments from counsel for Nelson and St Vincent twice, from two separate sets of lawyers, before it came to deliver its judgment on 26th November 1802. Four careful and considered judgments were delivered, but they were split with two on each side. Alvanley

[69] Nicolas, *The Dispatches and Letters*, vol. VII p. cxciii.
[70] 9th May 1799 Nelson to Davison from Malta Nicolas, vol. IV p. 233.
[71] Per Serjeant Shepherd in submissions reported in: *A Correct Account of The Trial at Large between Ross Donnelly, Esq. a Post Captain in His Majesty's Navy, Plaintiff and Sir Home Popham, Knt. Defendant.*, 92–93.
[72] For the reasons behind this choice of court see Aldous, 'Lord Nelson and Earl St Vincent: Prize Fighters', 143.

and Rooke J. found for St Vincent on the basis of Scott's reasoning in The St Anne that St Vincent had not given up command of the station, even though he had left it with permission from the Admiralty for reasons of his health. Heath and Chambre JJ. found for Nelson on the basis that the rule was intended to deal with apportionment between Flag-officers. St Vincent was clearly returning home and he had left the fleet under 'another command', namely Nelson. Heath J. asked what the word 'another' was referring to in the article. Looking at the antecedent articles he considered that it referred to 'another flag-officer'. Otherwise the phrase would have no meaning as the fleet would always be under the command of someone when the commander-in-chief left the station. Nelson, he held, was another flag-officer and so St Vincent was not entitled. Murray had been entitled in The St Anne because he had not left his fleet under the command of another flag-officer.

To break the impasse the most junior member of the court, Heath J. who had been in favour of Nelson, withdrew his opinion. This allowed the court to enter a verdict for St Vincent and the case to go to appeal before the Court of King's Bench.

In the course of the proceedings before the Court of Common Pleas it was pointed out that there may be very good reasons why a commander-in-chief has to leave his station to come home where it would be unfair to deprive them of their share of prize money. It was expressed by Rooke J.:

'It is well known in point of fact, that officers have been sent for home that Government might consult or advise with them – they may render the public as essential service by their return on such an account as if they had remained on their station. It would be hard that in such case they should lose the emolument of prize-money, which is a mere gratuity from the country, and disposable at the discretion of the Crown.'[73]

To try and meet this concern the 1803 Proclamation, applying to French and Batavian captures after the collapse of the Peace of Amiens, changed the wording of the article so that it provided:

'a chief flag-officer quitting a station either to return home, or to assume another command, or otherwise, except upon some particular urgent service, with the intention of returning to the

[73] Per Rooke J. Lord Nelson v Tucker (1802) 3 Bos. & Pull. 257 at 270.

station as soon as such service is performed, shall have no share of prizes taken by the ships or vessels left behind, after he shall have passed the limits of the station, or after he shall have surrendered the command to another flag-officer appointed by the Admiralty to be commander-in-chief upon such station.'

Although the 1803 proclamation came into force before final judgment in Nelson's case by the King's Bench, the revised proclamation wording was not retrospective and it was too late to assist in the dispute between St Vincent and Nelson.

The King's Bench heard arguments in the case of Lord Nelson v Tucker in the summer of 1803.[74] It was presided over by Lord Ellenborough, who had been appointed Lord Chief Justice in April 1802 after the death of Lord Kenyon a week earlier. Ellenborough was no stranger to the naval politics involved in the case. As Sir Edward Law, before his elevation to the bench and the peerage, he had served as Attorney General in Addington's administration, along with St Vincent as First Lord of the Admiralty, a post that St Vincent still held at the time the case was argued and decided. Ellenborough was also married to the daughter of George Towry, a Commissioner on the Victualling Board and would have been familiar not just with politics and the law, but also with the politics of naval administration.[75] St Vincent certainly considered that Ellenborough would consult his father-in-law on naval matters.[76] Ellenborough had already heard a similar dispute involving the same issue of construction in an action between Lord Keith and Admiral Pringle concerning the command of the Indian Seas fleet in 1796.[77] He had heard that case in Hilary Term in early 1803 in the Court of Common Pleas sitting again at Guildhall. Like Alvanley in the case of St Vincent/Nelson v Tucker, he had entered a verdict for the plaintiff, but subject to the issue of law being submitted for the opinion of a bench of judges. As Nelson's case was then pending in the list for argument before the King's Bench he put off judgment in Keith's case until after the court had heard the arguments and given judgment in Nelson's case.

Ellenborough delivered a single judgment of the whole court on 14th November 1803. He agreed with Alvanley that the reason Murray had been held to be entitled to the flag-eighth in

[74] Trinity Term; (1803) 4 East 268 n.
[75] Knight R. Britain Against Napoleon, p. 40.
[76] St Vincent to Captain John Markham 2nd December 1802, Letters of Admiral Markham, NRS (1904) p.7.
[77] Keith v Pringle (1803) 4 East 262, also briefly reported in Naval Chronicle, Vol. X, 432.

The St Anne was because Sir William Scott had found that Murray had not abdicated his command, rather than because Mowatt had not been another flag-officer. With all due deference, however, he disagreed with the reasoning behind the decision. He considered that the construction of the proclamation could not depend on the intent with which a commander-in-chief returned home, but on the fact of the return home. Looking at the intent behind the proclamation as a whole, it was to encourage the active service of the Navy, and that would not be achieved by granting prize shares to admirals who were not on active service. He thought that that approach followed the approach of the courts to other cases[78] apart from The St Anne, and accordingly he found for Nelson and overturned the previous judgment in favour of St Vincent.

The court was as respectful of Scott's opinion as Alvanley had been, but they disagreed with both of them. It was an example of what today we would call a purposive approach to construction by the court. The Court of Common Pleas gave its verdict during the Peace of Amiens. By the time the King's Bench came to consider the matter, war had resumed and maybe the purpose of encouraging active naval officers such as Nelson seemed more pressing than during the peace.

The potential unfairness to a Flag-officer coming home in the interests of the nation had been addressed in the 1803 wording. Indeed, Nelson was to benefit from the 1803 (and 1805) wording as it justified the claims that Nelson's then secretary and prize agent, John Scott, made to prizes taken during Nelson's absence to pursue Villeneuve across the Atlantic in 1805, when Admiral Sir Richard Bickerton was left in acting command of the Mediterranean station.[79] It has been suggested that Scott's claim put Nelson 'dangerously close' to St Vincent's position in the litigation arising from the 1799 captures.[80] Although Scott was not a trained lawyer he had acted as a Judge Advocate at a Court Martial, was experienced in handling prize claims and was as well qualified legally as most undertaking such work.[81] The rules had changed since 1799 and so whilst Nelson's position in 1805 may have been factually close to St Vincent's, under the rules then applicable it was legally quite different. There was no inconsistency

[78] Johnstone v Margetson 1 H. Blac. 261, Pigot v White 1 H. Blac. 265 n.
[79] John Sugden, *Nelson: The Sword of Albion*, 2013, 929n4.
[80] Sugden, 929n4.
[81] His certificate of this service was enclosed with the letter to Marsh &Creed of 11th August 1803, John and Beryl Maynard, 'Nelson's Secretary and Friend, John Scott [2 Parts]', *The Nelson Dispatch* 12, no. 6 & 7 (2016): 358–63 & 424–32.

between the claims made by Nelson in 1799 and 1805: the rules were not the same, and the change justified different positions.

Duncan v Mitchell

Even the decision in Nelson v Tucker did not put an end to claims by admirals departing on grounds of ill health, however. In 1799 Admiral Sir Andrew Mitchell had been ordered to command an Anglo-Russian joint land and naval expedition in the Texel in Holland, then known as the Batavian Republic. The land forces were under the command of Sir Ralph Abercrombie. Admiral Lord Duncan already had command of a fleet on that station, however, and Mitchell's orders required him to put himself and his fleet under the command of Duncan should it be necessary for the two fleets to cooperate, and to consider himself under his command and attend to his orders and signals while the two fleets remained on the station. When Mitchell arrived on the station he placed himself under Duncan, who exercised his command of the expedition, including drawing up a line of battle and sending in a proposal to Admiral Story in command of the Batavian forces for his surrender. Before anything came of the preparations, however, Duncan sailed for home with his fleet as a result of his own ill health. After Duncan and his ships were out of sight and beyond the point where they could have seen signals of distress, heard the sound of guns or come to Mitchell's assistance, but before they reached England, Story, faced with mutiny in his own fleet, accepted the proposal for his surrender and the Dutch fleet surrendered. Two days later Duncan, unaware of the surrender, wrote to Mitchell that he should not consider himself as having been under Duncan's command 'longer than from the 30th August' and that he had only been unable to notify him earlier due to his indisposition. The Dutch fleet had agreed to surrender at about two o'clock on the 30th, and struck their colours at about ten at night.

As the expedition was a joint land and naval expedition, the distribution of prize money arising from captures was determined by a warrant from the King dated 26th June 1800. The warrant granted the produce of the ships and other captures to Abercrombie and Mitchell in trust to be paid by them to those in the army and navy as were entitled according to a plan of distribution set out in the warrant. The plan determined that the whole sum was divided into eighths, with one eighth to go to the commanders-in-chief and flag and general officers. Despite his departure Duncan claimed to be entitled to the commander-in-chief's share. Anticipating the usual disputes, the warrant provided for 'any doubts' to be decided by the two commanders-in-chief

and the flag and general officers, or such of them as could be conveniently assembled, or by such persons to whom they or the majority of them may agree to refer the issue. There being no other flag-officers than Duncan and Mitchell, four of the army generals who could be assembled referred Duncan's claim under this clause to three referees. The referees found for Duncan, but Mitchell objected that the clause was not intended to cover a dispute as to who was the commander-in-chief. Duncan died in 1804, but Duncan's estate pursued his claim for the commander-in-chief's share of the prize money. The claim only reached a hearing on the issues in 1814 and Lord Ellenborough delivered the judgment of the court on 3rd May 1815.[82] The court rejected Duncan's claim. It agreed that the dispute resolution clause in the warrant was not intended to cover the question of who was the commander-in-chief and so the decision of the referees was not binding. As Duncan had sailed for home, the court decided that he was no longer the commander-in-chief and that Mitchell must therefore have been in that position. Mitchell was entitled to the commander in chief's share, not Duncan.

1805 and 1808

A further proclamation on 31st January 1805 applied the same wording as the 1803 proclamation to captures of Spanish, Italian and Ligurian prizes.

The 1808 proclamation then sought to clarify the wording adopted in 1803 and 1805 even further, to make plain that there were two circumstances dictating when a departing commander-in-chief lost his right to share in prizes. The first was where another Flag-officer had been appointed by the Admiralty to command the station in which case he lost his right to prizes when he surrendered the command to his successor. The second was where he left his command without having been superseded, in which case he lost his right to prizes once he passed out of the limits of the station. The proviso saving the right to share in prizes where the departure was temporary and upon some particular urgent service with the intent of returning to the station as soon as such service was performed still applied. The 1808 wording was that:

'a Chief Flag-officer quitting a Station either to return Home, or to assume another command, or otherwise, except upon some particular urgent Service, with the Intention of returning to the Station as soon as such service is performed, shall have no Share of the Prizes taken by the

[82] Duncan v Mitchell (1815) 4 M&S 105.

Ships or Vessels left behind after he shall have surrendered the Command to another flag-officer appointed by the Admiralty to be Commander-in-Chief upon such station or after he shall have passed the Limits of the Station, in the Event of his leaving the Command without being superseded.'

7th Article: Departing Junior Flag-officers

The 1803 and 1805 proclamations also introduced a similar provision relating to inferior Flag-officers quitting a station. Such officers had no right to a share of prizes taken by the ships remaining on station, but equally did not have to share the prizes taken by ships under their immediate command, once they had passed out of the limits of the station. The one exception was if they had been sent by the Commander-in-Chief for a special service with orders to return as soon as it was over. Thus, If Nelson had sent Bickerton to chase Villeneuve across the Atlantic and then return to the Mediterranean fleet, Bickerton would not have lost out on prizes taken in his absence, but would have had to give a share to Nelson of any prizes he took while away.

The wording of the proclamations, which was repeated in 1808 was that:

'an inferior Flag-officer quitting a station, except when detached by Orders from his Commander-in-Chief out of the limits thereof upon a special service, with orders to return to such station as soon as such service is performed, shall have no share in prizes taken by the ships and vessels remaining on the station, after he shall have passed the limits thereof; and in like manner the Flag-officers remaining on the station shall have no share in prizes taken by such inferior Flag-officer, or by any ships and vessels under his immediate command, after he shall have quitted the limits of the station, except when detached as aforesaid.'

8th Article: Joint Captures with ships from other stations

The 1803 and 1805 proclamations also dealt expressly for the first time with how captains of ships involved in joint captures with ships under a different command were to account for any flag-share. The provision, which was repeated in 1808, was that:

‘when vessels under the command of a Flag, which belong to separate Stations shall happen to be joint captors, the Captain of each ship shall pay one third of the share to which he is entitled to the Flag-officers of the station to which he belongs; but the captains of vessels under Admiralty Orders, being joint captors with other vessels under a Flag shall retain the Whole of their share.’

9th Article: Captures under direct Admiralty Orders

The right of a captain involved in a joint capture but under direct Admiralty orders to keep the whole of his share, rather than share it with any Flag-officers, was in line with longstanding provisions to that effect even where a ship was sailing out of a port or in a station commanded by a Flag-officer. If the captain was under direct Admiralty orders the Flag-officers had no right to a share of prizes taken by that captain.

The wording used from 1793 was:

‘if a Flag-officer is sent to command in the Out-Ports of this Kingdom, he shall have no Share of the Prizes taken by Ships or Vessels which have sailed, or shall sail, from that Port by Order of the Admiralty’

The wording was repeated in 1808, but thereafter the captain’s share was reduced to two-eighths in any event (see above). The provision was still of benefit, however, as at least the captain did not have to account to any Flag-officers for a third of his remaining two-eighths share if he was under direct Admiralty orders.

Confusion caused by a lack of clarity in orders issued by the Admiralty could, however, lead to disputes about whether a ship was sailing under Admiralty orders or the orders of a flag-officer at the time of a capture.

The Orion

In September 1796 the 32 gun frigate *HMS Unicorn,* as a result of intelligence that her captain had received, met and captured a number of valuable homeward bound Dutch ships in the

channel bound for Amsterdam from Surinam. [83] The captain, Sir Thomas Williams, was an aggressive frigate captain who had just been knighted for his capture of the French frigate *Tribune*, following a running fight and a half hour of close combat which left 37 Frenchmen killed and 14 wounded, but not a single casualty on the *Unicorn*.[84] On 5th October he anchored at Spithead, put his Dutch prisoners ashore and recovered his prize crews and officers. His letter to the Admiralty brought an immediate response that the Admiralty approved of his actions.[85] Since the French invasion of the Netherlands and the declaration of the Batavian Republic on 19th January 1795, Dutch (or 'Batavian') ships were enemy ships.[86] The *Unicorn*'s captures were therefore condemned as prizes by the Admiralty Court. Notice of the registration of the prize accounts was finally given on 22nd October 1800.[87] The question that arose in the distribution of the sums awarded in the prize accounts was whether Williams had been sailing at the time under Admiralty orders, or the orders of Admiral Kingsmill, the commander-in-chief of the Irish station.

The Irish station had been created at the beginning of the French Revolutionary War as a new, independent station. There was concern that Ireland could be a backdoor means for the French to mount an invasion of England[88] and so a fleet based in Ireland could patrol for French activities supporting any possible landing of troops, as well as guarding British shipping in and out of the Channel. The limits of the station were poorly defined at the outset, however, and remained so in 1796. In 1797 ships of the Irish station re-captured two large Portuguese ships, the *Galatea* and the *Doris,* south of Ushant, which prompted the Admiralty to write to Kingsmill congratulating his officers on the recaptures, but directing Kingsmill to 'in future confine the limits of the stations of cruising ships under your orders to the northward of Ushant, that they may be at hand, in case their service should be required on the coast of Ireland'.[89]

Unicorn had been attached to the Irish station when it captured the *Tribune* in June 1796, but had been sent by Kingsmill to Portsmouth to refit. Kingsmill's orders to Williams were that

[83] Letter Williams to Admiralty after the captures, recited at *The Orion*, (1803) 4 Rob Adm. Rep. 362, 377n.
[84] ODNB/29552, J.K. Laughton, rev. Andrew Lambert accessed 6.6.2016.
[85] Letter 6th October 1796, William Marsden to Williams recited at The Orion, (1803) 4 Rob Adm. Rep. 362, 378n.
[86] Royal Proclamation against 'United provinces', 25th November 1795, *London Gazette* 1795 No. 13836 p. 1255, see above.
[87] *London Gazette*, 22nd October 1800, No. 15304 p. 1210.
[88] See: W. G. Perrin, Pellew and the Departure of the Bantry Bay Expedition, December 1796, *The Mariner's Mirror* (1920) 6:6 178-183.
[89] Evan Nepean to Kingsmill 4th August 1997, recited at The Orion, (1803) 4 Rob Adm. Rep. 362, 374n.

Williams should acquaint the Admiralty with his arrival in Portsmouth, lose no time in refitting, and then return to Cork for further orders.[90]

When Williams informed the Admiralty of his arrival at Portsmouth, their acknowledgment required him to 'take in stores, &tc. and having so done to continue to follow the orders of Admiral Kingsmill for his farther proceedings'.[91] Before Williams returned to Cork, however, the Admiralty gave him a number of direct orders. At no stage, however, did the Admiralty write to Kingsmill to tell him that they were detaching the Unicorn from his command. The evidence before the court was that the Admiralty would usually, but not invariably, write to tell a commander-in-chief that one of his ships was being detached from his command if that was the case.[92] Some of the orders were frustrated by events, but the last ones, dated 8th September 1796, were effective, and became highly material to the dispute that arose from the Surinam captures.

The first part of the Admiralty order to Williams of 8th September 1796 was to carry £20,000 from Portsmouth to Plymouth. This relatively simple task would have earned Williams the sum of £200 in freight money, paid by the treasury at a rate of 1 per cent.[93] Further, it was a sum that he would not have had to share with his officers or crew, or with his flag-officer as the order came from the Admiralty.

Once he had delivered the money, Williams was 'to proceed in the *Unicorn* to Cork agreeable to former orders, taking a short range on your way thither, so as to enable you to fall in with any homeward-bound ships coming into the Channel, to which you are to afford any protection in your power they may stand in need of.' It was whilst undertaking these orders that the *Unicorn* made the captures of the Surinam ships. It so happened that the area within which the *Unicorn* was to range under the Admiralty orders was none other than the area that ships from the Irish station were frequently sent to cruise by their flag-officer, but the only order that Williams had from Kingsmill was to return to Cork, not to undertake a cruise. Kingsmill argued that the return route to Cork would, or could, have taken the *Unicorn* through the same waters

[90] Orders 20th June 1796, recited at The Orion, (1803) 4 Rob Adm. Rep. 362, 368.
[91] 28th June 1796 recited at The Orion, (1803) 4 Rob Adm. Rep. 362, 368.
[92] 'certified by several officers of distinction, and by clerks of long experience in the business of the Admiralty', The Orion, (1803) 4 Rob Adm. Rep. 362, 367.
[93] See below Ch.10.

and led to the captures, and that as Williams' actions were reconcilable with his orders from Kingsmill, he as the flag-officer was entitled to his share.

The action was heard by Sir William Scott, the Admiralty Court Judge, on 12th August 1803. He concluded that the question was whether anything had been done to supersede, or suspend for a time, the command of Kingsmill as flag-officer. It was enough, he held, 'if another competent authority, and still more if a paramount authority [i.e. the Admiralty], had employed him on a clear, distinct and separate service, although that service might, in its own nature, be very short, and a party be directed immediately after the performance of it to return to his former relation of subjection'.[94]

Scott considered that the order from the Admiralty was inconsistent with the order from Kingsmill to return to Cork, as the instruction to afford protection to the homeward trade contained the prospect that the *Unicorn* would not return straight to Cork, and in fact that prospect had materialised. He held, therefore, that the Admiralty orders constituted a 'separate and distinct' service from any orders that Kingsmill had given and that the flag-officer therefore made no share in the prizes.

It will be recalled that Williams had just distinguished himself in ship-to-ship battle, and it was at a time when the nation stood in need of good news. His knighthood brought him no financial reward, however. Indeed it raised social expectations that required money to maintain them without supplying the means of fulfilment. A payment of freight money for a simple voyage from Portsmouth to Plymouth and the provision of 'intelligence' that there were ships due back from Surinam loaded to Dutch account, with instructions that could lead to their capture without giving the game away would be good ways for the Admiralty to reward an enterprising frigate captain in a more material way. Although this is not an aspect that is expressly identified in the law report, it is entirely consistent with the idea that the Admiralty intended a 'separate and distinct' service for Williams for his benefit, rather than that of Admiral Kingsmill, who was already benefiting from the Irish station.

What the Admiralty had to be careful about, however, was the risk of offending the captain's flag-officer. That would explain why, contrary to the usual practice, the Admiralty never wrote

[94] The Orion, (1803) 4 Rob Adm. Rep. 362, 372/3.

to Kingsmill to tell him in express terms what they were doing. As with the instructions concerning St Vincent's sick leave from the Mediterranean station in 1799 considered above, the Admiralty could leave matters somewhat vague and let the courts sort out their dirty washing in due course at a time conveniently far into the future.

Scott's judgment in The Orion was affirmed on appeal to the Privy Council. Lord Ellenborough, the Lord Chief Justice, and Sir William Wynne, the Master of the Rolls, sat on the appeal. It was a high-powered court sitting at 'the Cockpit', the site of the old cockpit theatre off Whitehall in Downing Street that was used as a Judicial Chamber by the Privy Council. Ellenborough later recalled that the decision on appeal was that:

'there was a new departure as it were from Captain William's original command by the special and paramount order of the Admiralty, appointing a certain deviation from his original orders, after which he was to return again under the command of Admiral Kingsmill: and the prize happened to be taken during that deviation'.[95]

The notion of a 'distinct and separate enterprise' was not a new one in law, and had already been applied in insurance claims. In 1778 a French East Indiaman, the *Carnatic*, had deviated to Bengal during a voyage from L'Orient to China, via the Cape, and back. On her return she was captured in October 1778 by the privateer, *Mentor*. The owner of goods lost to the privateer claimed on insurance in England but failed. Lord Mansfield, in a case that has been cited ever since, held that the deviation meant that the voyage was no longer the one that the underwriters had insured.[96] The deviation had not arisen out of necessity during the contracted-for voyage, but was a separate and distinct enterprise. The owner of the goods was left to try and claim against the owner of the ship in wartime France for having deviated from the route. Such a philosophy was a basic assumption for Lord Ellenborough and others on the bench at the time, as in the case of the *Mary Stevens*, which was captured in 1803 when her captain deviated from her route between Liverpool and Trieste and so the owner of cargo lost in the capture lost the benefit of his insurance cover.[97]

[95] Per Lord Ellenborough during argument in *Harvey v Cooke* (1805) 6 East 220, 232.
[96] Lavabre v Wilson (1779) 1 Doug. P. 284.
[97] Parker v James (1814) 4 Campb. 112 per Lord Ellenborough. See also Marsden v Reid (1803) 3 East 572, 577, Lawrence v Sydenham (1805) 6 East 45 , and Parr v Anderson (1805) 6 East 202.

Even if the court in The Orion was attempting to give effect to the wishes of the Admiralty, it was doing so because that was what the law required of it, and in doing so it was applying a legal test of general and proven use. There was no need to lean on the court to achieve the Admiralty's wishes. They could leave the law to take its course.

10th Article: More than One Flag-officer entitled

Where there was more than one Flag-officer on a station then they shared the 'Flag eighth' between them. Thus, for example, although Nelson had claimed the Commander-in Chief's share of prizes taken by ships of the Mediterranean fleet after St Vincent's departure in 1799, he recognised the right of Sir John Thomas Duckworth to a share as the other Flag-officer remaining on the station.

The size of the share depended on the number of Flag-officers involved, but the Commander-in-Chief always took a larger share. Where there were two Flag-officers then the Commander-in-Chief took two thirds of the flag-share and the inferior Flag-officer took the remaining third. If there were more than two Flag-officers entitled to share then the Commander-in-Chief took half of the flag-share and the remainder was split equally between the other Flag-officers irrespective of seniority.

Allied Fleets and their Flag-officers

The combined fleets of the Royal Navy and allied squadrons in the Mediterranean raised the issue of whether a flag-officer of an allied squadron attached to a British fleet was entitled to share as a flag-officer on the station for the purposes of prize money even if he had not been present at the capture.

Duckworth v Tucker

The officer who eventually brought the issue before an English court of law was Admiral Marquis de Niza, who was in command of a Portuguese squadron attached to St Vincent's British Mediterranean fleet. His squadron of four Portuguese ships led by his flagship *Principe Real* had been attached to the British fleet since May 1798. Initially Nelson had doubted the contribution that the Portuguese ships could make, even though the other three ships, *Rheine*

de Portugal (74, Capt. Thomas Stone), *Alfonso d'Albuquerque* (74, Capt. Donald Campbell) and *St Sebastian* (64, Capt. Sampson Mitchell) were captained by British trained officers.[98] De Niza and his ships had, however, played a significant role on the Italian Coast and in the taking of Malta after the Battle of the Nile.[99]

Where allied ships were jointly involved in the actual capture of prize ships then they could claim a share of the prize money as joint captors when the prizes were condemned before the Admiralty Court. St Vincent recognised the rights of the Portuguese ships in such captures when de Niza was placed under his command.[100] He did so on the basis of his own anecdotal understanding of precedent. His understanding was that the Dutch squadron serving with the British fleet in 1745 had shared in the fleet's prize money and he and Lord Hotham had shared in a similar way with the Neapolitan squadron that had served with them in the Mediterranean. His soundings amongst others, including Sir Philip Stephens[101], confirmed his view.

As noted in chapter 6 above, the 1803 proclamation dealt expressly with captures that the Royal Navy had made together with the ships of allied countries. The proclamation provided that a share of such prizes equal to that which the allied ships would have been entitled to if they had been HM ships would be set apart and be at the King's disposal. Even in such cases, however, disputes could arise and the Prize Act 1807 made express provision for Sicilian ships acting in conjunction with British ships under Admiral Keith at the surrender of Genoa and Savona to share in prize money.[102] To remove the burden of resolving disputes among the Sicilian officers, their share was to be paid to the Sicilian envoy in London to be distributed as the Sicilian King might direct. The provisions of the 1807 Act were extended the following year to include all other joint captures, including the joint capture of Malta in which de Niza had been involved.[103]

What de Niza claimed, however, was not limited to a share of the captures where he was actually involved. He sought a flag-officer's share of captures made by the fleet even where he was not directly involved.

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[98] Sugden, *Nelson*, 120.
[99] Sugden, 150.
[100] St Vincent to Viscount Duncan 18th January 1802, *Letters of Lord St Vincent*, D. Bonner Smith (Ed.) NRS (1921) Vol. 1 p. 299.
[101] A member of the Board of Admiralty who had previously been the long standing First Secretary to the Admiralty.
[102] 47 Geo. III c. 47
[103] 48 Geo. III c. 100.

On 17th June 1799, while St Vincent was commander-in-chief of the Mediterranean station, a French frigate squadron under Rear-Admiral Perree[104], was spotted by a British fleet of 30 ships under Lord Keith near Toulon. Three ships of the line and two frigates under the command of Captain Markham of *HMS Centaur* were detached by Keith to give chase.[105] After a lengthy running battle Perree and his ships surrendered to Captain Markham. By October 1799 both St Vincent and Keith had left the Mediterranean station leaving Nelson in command of the fleet, including de Niza, when the Spanish treasure ships that gave rise to Nelson's dispute with St Vincent were captured.

De Niza claimed a share of both Perree's French ships that had been taken as prizes and the Spanish treasure ship prizes. He did so as a junior flag-officer attached to the British Mediterranean fleet, not because he had had any involvement in the captures. The claim to the Spanish ships in particular presented something of a diplomatic problem. Both Britain and Portugal were at war with France. Britain was at war with Spain, but Portugal was not. The treaties of alliance between Britain and Portugal provided for their navies to act together, and specifically that the officer of either contracting power who commanded the smaller number of ships should be subordinate to the commanding officer of the larger portion of the joint fleet regardless of their respective rank.[106] Thus de Niza was subordinate to St Vincent at the time of the French captures and to Nelson when the Spanish ships were captured.

By an agreement between the British and Portuguese governments, however, the Portuguese ships were not to act against Spain, or be employed in any manner likely to give offence to that power. If the French and Spanish were to combine in the Mediterranean and try to pass through the straits of Gibraltar then Portugal would consider itself threatened by Spain and the Portuguese ships could then be used against the combined enemy fleet, but not otherwise. Both St Vincent and de Niza were aware of the terms that their respective governments had agreed. Thus, de Niza could not himself have taken the Spanish treasure ships as prizes, and neither St Vincent nor Nelson could have ordered him to do so. The contribution of the Portuguese ships off the coasts of Italy and Malta, however, freed British ships to capture Spanish ships off the coast of Spain.

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[104] The frigates *Junon*, *Courageuse* and *Alceste* and brigs *Salamine* and *Alert*e.
[105] In addition to *HMS Centaur*, the ships of the line *Bellona* and *Captain* were detached along with the frigates *Emerald* and *Santa Theresa*, William James, *The Naval History of Great Britain During the French Revolutionary and Napoleonic Wars, (*London, 1822-4), Vol. 2 p.262.
[106] Duckworth v Tucker (1809) 2 Taunt. 7.

None of St Vincent, Nelson or Sir John Thomas Duckworth, the other junior British flag-officer on the station at the time of the treasure ship captures, recognised de Niza's claim to a share of any of these captures as prizes. None of them had been directly involved in the captures and any entitlement depended on the terms of the 1793 prize proclamation, or that of 25th January 1797, which applied the terms of the 1793 proclamation to Spanish prizes.[107] Even after Nelson had won his litigation against St Vincent, however, de Niza's claim grumbled on. Tucker insisted on keeping a retention to meet any possible claim by de Niza despite being pressed by Nelson's lawyer, William Haslewood, to pay over the monies.[108] If de Niza was entitled to a share then Nelson's share would reduce from two-thirds to one half of the flag-share and Duckworth's share would reduce from one-third to a quarter. De Niza had, however, received legal advice from the experienced Admiralty Court lawyer Sir John Nicholl, and pressed on with his claim.[109] His representatives used the admiral's absence from London as a reason for delay, but there may also have been good diplomatic reasons to keep the claim by a Portuguese admiral to Spanish prizes from the public eye. Nelson was killed before the issue was resolved. Those who survived him had to wait until 1809, when judgment was given in an action that Duckworth had brought against Tucker for payment of the disputed share.[110] By 1809 the diplomatic niceties had become less pressing as war had come to the Iberian Peninsula. In November 1807 the entire Braganza court, including the Queen and the Prince Regent,[111] escaped to Brazil on board the *Principe Real* under the protection of the Royal Navy. By 1809 the British had begun the military action in Portugal to remove Napoleon from the Iberian Peninsula that became the Peninsular War.

In June 1809 the Court of Common Pleas held that as a matter of interpretation the proclamation only applied to officers in the pay of the King and that Portuguese officers were therefore not entitled to claim a share.[112] A later attempt by the Portuguese ambassador to persuade the court that the matter should be reconsidered failed, and the judgment stood.[113]

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[107] If de Niza had actually assisted then he would have had to have make his claim as a joint captor in the Admiralty Court proceedings leading to condemnation of the prizes in favour of the captors, per Mansfield C.J. Duckworth v Tucker (1809) 2 Taunt. 7, 34.
[108]Haslewood to Tucker 15th March 1804, NMM CRK/6/139.
[109] De Niza's London representative to Tucker 1804, NMM CRK/6/141.
[110] Duckworth v Tucker (1809) 2 Taunton 7.
[111] The mental incapacity of Queen Maria I of Portugal had led to the regency under Prince Regent Joao.
[112] Mansfield C.J. (Chief Justice of Court of Common Pleas), Heath J., Lawrence J. & Chambre J.
[113] Duckworth v Tucker (1809) 2 Taunt. 7, 37.

Conclusion

The size of the claims for flag shares lead to extensive litigation, which has left a trail of evidence that assists in understanding the dynamics of the changes that were introduced. The Admiralty was concerned to try and reduce friction between officers and to reduce the scope for disputes so as to improve the operational strength of the Royal Navy. It is notable, however, that the Admiralty was happy to leave the resolution of disputes to the courts, rather than seeking to impose resolutions itself. An area of particular dispute involved the final two articles of the proclamations dealing with flag-share rights enjoyed by captains despite their not having reached permanent flag status. The next chapter deals with those circumstances, and the acrimonious litigation to which they led.

Chapter 8, Captains as Flag-officers: Commodores and Captains of the Fleet

11th Article: Commodores as Flag-officers

In the Georgian Royal Navy an appointment by the Admiralty of a captain as a commodore was a temporary position, rather than a permanent rank. A commodore could exercise the powers of a flag-officer as if he were an admiral, but without the permanent elevation to flag rank as an admiral. Once his appointment as a commodore came to an end he reverted to his rank of captain. A commodore could be ordered to take charge of a squadron of ships as their commander-in-chief as if he were an admiral. Some orders terminated the right to fly a commodore's flag when there were other flag officers present. Alternatively the orders could allow a commodore to serve with a fleet as if he were a junior flag-officer in that fleet, under the overall command of an admiral. Thus it was as Commodore Sir Horatio Nelson that Nelson fought at the Battle of St Vincent under the overall command of Admiral Sir John Jervis.

There were two forms of appointment as a commodore. The differences between the two had significant implications for the captain so appointed. A captain could be appointed as a commodore with a captain serving under him or as a commodore without a captain serving under him. A captain who was appointed as a commodore with a captain serving under him was entitled to a captain appointed to command his flagship, leaving him to deal with command of the squadron and whatever task had been assigned to him. A captain who was appointed without a captain under him was expected to captain his own flagship in addition to being commodore and carrying out the command of the squadron and the operation that it had been formed in order to undertake.

A commodore appointed with a captain under him was entitled to the pay and allowances of a rear admiral. A commodore appointed without a captain under him was entitled to the less generous allowance of an extra ten shillings per day. Hence such commodores were known as 'Ten Shilling Commodores'.

In addition to the difference in allowances the distinction between the two forms of appointment had a significant effect on the entitlement of a commodore to enjoy a share of prize money. All serving admirals were flag-officers, but not all commodores counted as flag-

officers for prize money purposes, even though as commodores they all wore the broad pennant, or flag, that the title flag-officer referred to.[1] Each of the royal proclamations during the French revolutionary and Napoleonic wars between 1793 and 1815 provided that commodores with captains under them 'shall be esteemed as Flag-officers', with respect to the flag-share of prizes taken, whether commanding in chief, or serving under command. Thus, commodores without captains under them in their own ship were not flag-officers for the purposes of prize money. They were 'mere' Ten Shilling Commodores, without the right to any part of the flag-share. This distinction could and did lead to problems. The problems are illustrated by a dispute that arose out of an expedition to capture the Cape, and subsequently the Rio Plata, that set out from Britain in 1805.

An Expedition to the Cape, 1805

In 1805 Captain Sir Home Popham was appointed to command a squadron of ships being sent from England to recapture the Cape from the Dutch, to whom the Cape had been returned as part of the peace treaty negotiated in Amiens in 1802. When hostilities resumed in 1803 the Cape remained in Dutch hands, and available for use by French ships. Although the British had a base at St Helena to use en-route to the Indian Ocean, the Dutch base at the Cape threatened the economically important British trade with India, including the vital trade in Indian saltpetre, which was required by Britain as an ingredient for gunpowder. In June 1805 Popham received intelligence from a dragoon captain, who had been at the Cape as a prisoner of war, that the Cape was preparing for use as a base for a French fleet. Although opinions differed on the value of the Cape, the thought of it being a base for the French was too much to bear. Eager to intervene, Popham shared the news with the Prime Minister, William Pitt, and the Admiralty.[2] The Admiralty was then under an experienced naval administrator in Lord Barham as its First Lord.[3] If he was to appoint someone to lead an expedition to retake the Cape then it would need to be a man who could exercise considerable discretion to react according to the circumstances that presented themselves on arrival without having to rely on instructions from London.

Popham was an intelligent, imaginative officer, who displayed a scientific bent in his career, introducing innovations such as an improved method of signalling. He had something of a chequered reputation, however. During a period of leave of absence from the Navy after the

[1] Or 'pendant' as it was referred to at the time.
[2] Grainger p. 2-3.
[3] As Sir Charles Middleton he had served as a distinguished Comptroller of the Navy and as a member of the Admiralty Board.

American War of Independence, Popham, like Pitt's family before him, had tried his hand at earning a fortune in the East Indies. His mercantile activities had drawn allegations that he was prepared to play fast and loose with the law and that he had engaged in unlawful trading, embezzlement and smuggling. Fifteen years of litigation had ensued.[4] The dispute took on something of a political flavour, as Popham was associated, through his connections with Lord Melville the disgraced former First Lord of the Admiralty, with the Pittite faction in Parliament.[5] A biography of Popham published in 1991 by a distant descendant took a contemporary description of him as its title; 'A Damned Cunning Fellow', which gives something of the flavour of his reputation.

Barham would go down in history for his wisdom in making an inspired appointment of a singular naval leader that same summer when he appointed Nelson to deal with the French fleets in what became the Battle of Trafalgar. For the Cape expedition he appointed Popham to take charge of a military force that had previously been assembled to go to the West Indies, but which was no longer to be used for that purpose. The land forces were under the command of Lieutenant-General Sir David Baird, who was to take over as acting Governor of the Cape once the occupation was complete. Popham had prior experience in combined naval and military amphibious operations and had previously worked well with Baird. Like Nelson, Popham was an imaginative and enterprising officer. It was, therefore, understandable that Barham appointed Popham to command an operation that called for a large land force to be put on a distant shore on the initiative of the commander on the scene.

The Cape was not the only destination that Popham had his eye on. South America and the Spanish colonies there were of great interest to Popham and he had held himself out as an expert on the area, even though he had never been there.[6] Pitt had been lobbied by a Venezuelan nationalist adventurer, Francisco de Miranda, for support for the independence cause against Spain and in 1803 Popham had proposed a plan to the Admiralty for attacking Spanish colonies in South America to support an uprising, but the idea had been abandoned.[7]

[4] Popham, *A Damned Cunning Fellow*, 29–43.
[5] Grainger, *British Campaigns in the South Atlantic, 1805-1807*, 2. *Hansard* HC 31 May 1808 Vol 2 cc721-63
[6] Popham, *A Damned Cunning Fellow*, 114.
[7] Popham, 134.

Popham was not the only one to see the potential advantages for trade from involvement in South America. In November 1806, John Fordyce, a member of the Commission of Naval Revision, wrote to Barham:

"It seems probable now that Europe will soon be divided into three great Empires, Russia, France and England, while England can preserve the dominion of the sea; if she shall lose that dominion the whole may be under two or under one power. This country must therefore provide for a much greater navy than it ever had before – and we must keep that increase in view in our reports particularly in what relates to the proposed new dockyard which should be on a great scale and on one that will admit of further increase. This country must not end the war without preserving the connection with South America which affords the best chance of enabling us to afford the expense of such a navy and of providing a nursery of seamen superior to that of other nations. Our navy is to be considered as that on which our existence depends, more absolutely if possible than it ever did before; and too much care cannot be taken to guard against the effects of neglect, confusion from want of system and the ignorance which have been already explained in our reports, to insure the introduction of the great improvements from the use of mechanical powers instead of manual labour and to take all practical means of providing the timber and other necessary materials which we are to recommend in that [report] now under our consideration." [8]

Nor were such thoughts purely theoretical. In response to the economic warfare of the Continental System in Europe 'British exports to North America and particularly the untapped territories in South America grew dramatically in the years after 1806, and proved a crucial supplement to the trade lost on the Continent.'[9]

Although Popham would later claim that Pitt shared his interest in South America and had tacitly approved the actions that he would take, Pitt was dead by the time the consequences had to be dealt with, and Popham's orders made no reference to a conquest in South America.

Appointment of a 'Flag Captain' of *HMS Diadem*

Popham's orders, dated 31st July 1805, directed that when he left Madeira for the Cape he was to hoist a broad pendant as commodore on board his ship, *HMS Diadem* and authorized him to

[8] Morriss, *The Royal Dockyards during the Revolutionary and Napoleonic Wars*, 203/4.
[9] James Davey, Economic Warfare and the Defeat of the Continental System: The Royal Navy in the Baltic 1808-1811, *Trafalgar Chronicle* 2015 Vol. 25 p. 29 p. 42.

wear the flag in the absence of a Flag-officer until given further orders. No mention was made in the order of his being entitled to have a captain under him, and no such appointment was made by the Admiralty. Two years later Barham, by then out of office, was to write to the Admiralty that he had 'no hesitation in declaring' that when he directed Popham to hoist a broad pendant it was his intention that he should have a captain to serve under him and that the order authorised him to appoint a captain to the *Diadem* to serve under him.[10] The form of orders used by the Admiralty for the two different appointments as commodore were clear, however, and Popham's order did not contain the wording that he was appointed to have a captain under him.[11] In his letter to the Admiralty Barham explained the omission from the orders as rebounding to Popham's credit. He wrote that:

'Sir Home's disinterestedness was such that he never introduced any subject to me which had for its object his own private or personal interest, but always confined himself to the more essential details of the service on which he was to be employed and if I had conceived it possible for any doubt to have arisen on the construction of his authority, or that my intentions towards him should, by any accident or interpretation have been defeated, a Commodore's Commission should certainly have accompanied him; and I meant to have sent one after him, but, owing to the hurry of business, it escaped my memory at the moment, nor did it occur to me on leaving the Admiralty, or a Commission should have been ante-dated and transmitted afterwards."

Barham did have other matters on his mind at the time when he dispatched Popham to the Cape. Villeneuve had put to sea with the Toulon fleet and Nelson was chasing him out and back across the Atlantic. Britain was in danger of invasion and it was Barham's job to prevent it.

The fact remains, however, that Barham's 1807 letter was written after the event, amid the controversy that had arisen in the meantime, with the benefit of hindsight and when he was already out of office. The order to Popham made no provision for him to appoint a captain under him, as it would or should have done had that been intended.

[10] 14th June 1807 Barham to Admiralty, Papers relating to Property captured at Buenos Ayres, HC Miscellaneous Accounts and Papers Vol. X 1812, p. 382.
[11] Anon, *A Correct Account of The Trial at Large between Ross Donnelly, Esq. a Post Captain in His Majesty's Navy, Plaintiff and Sir Home Popham, Knt. Defendant.* Appendices 3, 4, & 5. 'A Correct Account' was published in London in 1807 with various of the key correspondence referred to as appendices. Comments in footnotes to the text make plain that it was published at the behest of someone aligned with the Donnelly interest in the case.

When Popham left Madeira he raised his broad pendant, his commodore's flag, but he also went further. He appointed a captain under him. Before Madeira Popham had been captain of *HMS Diadem* (64) with William King as his 1st lieutenant. Captain Hugh Downman had been captain of *HMS Diomede* (50) and Captain Joseph Edwards captain of the smaller brig-sloop *HMS Espoir*[12]. In order to appoint a captain under him, Popham gave King command as captain of *Espoir* and moved Edwards into *Diomede* and Downman into *Diadem*. The 32 gun frigate, *HMS Narcissus*, remained under the command of Captain Ross Donnelly.

The captains of Popham's squadron thus appointed turned their mind to the distribution of prize money and agreed to share all prize money from prizes taken by any of their number regardless of who was actually present at the time of capture.[13] Confident in the right of Popham to the flag-share as they all were, their agreements made no provision for Popham as his share was already assumed as a given.

Cape Captured: An Expedition to the Rio Plata, 1806

By January 1806 the Cape had been recaptured.[14] At first there was anxiety about the security of the Cape. In particular a French squadron under Rear Admiral Linois was thought to be still in the area and posing a real threat, so Popham prepared to defend the Cape. By March, however, Popham had correctly assessed that a French attack was unlikely. On 28th March an American merchantman arrived at the Cape from Buenos Aires. Her captain, Thomas Waine, brought news that Buenos Aires was defenceless and that a British force would be welcomed.[15] Given the tensions between Spain and her distant colonies, that was a credible, if simplistic, claim, and it was welcome news to Popham. It would not be the last time that an invading force made the same error.

Popham's orders provided for him to send some of his force on to India and to return his transports to England. He also had an order to send a ship to cruise the waters off South America. His orders did not provide for him to strip the Cape of its defences and set off with all that he could muster for an invasion of the Rio Plata. That, however, is what he did, in April 1806. Just before the fleet set off from Table Bay for South America the captains renewed their

[12] *Espoir* is sometimes referred to by her original French name of *L'Espoir*.
[13] HC Misc Accounts and Papers 1812 Vol. X, p. 385
[14] Grainger, *British Campaigns in the South Atlantic 1805-1807*, 5.
[15] Ibid, p. 43.

prize money agreement, once again evincing no need to mention Popham's share on the basis that he was the commander-in-chief entitled to his share as such.[16]

On the 2nd July 1806 Buenos Aires capitulated to the forces landed by Popham and under the command of Brigadier-General Beresford.[17] The British, however, were not welcomed by the local civil or military powers. They were regarded as invaders rather than liberators and their position was untenable without urgent reinforcement.

Treasure and the Payment of Freight

Amongst the Spanish treasure seized by the British forces was a considerable sum in Spanish dollars. Popham decided to send £275,000 worth of the dollars back to Britain on the *Narcissus*, under Captain Ross Donnelly, with letters to merchants in Britain's mercantile centres encouraging them to trade with the Rio Plata.

It was at that time usual for the Treasury to pay as commission a percentage of the value of public specie carried by Royal Navy ships as freight to the captain of the ship entrusted with the carriage. On this occasion a payment of 2 per cent was granted, amounting to £5,500. Whilst the distribution of prize money was governed by the Royal Proclamations in force under the Prize Act, no such provision existed for payments of freight money. Nevertheless, it was also at that time the custom and usage in the Royal Navy for captains to pay a one third flag-share of such freight money to their flag-officer as if the money had been received as prize money.[18] Accordingly, when Donnelly's agents, Messrs J.J. and R Mangles and Thomas Goode, received his freight money and some payments for head money paid for the crews of captured French prizes, they accounted to Popham's agent, one Thomas Collier, for a flag-share.

By that time Popham was still in Buenos Aires and Donnelly, rewarded with an appointment as captain of *HMS Ardent* had also sailed back to Buenos Aires, with the approbation of the Admiralty. A question had already been raised, however, about Popham's entitlement to a flag-share, with suggestions that he was indeed a mere 'Ten Shilling Commodore'. Accordingly Donnelly's agents took the precaution of obtaining a conditional receipt from Thomas Collier including the following term:

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[16] 10th April 1806, Memorandum of agreement between Josiah Rowley, *Raisonable*, Ross Donnelly, *Narcissus*, Joseph Edmonds, *Diomede*, and William King, *Diadem*, Correct Account Appendix 12.
[17] Grainger p. 87.
[18] See Chapter 10

‘Some doubts having arisen, whether Sir Home Popham is entitled to share as a flag-officer, it is hereby acknowledged, that the payment thereof, is made and received by me, as not tending to prejudice the interest of Captain Donnelly, or as an admission of Sir Home’s claim, and is to be repaid, should Sir Home be declared not entitled thereto by any suit at law’.[19]

Popham was replaced as commander-in-chief by a reinforcing fleet under the command of Rear-Admiral Charles Stirling. By that time Popham’s invasion had been repulsed, leaving prisoners in the hands of the local forces. Another invasion was undertaken, which was also ultimately defeated, but by then Popham and Donnelly had returned to Britain. When they arrived back they discovered that the payment made to Popham’s agent for the ‘Flag-eighth’ had been one eighth of the monies received, rather than the customary one third, as captains accounted to their flag-officer for one third of the money that they received, i.e. one of the three eighths that they were paid for prize money, and not one eighth of the money they received. Donnelly then prompted his agent to pay the balance to Popham. On this occasion no conditional receipt was obtained, but the payment was treated in court as having been made on the same basis as the original, conditional, payment.[20]

The Court Martial of Sir Home Popham, 1807

On his return Popham found that the government had changed. Pitt had died in January 1806, the Tories had been replaced in government by a Whig ‘Ministry of All the Talents’ and Barham was no longer at the Admiralty. The new Admiralty Board under Charles Grey was unimpressed by Popham’s South American adventures but constrained by the popular enthusiasm Popham’s publicity for his ‘victories’ had engendered. The result was a court martial on board *HMS Gladiator* in March 1807. Popham defended himself with his customary confidence. His written defence is a joy to read.[21] He recited the great and glorious events in British naval history won as a result of a flexible interpretation of the powers given to the commanders of naval forces. Not least of these was Nelson’s decision to leave the Mediterranean and chase Villeneuve across the Atlantic in 1805, leaving Britain undefended against the French if he had miscalculated. Popham’s confident performance did not prevent him from being convicted by the Court Martial and sentenced to a severe reprimand. The

[19] Recited in the Court of Common Pleas by Donnelly’s counsel, Serjeant Shepherd, per *Correct Account* page 28.
[20] Ibid, page 29.
[21] TNA ADM 1/5378

sentence had little effect on Popham's naval career and he was soon back in favour with the Admiralty. It merely added to an already maverick reputation; 'A Damned Cunning Fellow'.

Ten Shilling Commodore?

Having got through the court martial Popham sought to deal with the doubt that had arisen in his absence about his status as a commodore. On 14th April 1807 he wrote to the Admiralty requesting to be paid the pay of a rear admiral in full for his time as a commodore from when he raised his broad pendant flag at Madeira until he was relieved on the Rio Plata at Maldonado.

Popham prayed in aid the example of Captain George Losack who had been captain of *HMS Jupiter* at the Cape in November 1798. The British had first taken the Cape from the Dutch in the summer of 1795. They correctly feared that there might be an attempt to regain the territory and in 1796 the Batavian Republic, as the Dutch Republic had become known after the Netherlands were overrun by the French revolutionary forces, sent a fleet under Admiral Lucas to attempt to recapture the Cape. Lucas' fleet was discovered in Saldanha Bay, near the Cape, by a fleet under Vice-Admiral Sir George Elphinstone and was forced to capitulate.[22] Elphinstone sailed home to be made Lord Keith for his efforts, but unlike Popham he left a fleet protecting the Cape against the chance of another attempt at recapture. In 1798 Losack and *HMS Jupiter* were part of that protective British fleet under rear-admiral Sir Hugh Christian, when Christian died in service. Losack as the senior officer in the fleet took it upon himself to hoist a broad pendant as commander-in-chief of the fleet. Although Losack had no express or written authority from the Admiralty to act as he did, he exercised his discretion as Senior Captain as he considered the situation demanded. On 30th November 1798 he wrote to the Admiralty to tell them what he had done. The circumstances of the station required the commander-in-chief to reside at Cape Town and on 31st January 1799 Losack appointed Captain Granger to act as captain of the *Jupiter*, while he stayed on shore. By a letter dated 1st February 1804 the Admiralty wrote approving of what Losack had done and authorising him to be paid the daily ten shilling commodore's allowance from when he hoisted his flag on the death of Christian.[23] From the 1st February 1799, following Losack's appointment of Granger to *Jupiter*, however, the Admiralty authorised the full flag pay of a rear admiral, including the daily allowance for servants. On 16th October 1799 a more senior officer, Captain Valentine Edwards, arrived on the station and Losack was not paid the full rate from that time for nearly

[22] McCranie, *Admiral Lord Keith and the Naval War against Napoleon*, 52.
[23] Letter 1st February 1804, *Correct Account* App. 14

a month until Edwards also died, on 6th November 1799. Thereafter Losack was paid the full rate until the arrival of Sir Roger Curtis as a replacement for Christian.

Thus, so Popham argued, there was a precedent for a commodore having authority to appoint a captain under him and to benefit from the full rate of pay in consequence even where neither the appointment of the commodore nor of the captain had been expressly authorised by the Admiralty. If Popham thought that a precedent of that sort would be followed automatically then he was soon disappointed. The following day William Marsden, the first secretary to the Admiralty, replied peremptorily that his assuming the rank of a commodore with a captain under him having not been approved by the Admiralty board, they could not comply with his request.[24]

In April 1807 Donnelly was living at 34 Welbeck Street, London, only one street away from where Popham was living, in Wimpole Street. Towards the end of April 1807 Donnelly and Popham met each other in Wimpole Street and Donnelly raised the issue of Popham's entitlement to a flag-share. Popham, despite his rebuff by the Admiralty, told Donnelly that he had not been a mere ten shilling commodore and was entitled to the flag-share. A fortnight later though, on Friday 8th May 1807, Donnelly asked Popham for an interview to discuss his authority as a commodore. By the following Tuesday he had not received a response so Donnelly wrote to Popham saying that if Popham could prove explicitly that he had been legally authorised to bear a captain under him then he would give 'no further trouble'. He added though that Popham could not feel hurt if he endeavoured 'to assert my rights openly and legally, which I mean to do'. He again requested an interview, now asking for it to be in the presence of some other naval officers of 'rank and honour, who are well acquainted with the customs of the service, for the purpose of elucidating subjects which may be generally spoken by both parties, under the impression of bearing different interpretations, if not explained candidly'.[25]

Popham replied the same evening raising no objection to such a meeting, but stated that 'I am not aware of the misrepresentations you refer to in your letter, or any misconstructions of the facts appertaining to the subject in question".[26] Donnelly received the reply the next morning,

[24] Letter 15th April William Marsden to Captain Popham, ibid App. 15. The request was denied even though the 'Ministry of All the Talents' had collapsed and Lord Mulgrave had taken over as First Lord of the Admiralty in March 1807 with the return of the Pittites under Lord Portland.
[25] Letter 12th May 1807 Donnelly to Popham , *Correct Account* App. 6.
[26] Letter 12th May 1807 Popham to Donnelly, ibid App. 7

but it seems not to have satisfied Donnelly, or the 'friends' to whom he showed the letters. On Saturday 16th May 1807 Donnelly wrote to Popham that 'as you are not aware of the necessity of the explanation desired in my letter', the affair should be settled by their solicitors.[27] Within a week, on Friday 16th May 1807, Donnelly's solicitors, Parker, Young and Hughes of Essex Street, on the Strand, London, had written to Popham demanding repayment of the sum of £2,004 17s 2d paid to his agent, Thomas Collier, 'under the misconception of your being entitled to receive the same as a Flag-officer, with orders to bear a Captain under you, and which he now understands not to be the case".[28] As Popham did not intend to back down and matters appeared to be going to law, Popham instructed his solicitors, Crowder, Lavie and Garth, to act for him in the coming proceedings.

The Trial of Donnelly v Popham, 1807

In a display of remarkable alacrity the dispute came on for hearing at Westminster Hall before Sir James Mansfield, Chief Justice of the Court of Common Pleas, and a jury only a month after the letter before action, on Saturday 27th June 1807.[29] Neither side stinted on instructing counsel. Donnelly instructed two Serjeants-at-law, Serjeant Shepherd and Serjeant Best.[30] Even when Serjeant Best was indisposed for the trial, a replacement, Serjeant Onslow, was asked to 'hold his brief'. They appeared at the trial with the additional assistance of Charles Abbott of counsel. Abbott was considered an excellent, if dull, lawyer and would rise to be Lord Chief Justice in succession to Lord Ellenborough. Popham instructed Serjeant Bayley with Robert Dallas KC and William Harrison of counsel.[31]

Popham had not accepted his rebuff by the Admiralty, and had petitioned the Privy Council for the redress that he felt entitled to. Indeed, when the case was called on for trial his counsel applied to adjourn the matter on the basis that a decision of the Privy Council was awaited. Mansfield refused the adjournment on the basis that a decision of the Privy Council could not

[27] Letter 16th May 1807 Donnelly to Popham, ibid App. 8
[28] Letter 22nd Mat 1807, Parker, Young, and Hughes to Popham ibid App. 9. The sum included the share of the freight money plus some additional head money for ships captured by Donnelly.
[29] Sir James Mansfield was no relation to the more famous (and senior) Lord Mansfield, Lord Chief Justice, 1756-88.
[30] [30] The Serjeants-at-law were, like Sir James Mansfield, 'Brothers' of Serjeant's Inn, an order of senior barristers, now abolished. Serjeants-at- law had exclusive rights of audience before the Court of Common Pleas, though, as appears in this case, they could appear with the assistance of other counsel.
[31] Robert Dallas had at this time been appointed King's Counsel (the equivalent of Queen's Counsel today). Although he was not a member of Serjeant's Inn at this time he did go on to become Chief Justice of the Court of Common Pleas in 1818.

retrospectively determine the rights of the parties and that it was for the court of law to determine those rights.

In the short time between the letter before action and the case coming on for trial Donnelly had gathered a stellar line up of senior naval officers prepared to give evidence on his behalf. They must have been part of the group of interested 'friends' that Donnelly had referred to in his correspondence with Popham. The court heard from Admiral Sir John Borlase Warren, Admiral Peter Rainier, Admiral Lord Hotham, Admiral Sir Samuel Hood and Commodore (later Admiral) Richard Goodwin Keats. Admiral Montagu was also at court, but was not called.[32]

Donnelly's distinguished naval witnesses all testified that they had acted at various times as a commodore, that the order appointing them had indicated whether they were to have a captain under them or not and that they had only had a flag-share of prizes if they had been appointed with a captain under them. Although there were attempts at cross-examination, Dallas ended up accepting on behalf of Popham that a commodore who did not in fact have a captain under him was not entitled to share. Popham's case was that as commander-in-chief he had implied authority to appoint a captain under him and that he had done so. Although the appointment was subject to approval by the Admiralty, at the time it had been effective and so he was in fact a commodore with a captain under him at the material time. Thus, so it was argued, he was entitled to a flag-share under the terms of the royal proclamation.

Popham called William King as a witness. From being Popham's First lieutenant on *Diadem*, King had been appointed to command of *Espoir* by Popham when they left Madeira bound for the Cape. He had then gone ashore from *Espoir* and seen action alongside the army, commanding a brigade of seamen and marines ashore in Buenos Aires. King gave evidence of Popham's promotions within the fleet and of the prize money agreement that the newly appointed captains had entered into among themselves on the basis that Popham was a flag-officer. King had to accept, however, that his appointment to *Espoir* had not been confirmed by the Admiralty and that he had been forced to make an appeal to the Privy Council against their refusal to accept his appointment, an appeal that had yet to receive a response. A footnote to the published account of the trial suggests that the Admiralty had informed Popham of their disapproval of his appointments as early as a letter dated 12th April 1806.[33] That date was

[32] A Correct Account p. 48.
[33] Correct Account p.91.

shortly after the departure of Lord Barham from the Admiralty following the death of William Pitt.[34] The footnote also suggests that Popham had received the letter whilst still in the River Plate, carried out to him by Captain Bouverie of the *Medusa*, but that Popham had neither told the captains under his command about that letter, nor had he told Donnelly about the later letters he had received from the Admiralty after his return to England.

Popham then called evidence that he was treated as a flag-officer according to the royal proclamation concerning the distribution of prize money that resulted from the seizures of treasure on land by the joint operations with the army. Such treasure was not covered by the royal proclamation under the Prize Act, but was subject to separate grants by the King on whatever terms he saw fit. Although the King in the Privy Council determined matters of conjunct prizes, the Privy Council did not decide matters of naval prize law. As Serjeant Shepherd for Donnelly reminded the court, Lords Keith, Nelson and St Vincent had tried to involve the Privy Counsel in their dispute over prize money, but had been told to go to the courts of law.[35]

The case turned on whether Popham had had authority to appoint a captain under him, when the written terms of his appointment did not provide for him to do so. As in his letter to the Admiralty, Popham relied heavily on the precedent that he saw in Losack's conduct after the death of Admiral Christian at the Cape. The evidence called about this did not, however, help his cause. The written instructions given to commanders-in-chief on foreign service under which Losack had appointed himself a flag-officer to fill the vacancy due to Christian's death provided that in the case of a death of any officer they were empowered to fill the vacancy and in the event of the commander-in-chief being unable to act for any reason then the instructions passed to the next senior officer.[36] Losack had, therefore, had power to act as he did. There had been no vacancy in Popham's case, and he had no power to do what he did. Had Barham been called to give evidence in accordance with his letter to the Admiralty about his intention that Popham should be able to appoint a captain under him then that may have influenced the case.[37] Equally, Mansfield may have ruled that whatever Barham said now about his intentions, the form of order actually issued was what mattered, and later evidence about intention could not alter that. In any event, Barham was not called. On the evidence Popham was not appointed as

[34] Charles Grey had been appointed First Lord of the Admiralty in February 1806 and become Viscount Howick on 11th April 1806, the day before this letter, on the elevation of his father, General Grey, to an earldom.
[35] *Correct Account* p. 92, Nelson v Tucker (1802) 3 Bos. & Pull. 257 and Keith v Pringle (1803) 4 East 262
[36] *Correct Account* App. 13.
[37] Barham's letter to the Privy Council dated 14th June 1807.

a commodore with a captain under him and he could not make himself into such a commodore without instructions to do so. Mansfield, having made his views plain during the course of the hearing, summed the case up to the jury in such terms and it is no surprise that the jury immediately found for Donnelly without taking the trouble to retire to consider their verdict.[38]

Popham did not give up in the face of the jury's verdict. On 11th November 1807 Serjeant Bayley addressed the Court of King's Bench on Popham's behalf to try and overturn the verdict of the Court of Common Pleas. Mansfield was again presiding, but this time he sat with Mr Justice Heath and Mr Justice Chambre. Still there was no reference to Barham's letter. Bayley argued that although the Privy Council had still not reached any determination there was reason to believe that they may do so and establish the validity of Popham's appointments, and thus he would be entitled to the flag-share. The court held unanimously that even if the Privy Council did confirm the appointments Popham had made, it would not signify that he had at the time been a commodore with a captain legitimately under him and so it would be to no avail on the issue of a flag-officer's share under the royal proclamation. The judgment in favour of Donnelly stood.[39] If ratification of the appointments by those with the power to do so would not have helped Popham then evidence from Barham, who was no longer in office, may not have assisted either if it had been viewed as an attempt to ratify something after the event, rather than evidence of implied authority from the outset. As has been seen in chapter 6, there was an understandable reluctance to argue for the implication of any wide authority in naval orders.

Petitions to the King-in-Council

Meanwhile things were indeed heating up before the Privy Council. Beresford's agent had written to the Privy Council suggesting that he alone should take the commanding officers' share of 'the booty captured at the Cape of Good Hope, and at Buenos Ayres, in the year 1806, by conjunct Expeditions of your Majesty's sea and land forces'. Popham, he submitted, should only be entitled as a senior captain present at the capture, and not as a commanding officer.[40] Beresford's claim was rejected, but the treasure that had been seized was up for grabs.

On 28th November 1807, only 17 days after Popham's application to set aside the judgment had been dismissed by the Court of King's Bench, Donnelly wrote to the Privy Council about

[38] *Correct Account* p.107.
[39] Donnelly v Popham (1807) 1 Taunt. 1.
[40] HC Misc Accounts and Papers 1812 Vol. X, 383.

the distribution of the joint booty. Applying the logic of his success before the courts Donnelly submitted that King should be considered only as a lieutenant when it came to sharing such booty. This astonished and horrified King. He had a wife and six small children and had need of the money that he had expected to receive. He had after all been appointed to command by his commanding officer. As he pointed out in further submissions to the Privy Council, he was not in a position to question the powers of his commander-in-chief and it would materially affect the discipline of the navy if such questioning were to be encouraged.[41] He had worked hard for the booty both at sea and on land and everyone, including Donnelly had conducted themselves on the basis that he was entitled to a share as a captain.

King was finally awarded his pay as a captain in January 1808. Popham had to wait another year, but in January 1809 be was awarded the full pay and allowances of a rear admiral from 5th October 1805 to 7th December 1806, the date when he was superseded by Admiral Sterling in the river Plate. Then in October 1809 the Admiralty were even more generous and awarded him the full pay and allowances up until the end of his court martial on 11th March 1807.[42]

The right of a flag-officer to a share of freight money paid by the Treasury to a captain for the carriage of public treasure was not challenged in the case of Donnelly v Popham. If there was no right to a share then the argument that was considered, as to Popham's status as a flag-officer would have been an unnecessary one so far as the freight money claim was concerned. That argument would arise later, see Chapter 10.

12th Article: Captains of the Fleet as Flag-officers

Commodores with captains under them were not the only captains with additional responsibilities who were granted a flag-share. Certain 'flag captains', i.e. captains of ships carrying a flag-officer, were granted the flag-share where they were 'captains of the fleet'. Senior captains in such positions took on the role of Chief of Staff for their commander-in-chief, with the additional responsibilities that that involved. The captains to benefit from this form of flag-share status were, from 1793:

a) The First Captain to the Admiral and Commander-in-Chief of a fleet,

[41] Ibid pp. 369-371.
[42] Ibid pp. 387-388.

b) the First Captain to a Flag-officer appointed to command a Fleet or Squadron of Twenty Ships of the Line of Battle, whether they be made up of British or British and allied ships,
c) the First Captain to a Flag-officer appointed to command a Fleet or Squadron of Fifteen Ships of the Line of Battle where all the ships are British ships.

From 1803 the size of any junior Flag-officer's fleet or squadron to qualify the flag captain as entitled to a flag-officer's share was reduced to 10, whether they were made up of all British ships or a mixture of British and allied ships, and that position continued after 1808.

Conclusion

The previous five chapters show that the rules for distribution of prize money to the Royal Navy were a dynamic system that reacted to the pressures of war, and were supervised by the courts applying municipal law. As has been seen in the last three chapters, there were significant changes in the distribution of prize money in 1808. The next chapter considers the reasons behind those changes, and what they tell us about the Royal Navy at the time.

Chapter 9, 1808: The Year of Revolution?

Like a lot of wars, the French Revolutionary and Napoleonic wars coincided with, and propelled, a period of social change. Britain was shaken by its loss of America and there followed a period of soul searching. The British economy, however, was doing well. Between 1783 and 1802 the British economy grew at a faster rate than at any time during the previous century, an annual rate of nearly 6 per cent.[1] Britain's industrial and commercial development was pulling ahead of the rest of Europe. The government machinery to deal with this growth, however, was creaking. In 1780 Lord North established a committee for examining the public accounts. Over the next seven years they produced reports which were welcomed by the new Prime Minister, William Pitt, as giving 'light to parliament on subjects hitherto involved in the most inscrutable obscurity'.[2] The investigation into the public accounts revealed widespread sinecures held by public officials and disturbing levels of inefficiency.[3] The committee proposed a new principle. Those holding government posts should be there to serve the public and should not exploit their official positions for personal profit. To implement this principle Pitt appointed a further Commission on Fees in 1785.[4]

Perquisites to Salaries

The new Commission found a baffling array of inefficient, bureaucratic bodies whose officials received small official salaries and relied on the receipt of a range of 'Fees, Gratuities, Perquisites and Emoluments' paid by contractors, subordinates seeking to retain or improve their position or other interested parties seeking an advantage. Between 1786 and 1788 the three commissioners reported not just on the treasury, but on the Admiralty, the treasurer of the Navy, the navy commissioners, the royal dockyards, the Sick and Hurt Office, the Victualling Office, the Naval and Victualling Departments abroad as well as the Post Office.[5] They recommended that the sinecures and private charges supplementing public pay should be done away with and replaced with adequate salaries, funded where possible by taking the payments previously paid to the officials into the public purse and under proper public control.

[1] Knight, *Britain against Napoleon*, 2013, 21.
[2] John R. Breihan, 'William Pitt and the Commission on Fees 1785-1801', *The Historical Journal* 27, no. 1 (March 1984): 59.
[3] Knight, *Britain against Napoleon*, 2013, 25.
[4] By Act of Parliament 25 Geo. III cc. 19,47 and 52.
[5] Knight, *Britain against Napoleon*, 2013, 26, 506.

This change did not occur overnight, but the ideas began to take root. The eventual reforms have earned Pitt a reputation as a new broom who swept clean the public finances, but as important as his actual reforming achievements in office was the legacy of administrative goals that he left to his successors.[6]

Pitt had a reforming ally in Charles Middleton, the comptroller of the navy.[7] Despite complaints both that he was reforming too much and too little Middleton encouraged a number of significant changes to the administration and resources of the navy. Some naval officers (then and throughout the navy's history) shared the view that their lords and masters were a penny-pinching 'farthing-candle admiralty'.[8] However, impressive levels of investment prior to 1793 led to significant developments in the royal dockyards and elsewhere. It was in no small part the result of Middleton's reforms that the navy was ready in 1805 for the task of taking on the French fleet when Middleton, as Lord Barham the First Lord of the Admiralty, appointed Nelson to command the fleet that would bring the French to battle. The credit for Trafalgar is owed as much to him as to his commander-in-chief on the *Victory*.

Yet despite the vigour of these reforms the payment of prize money remained untouched and accepted. Between 1793 and 1815 there were at least 14 acts of parliament whose provisions touched and concerned the payment of prize money. Over ten royal proclamations decreed the distribution of prize money. Numerous court cases highlighted the gains being made by officers, normally senior officers, fortunate enough to be in a position to argue about their share of prize money. The fact that all this activity took place in the public eye in a country with a parliamentary system suggests that the principle of prize money remained fundamentally secure from attack, and those in government felt able to risk adjustments without bringing the underlying system into question.

Mutinies

In 1797, four years into the war with revolutionary France, the Royal Navy was shaken by unprecedented mutinies by its seamen at Spithead, the naval anchorage off Portsmouth, and at the Nore, the naval anchorage off Sheerness at the mouth of the Thames and Medway rivers. With the country under threat of invasion the sailors refused to weigh anchor and set sail. Their

[6] John R. Breihan, 'William Pitt and the Commission on Fees 1785-1801', 81.
[7] Knight, *Britain against Napoleon*, 2013, 29.
[8] Letter, Capt. Macbride to Charles Middleton 18th August 1787; Sir John Knox Laughton [ed.], *Letters of Lord Barham* (NRS, 1909), Vol. II, 257.

demands appeared in a number of petitions to parliament, which appeared in the press. The petition of the Spithead delegates that appeared in *The Times* on 22nd April 1797 sought a pay increase to reflect the fact that inflation had undermined seaman's pay, which no longer reflected either the pay available to merchant seamen or the pay increases that had been granted elsewhere in the military. It also sought full meat allowances without deductions, more vegetables, shore leave for the sailors when in harbour and improvements in welfare provision for the sick and wounded.[9] It did not include a demand for fairer prize distribution.[10] By the time the demands found support on the east coast, however, the mutinous tone had changed to one of greater overt radicalism, and the demands now included fairer distribution of prize money.[11] Unable to achieve the publicity and public support that had been achieved at Spithead and facing a harder line from the Admiralty, the later Nore mutiny failed. The different nature of the two mutinies called forth different responses from the government. A peaceful end was found to the Spithead outbreak, but with the government placing blame on Fox and the Whig opposition for encouraging revolutionary ideas, twenty-nine Nore mutineers were hanged.[12] Whilst the Admiralty gave way on the demanded increase in seamen's pay, did away with the hated right of pursers to deduct an eighth of their food allowance to cover wastage, increased provision for care and pay of sick and injured seamen and even removed 113 particularly detested officers from their ships, they did not agree to alter the distribution of prize shares.[13]

It was not just the sailors who saw the justice of their demands. Admiral Adam Duncan commanding the North Sea fleet facing the Batavian threat from Holland favoured a number of the demands including a redistribution of prize money to give more to the lower decks and had told the Admiralty so.[14] His pleas fell on deaf ears, and when the Admiralty was eventually forced by the mutiny to give ground, the distribution of prize money as between officers and men remained unaltered.

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[9] 'Ship News', *The Times* 22 Apr. 1797.
[10] Cf. the assertion to the contrary at Philip MacDougall and Ann Veronica Coats, eds., *The Naval Mutinies of 1797: Unity and Perseverance* (Woodbridge: Boydell Press, 2011), 26.
[11] MacDougall and Coats, 253, Ellen Gill, *Naval Families, War and Duty in Britain, 1740-1820* (Woodbridge: Boydell Press, 2016, 217-222. TNA ADM1/727, 12th June 1797, paper No. 25.
[12] James Davey, 'Mutiny and Insecurity' in Quintin Colville, ed., *Nelson, Navy & Nation: The Royal Navy & the British People 1688 - 1815* (London: Conway, 2013), 141–43.
[13] MacDougall and Coats, *The Naval Mutinies of 1797*, 27.
[14] Richard Blake, *Evangelicals in the Royal Navy, 1775-1815: Blue Lights & Psalm-Singers* (Woodbridge, UK ; Rochester, NY: Boydell Press, 2008), 134. Duncan Papers NMM: DUN/19 Public and Private Correspondence, 2 vols.; DUN/31 Memorandum Book of Captain Adam Duncan, Le Fevre and Harding, *British Admirals of the Napoleonic Wars*, 54.

In response to the mutiny the government sent a magistrate, Aaron Graham, to investigate. Graham was a good choice. A former midshipman and admiral's secretary, Graham was a self-taught lawyer who had served as Chief Magistrate of the bleak Newfoundland station and successfully defended Peter Haywood, a young midshipman who had been charged with mutiny against Bligh on the Bounty.[15] As a result of his enquires Graham, struck by the inherent loyalty of the sailors striking to improve their lot, recommended in May 1797 that a more 'reasonable Distribution of Prize Money' be introduced.[16] Specifically he suggested that captains should give over one of their three-eighths to their ships' companies. He did so, however, although reform of prize distribution had 'never much been insisted upon'. He thought that in time the demand would arise, and be claimed as a right. A claim to equal distribution of prize money 'without even the exception of the captains or commander-in-chief' would, he thought, be 'encouraged by landlords and common women at the sea ports whose interests and inclination no doubt it is to get the seamen as much as possible'. If such calls were pre-empted and reform of prize distribution was 'granted as a boon' then it 'would tend much to the purposes of a prompt reconciliation' after the mutinies. The recommendation from a man who understood the navy and its men was, however, ignored.

The next royal proclamation dealing with prize shares following the mutinies was three years later to deal with prizes taken from the Italian states that had been overrun by the French. It contained no material change from the proclamations of 1793 and 1797 against France and Spain respectively, which themselves also remained unchanged. Three eighths of the prize money still went to the Captains and Flag-officers.

The demand for a more equal distribution of prize money fits in with both of the two main underlying explanations offered for the mutinies: the injustice suffered by oppressed and underpaid seamen boiling over, and an outbreak of Jacobin revolutionary zeal against the hierarchy of the navy. The more immediate explanation for the mutinies was that perfectly polite and reasonable, if worryingly organised, petitions had seemingly been ignored by the Admiralty. The French revolution had instilled a fear of revolution in Britain, aggravated by the agitating activities of 'Societies' in Britain, such as the London Corresponding Society. Even if they were intending to encourage peaceful reform, the Societies were seen as

[15] Annual Biography and Obituary vol. 4 , 1820, p. 402, Grahame Aldous, 'Mutiny: The Trial of William Muspratt of the Bounty', *Inner Temple Yearbook*, 2015, 18. Caroline Alexander, *The Bounty: The True Story of the Mutiny on the Bounty* (London: HarperPerennial, 2004), 205–6, 380.
[16] BL Add. MS 37, 877, Windham Papers, vol. 36, folio 73, May 1797.

dangerously close to the Jacobin clubs in Paris.[17] The British government's response included the Police Act, passed by parliament in 1792 and leading to the creation of a new police force and a network of counter-revolutionary agents organised by William Wickham. The execution of Louis XVI in January 1793 did nothing to assuage the concern. Instead it led to war, and increased suspicion. Internal political factionalism, Irish insurrection, fears of invasion, the reign of terror across the channel and failed harvests did nothing to encourage liberalisation. Suspensions of habeas corpus in relation to 'high treason, suspicion of high treason or treasonable practices' and laws against seditious practices and assemblies followed. So too did less formal penalties for liberal views, whether in the streets or the corridors of power.[18] As is often the case, the fear of revolution acted as a brake on moderate reform rather than an encouragement. The result was that even after the 1797 mutinies the distribution of prize money was not reformed. Despite the support they had received, the sailors' overt demands for changes to prize distribution went unmet.

Commission on Frauds

That is not to say that the way the system operated went without any scrutiny. Admiral Sir John Jervis had been dismissive of Middleton's reforming efforts as 'cant, Imposture, loads of precedents, and scraps of Tape & Buckram'.[19] When, as Earl St Vincent, Jervis became First Lord of the Admiralty in 1801 he was convinced that the royal dockyards were dens of iniquity and that the prize courts were full of rogues. The common theme was that those responsible on shore for assisting sea officers were obstructing the success of the navy for their own profit rather than providing the required help. On taking office he set up yet another commission of enquiry. The Act 'for appointing Commissioners to enquire and examine into any Irregularities, Frauds, or Abuses, which are or have been practised by Persons employed in the several Naval Departments therein mentioned, and the Business of Prize Agency' left little doubt as to what the commissioners were expected to find.[20] Their fourth report dealt with their investigation of Prize Agencies.

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[17] Elizabeth Sparrow, *Secret Service: British Agents in France, 1792-1815* (Woodbridge: Boydell Press, 1999), 7.

[18] Clive Emsley, 'Repression, "terror" and the Rule of Law in England during the Decade of the French Revolution', *English Historical Review* 100, no. 357 (1985): 801–25; Halliday, *Habeas Corpus*, 134; Mark Philp, *Reforming Ideas in Britain: Politics and Language in the Shadow of the French Revolution, 1789-1815* (Cambridge: CUP, 2017, 102–32.

[19] Knight, *Britain against Napoleon*, 2013, 29.

[20] Appointed under the Act of 43 Geo. III ch. 16, Dec. 1802 their enquiry into Prize Agency was published 6 months later in July 1803, HC Paper 160, p. 251.

Between March and July 1803, the commission took evidence from 18 witnesses with experience of the prize system. Their report was published two weeks after the last witness had given evidence. The report provides a valuable insight into the workings of the prize agency system, due in large part to the evidence that was received from an experienced prize agent, James Primrose Maxwell Esq. The commissioners also heard the complaints of naval officers. Lord Nelson gave evidence that 'From my own Knowledge and Experience I am warranted in observing That Prize Money does not get into the Pockets of the Captors so expeditiously as it ought, and in many instances not at all; great Sums of Money having been lost by the failure of Agents'.[21] Evidence was also heard from active 'Star' frigate captains. These included the evidence of Capt. The Hon. Alexander Cochrane that 'agents abroad are in general more attentive to their private Interest than to that of their Constituents; and I have not the least Doubt, that in many Cases where Appeals are entered, it is done by the Contrivance of the Agents, in order that they may keep the Proceeds longer in their Hands…at the Risk of the Captors for should their Commercial Speculations fail and they become Bankrupts, the ultimate loss would fall on the Captain of the Ship who made the Capture*'*.[22]

The following day the commissioners heard evidence from another 'Star' frigate captain, Capt. Graham Moore, just days before his wishes were fulfilled by his appointment to the *Indefatigable*.[23] The Peace of Amiens had just ended and renewed war meant renewed opportunities for prizes to be taken in a crack frigate such as Sir Edward Pellew's former ship *Indefatigable*. Moore gave more measured evidence to the effect that although he had not personally come across deliberate delays in payments of prize monies, he had not the least doubt that they existed and that it had been the cause of 'much Dissatisfaction in the Service*'*.[24]

Nelson's evidence contained a number of suggestions for reform. It has been suggested that these may have come from his public secretary, John Scott.[25] Although Scott was experienced in prize agency matters he was not appointed as Nelson's public secretary until his transfer to Victory a month after Nelson gave evidence to the commissioners. He had received the invitation to take up the appointment on 16th March 1803 in a letter from Nelson's banker, Mr Marsh of Marsh and Creed.[26] Clearly something had brought Scott to Nelson's attention for

[21] Evidence on oath 1st April 1803, HC Paper 160, July 1803, App. 16, p. 322, Nicolas, *The Dispatches and Letters of Vice Admiral Lord Viscount Nelson*, Vol. V, 53-54.
[22] Evidence on oath 23rd June 1803, HC Paper 160, July 1803, App. 7, p. 302.
[23] Wareham, *Frigate Commander*, 235.
[24] Evidence on oath 24th June 1803, HC Paper 160, July 1803, App. 8, p. 304.
[25] Hill, *The Prizes of War*, 144.
[26] Maynard, 'Nelson's Secretary and Friend, John Scott ', 361.

him to request the transfer. Whether it involved Nelson's evidence on prize agents, however, is unknown.

The report of the commissioners did not find that there were major abuses but made some recommendations for change. To some extent they followed the changes recommended by Nelson. The key suggestion was for a new regulator, the Prize Office, or as Nelson had called it a Prize Agency Office. The main advantages of this new body were to be that it would provide a central registry so that those entitled to prize money could track it down, and within a reasonable time the monies themselves would be lodged with the office for distribution.[27] The recommendation would have been transformative, but it was not implemented.

Some changes were introduced by a new Prize Act, but they were limited in scope and mainly aimed at tightening up on the reported abuses by agents of the funds they were holding ostensibly while the administration of the awards was being undertaken.[28] The practice of taking prize agency commissions while farming the real work out to others was forbidden, agents were required to lodge a sizable bond of £5,000 as a surety for their good faith and the sending in of prize lists of those entitled to a share of prize money was tightened up. The court was given power to order that the proceeds be invested for the benefit of the captors and/or paid into court pending an appeal in order to prevent appeals being used as a way of delaying payment so as to leave the monies in the hands of agents, and then payment was to be made within three months once the time for any appeal had elapsed. If the balance of proceeds was not distributed once distribution had started then after four months the residue was to be sent to the Royal Hospital at Greenwich. Perhaps most significantly, the agents' commission was to be calculated on the net proceeds rather than the gross award.[29]

None of these changes affected the distribution of prize shares. They were as much to do with ensuring that the captains and flag-officers obtained their lion's share of the prize money as ensuring that the ordinary seamen were fairly treated. An uncharitable observer might have described them as 'scraps of Tape & Buckram'. For all his abhorrence of greed and corruption in others, St Vincent was, as the preceding chapters have noted, very keen on amassing the flag share of prize money and he did not seek to redistribute the flag share to the lower decks. Nor did his successor, Lord Melville. Melville had previously held the post of Treasurer to the navy and had the knowledge and aptitude to introduce reforms. His one year in office as First Lord

[27] Fourth Report of the Commissioners of Naval Enquiry, HC Paper 160, July 1803, pp275-276.
[28] 1803 45 Geo. III c. 72
[29] Hill, *The Prizes of War*, 145.

of the Admiralty from May 1804 to May 1805 ended, however, under a cloud of allegations of misappropriation of public monies in his time as Treasurer.

The major change in the distribution of shares in prize money came eventually in 1808. As has been seen above, the fundamental shift was to take one of the three-eighths that had previously gone to the captains and flag-officers and redistribute it to the lower ranks. It is easy to see this as a victory for ordinary tars after years of pressure. The reality, however, is rather different. As we have seen, the change did not come about as a result of the pressure for a more equitable system. Further, the real beneficiaries of the change were the 'middle classes' on board, the skilled and experienced men who were much in demand, and without whom the navy could not function. Whilst some had already been treated more favourably than the ordinary seamen before 1808, they were to take the main share of the extra money that trickled down from above. To understand how and why this was so it is important to understand the context in which change finally arrived in 1808.

Trafalgar had not ended the war at sea in 1805. Another ten years of war provided plenty of work for the navy, for a large navy, even if it was not to fight such a glorious battle again. Although Napoleon had turned his army away from the channel and marched it to Austria before the battle off Cape Trafalgar, the threat of invasion still troubled the British government and public until at least 1810. Further, when Britain was ready to go on the offensive on mainland Europe, the Navy would be essential to its success.[30] The French and their Spanish allies had lost most of their main fleet at Trafalgar or its associated actions. Napoleon responded, however, by embarking on a major shipbuilding programme, intending to build 150 new ships of the line against the British equivalent of 113, and sought to get access to the other navies of Europe. Between 1806 and 1809 naval action ensured that 99 ships of the line were destroyed or otherwise kept from Napoleon's grasp.[31]

Both the British and the French could build ships. Manning them was another matter. France struggled to man its fleet, but so too did Britain. The Royal Navy's manpower needs increased considerably during the wars. Having had 16,613 men on their books for wages in 1792 the figure rose to 69,868 with the outbreak of war the following year. By 1805 it had risen to 109, 205, but by 1808 it had risen to 140,822 and would peak over the next two years at over 142,000.[32] The position was aggravated by the changing nature of naval war. From essentially

[30] Davey, *In Nelson's Wake*, 2015, 292.
[31] Davey, 10–11.
[32] Morriss, *The Foundations of British Maritime Ascendancy*, 2014, 227.

seasonal expeditions from home waters earlier in the eighteenth century the navy had now spread its reach, maintaining fleets at sea year-round both in home waters and on foreign stations. As the need for men after 1805 increased, the shortage of skilled men became a serious problem for the navy.[33] It could not use the ships that it had for lack of men, and it needed to attract skilled men. It also needed to keep them. Between May 1804 and June 1805, 12,302 men deserted, mostly to merchant ships, but occasionally to other Royal Navy ships.[34] When men did desert they tended to do it early on in their service on a ship.[35] Once they had accrued a right to some prize money they had a stake in remaining on board in order to collect it. If they deserted, they lost the right to claim their money.

The popular view of the Royal Navy in this period is that it filled its ships by impressment of innocent landsmen seized by unscrupulous press gangs. Rodger recognised that 'it is extremely difficult to say with certainty what proportion of the men of the Navy were volunteers'.[36] Lewis had put the figure as high as 75 per cent serving under compulsion with only 25 per cent true volunteers in 1812.[37] A centralised Impress Service had been created during the Seven Years' War and both this administrative branch of the Royal Navy and the press gangs sent out by individual captains continued to operate during the revolutionary and Napoleonic wars, particularly in times of high demand. Recent research has suggested, however, that most of the men on the lower decks were volunteers, rather than pressed men. J. Ross Dancy has suggested that impressment accounted for no more than 20 per cent of the men on the lower decks.[38] In coming to this figure Dancy has attempted to adjust his assessment of the number of men shown in muster books as pressed, in particular for those coming through the Impress Service. Horizontal analysis of muster book records has revealed additional practices that need to be allowed for.[39] Men pressed direct into ships by their own press gangs might well be entered initially as pressed men in a ship's supernumerary muster but then transferred to the ship's company as 'volunteered' so as to earn the bounty payable to volunteers.[40] That bounty, as with

[33] Lambert, *The Challenge*, 243, 258–59.
[34] Davey, *In Nelson's Wake*, 2015, 26.
[35] Nick Slope, 'Discipline, desertion and death: HMS Trent 1796-1803' in MacDougall and Coats, *The Naval Mutinies of 1797*, 234.
[36] Rodger, *The Wooden World*, 153.
[37] Lewis, *A Social History of the Navy 1793-1815*, 139.
[38] Jeremiah R. Dancy, *The Myth of the Press Gang: Volunteers, Impressment and the Naval Manpower Problem in the Late Eighteenth Century* (Woodbridge: The Boydell Press, 2015), 187.
[39] N. Slope doctoral thesis Serving in Nelson's Navy: a Social History of Three Amazon Class Frigates Utilizing Database Technology (1795-1811), http://vistas.uwl.ac.uk/419/. Published posthumously as *Nelson's Navy: Recruitment, Promotion, Disciple and Death* (London: Incitatus Books, 2019).
[40] Review of Dancy's *Myth of the Press Gang* by Nick Slope, *The Nelson Dispatch* Vol. 12 Part 5, Winter 2016, p. 314.

prize money, was payable after a delayed period and so provided a new 'recruit' with an incentive to make the most of his lot and serve 'willingly'. Slope's estimation was that some 31 per cent of men were pressed, although a precise calculation is as impossible as with the calculation of prize money.[41] Either way, however, the evidence of such research reveals that the Royal Navy had a significant dependence on real, as opposed to pretend, volunteers as well as impressed men. Research such as this, based on state archives, has been criticised as downplaying the social impact of impressment as shown in contemporary discourse, and a greater willingness to resort to impressment after 1803.[42] Neither the debate about the figures, nor the success of the navy that the press gangs manned, should disguise the horrors of a brutal and often unfair method of manning the fleet. As Brunsman has put it: 'we do not have to deny the injustice of impressment or sailor resistance to recognise the extraordinary achievements of British seamen in the eighteenth century'.[43] Impressment caused problems for the Admiralty before the courts, as has been seen in chapter 3 above. It also gave rise to social unrest and resistance on the streets.[44] Such concerns, however, merely enforce the idea that there were good reasons to find inducements for skilled seafarers to volunteer for the Royal Navy, and to remain there once on board, however willingly they may have arrived.

In the mutinies at Spithead and the Nore the men on the lower decks had found a voice and although the prize money proclamations had not been altered, the relationships between the men and their masters had.[45] Although the pay of seamen had been increased in 1797 as a result of the mutinies, the navy had to compete with others who wanted the same manpower. Other branches of the military wanted men, both for armies abroad and militias at home. The merchant ships needed skilled men to keep the lifeblood of the nation's commerce flowing and paying for the war. Navies and merchant ships abroad offered opportunities to British seamen, for example in Russia and the US, whose use of British sailors would help bring about a conflict between the two nations in 1812.[46] The prospect of the US using sorely needed British sailors

[41] See Summary of Slope's work in Dr Michael Duffy's obituary for Nick Slope 'How Nick Slope became a naval historian' *The Nelson Dispatch* Vol. 12 Part 9 Winter 2017, p. 537.
[42] See e.g. Quintin Colville and James Davey, *A New Naval History*, 2019, 7; Isaac Land, 'New Scholarship on the Press Gang Part 1', *Port Towns & Urban Cultures*, 2015, porttowns.port.ac.uk/press-gangs-1/; Isaac Land, 'New Scholarship on the Press Gang - Part 2', *Port Towns & Urban Cultures*, 2015, porttowns.port.ac.uk/press-gang2/, Ellen Gill, *Naval Families*, 184-187.
[43] Brunsman, *The Evil Necessity*, 139.
[44] See e.g. Nicholas Rogers, *The Press Gang: Naval Impressment and Its Opponents in Georgian Britain* (London: Continuum, 2007), 37–58.
[45] James Davy, 'Mutiny and Insecurity' in Colville, *Nelson, Navy & Nation*, 143–44.
[46] Davey, *In Nelson's Wake*, 2015, 24. Lambert, *The Challenge*, 7.

to profit from the difficulties that Britain was experiencing in the war against Napoleon on behalf of the whole free world was galling for the British.

Honour and Duty

It was not just the men on the lower decks who had changed. The lure of prize money had been an undeniable influence on naval officers, but so had concepts of honour and duty traditionally associated with the aristocratic classes. The increasingly technical demands of seamanship had put the conventional social categories under considerable strain. Yet, as N. A. M. Rodger has put it 'the sea officer still needed the status of a gentleman, not only because society expected it, but because his condition required it. The code of honour was an essential psychological support on the day of battle.' [47] Prize money helped to sustain the status of a gentleman. The cost of such status applied not just on shore but at sea where captains and flag-officers were expected to keep up a level of entertainment that would not be covered by the admiralty allowances alone.[48] As Rodger has concluded, however: 'towards the end of the eighteenth century, the old idea of honour was infiltrated by the new ideal of duty. Personal, interested, egotistical service of one's king and one's honour were gradually replaced by disinterested duty to God, the Crown, and the good of the Service'. Indeed, in Rodger's view, 'The Navy was uniquely well-placed to exemplify if not to lead this movement, because in many ways it was already half-way there. It had always been a professional, quasi-bourgeois organisation, with a strong unaristocratic, if not anti-aristocratic, tradition in which honour and duty co-existed.'[49]

Patronage played a significant role in the eighteenth century navy, as it did in all public and professional life.[50] It is easy to misunderstand the nature of this patronage looking back from the 21st century, even though it still remains a force today. Eighteenth century patronage has been described as 'a system of exchanging or trading interest and influence, rather than a corrupt distribution of favours'.[51] As has been seen above, attitudes towards the use of powers of patronage for private gain were changing by the time the navy was plunged into new wars against France at the end of the eighteenth century leading to, and encouraged by, the

[47] N. A. M. Rodger, 'Honour and Duty at Sea, 1660-1815', *Historical Research* 75, no. 190 (November 2002): 430.
[48] Rodger, *The Command of the Ocean*, 524.
[49] N. A. M. Rodger, 'Honour and Duty at Sea, 1660-1815', 446–47.
[50] Wareham, *The Star Captains*, 110.
[51] Davey, *In Nelson's Wake*, 2015, 28. Citing Moira Bracknall, 'Lord Spencer, Patronage and Commissioned Officers' Careers, 1794-1801' (PhD thesis, University of Exeter, 2008), pp. 274-5.

Commission on Fees and its aftermath. Unlike the army, it was not possible simply to buy a commission in the navy. Those wishing to become officers had to serve at sea and 'pass for Lieutenant' by being examined on their seamanship skills by panels of senior officers.[52] Those wishing to exercise patronage not only had to comply with the requirement for qualification, but also had to persuade the Admiralty that their recommendations could be relied upon. Patronage therefore had to be used to promote merit and not otherwise.[53] Men who might be promoted without merit were side-lined and though they may have enjoyed rank, they did not necessarily achieve command. Without command there was no prize money. An unemployed officer may have enjoyed half pay, so long as he remained available for service,[54] but he would not achieve the income from prizes that an officer given command could achieve.

Hand-in-hand with the changing attitudes towards private gain from public office and the changes in naval attitudes towards honour and duty came a new sense of respect and public recognition. The effect of the public adulation for the likes of Admiral Vernon after the taking of Porto Bello in 1740 through to Nelson rubbed off on the service as a whole.[55] As a result the vast majority of naval officers came from 'the ambitious middle classes, for whom a naval career offered affordability, a degree of gentlemanliness, and the possibility of social advancement'.[56]

By 1808, therefore, attitudes to the wealth enjoyed by those at the top of the naval tree were changing and there was a desperate need for skilled men, seamen and petty officers.

Trafalgar to 'All Talents'

When Barham, who succeeded Melville as First Lord of the Admiralty in 1805, had been comptroller of the navy at the end of the American Revolutionary War in the 1780's he had enforced a comprehensive overhaul of the standing orders for the royal dockyards. In 1783 he oversaw 255 revised standing orders issued to the dockyards, with a further 96 the following year.[57] Despite being First Lord of the Admiralty from May 1805 to February 1806 he did not change the distribution of prize money, even though it was a task well suited to his talent for regulatory reform. Admittedly he had his hands full with operational matters during his brief

[52] Lavery, *Nelson's Navy*, 93.
[53] Rodger, *The Wooden World*, 277.
[54] Lavery, *Nelson's Navy*, 99.
[55] Kathleen Wilson 'Patriotism, Trade and Empire' in Colville, *Nelson, Navy & Nation*, 46.
[56] Davey, *In Nelson's Wake*, 2015, 31.
[57] R. J. B. Knight, *Britain against Napoleon*, 29.

period in office, but it would take a fresh approach to the war and to the Admiralty before reform was carried out.

Barham left office following Pitt's death in 1806 and the ironically named Ministry of All the Talents followed, with a period lacking in decisive leadership of the war effort.[58] Charles Grey took over at the Admiralty. His father, General Charles Grey had filled the family coffers through the plunder of the Caribbean for prize and booty along with Sir John Jervis.[59] General Grey was given an earldom in April 1806, upon which his son at the Admiralty became Lord Howick. Howick did not give any of the flag share to the lower decks.

For the last 6 months of the Ministry of All the Talents the Prime Minister, Lord Grenville, appointed his brother Thomas to the Admiralty upon Howick's appointment as foreign secretary on the death of Charles James Fox.[60] Though diffident about his own talents, Thomas Grenville worked hard to make something of his short period in office, the last he would chose to undertake. One of the last acts of his period of office, along with Lord Henry Petty at the Treasury, was to restore Treasury payments to Royal Navy captains for the carriage of public bullion in their ships. This was not so much an act of generosity, however, as a grudging submission to the claims of captains who had taken to deducting what they considered their entitlement before discharging their treasured cargoes.[61] Beset by numerous demands for his attention, the amiable and popular Grenville did not take away any of the share of prize money from captains or flag officers for the benefit of the lower decks.

Change at Last

By April 1807 the Talents were spent and were replaced by a new government in the spirit of the late Prime Minister, William Pitt. Although riven by personality differences, especially those between Canning as foreign secretary and Castlereagh as secretary of state for war which ended in a duel, the administration brought a new energy and realism to the war effort. The new administration understood that Britain was fighting a war for national survival and was accordingly prepared to bring greater organisation and drive to the fight.[62]

[58] Knight, 237.
[59] Duffy, *Soldiers, Sugar, and Seapower*, 106–14.
[60] Knight, *Britain against Napoleon*, 234.
[61] See Chapter 10
[62] James Davey, *In Nelson's Wake*, 151.

Henry Phipps, Lord Mulgrave took over from Grenville as First Lord of the Admiralty in April 1807. Mulgrave's background had been in the army before entering politics and it did not make him an instinctive reformer of naval matters when he first took office at the Admiralty. He took some persuading to follow up the recommendations of the Commission of Naval Reform that finished its business as he came to office, but he would eventually carry through reforms in the name of efficiency.[63] He was very conscious of the tax burden of funding the war and the need to keep public opinion on side by exercising 'very rigid economy', even in the face of support for loosening the public purse-strings from Canning and George Rose, the new Treasurer to the navy.[64]

Whilst refusing demands for a pay increase for the Navy Board, Mulgrave would nevertheless establish increased minimum salaries for Navy office clerks in order to keep up the standard of applicants.[65] With the realisation that Britain was in for a long economic war the outcome of which would depend on an effective and well manned navy, a solution to the need to motivate petty officers without increasing the burden on the public purse by increasing pay attracted itself to this military man, even if it did involve sacrifice by senior naval officers. As has been seen above, the period before 1808 had been one of profound political and cultural change, with mounting, but unanswered, pressures for a change to the distribution of prize money. By 1808 the language of the conflict had changed, however. It was less of a conflict with revolution, or even France. The enemy had been reinvented in the 'bogey-man' persona of Napoleon.[66] Further, by 1808 Napoleon's Continental Blockade had reached a peak of effectiveness.[67] It was the naval and economic realities that had finally brought the pressure for reform to the point of change. The precious, skilled middle ranks of the Royal Navy were the ones to reap the benefit. It was thus Mulgrave and Rose who implemented the long delayed change, combining it with continued vigilance to try and ensure that prize money was paid when due.[68]

[63] Knight, *Britain against Napoleon*, 329, 343.
[64] George Rose, *The Diaries and Correspondence of the Right Honourable George Rose*, vol. 2 (London: Richard Bentley, 1860), 336–38.
[65] Knight, *Britain against Napoleon*, 343.
[66] Mark Philp, ed., *Resisting Napoleon: The British Response to the Threat of Invasion, 1797-1815* (Aldershot: Ashgate, 2006), 8.
[67] Aaslestad, *Revisiting Napoleon's Continental System*, 8.
[68] Knight, *Britain against Napoleon*, 348.

The 1808 changes to prize distribution are generally recognised as having redistributed prize money away from the commanding officers to the ships company.[69] Whilst that is true overall, the changes made were more subtle than that. A more detailed analysis of the changes reveals that the change was not made out of a desire for equity, but as a practical measure to encourage the skilled men that were needed to serve in the navy.

The last royal proclamation concerning the distribution of prize money before 1808 had been as recently as 23rd December 1807.[70] The Treaty of Tilsit between Russia and Napoleon's France the previous July had brought Russia into the war as Napoleon's ally. In response the British ordered reprisals against the ships, goods and subjects of Alexander I of Russia by an Order-in-Council of 18th December 1807. Five days later a further Order-in-Council provided for the distribution of prizes seized under the reprisals. This hastily introduced proclamation maintained the pre-existing flag-share of one of the captain's three-eighths.

In contrast, the 1808 proclamation of 15th June was not prompted by any further order for reprisals against a new enemy.[71] It was a deliberate attempt to reform the distribution of prize money and was introduced to change the division of the spoils for prizes taken from the enemy states that were already subject to reprisals, and where there were already existing proclamations dealing with distribution of prizes from all the hostile states. Its revised terms indicate that considerable thought had been given to the changes. Thought had even been given to a transitional provision to allow for the practical implementation of the change. All previous proclamations distributing naval prize money were revoked, but the new provisions were expressly stated not to affect any prizes taken before the date of the proclamation, nor any prizes that were condemned in any of the British prizes courts abroad, the Vice-Admiralty courts, before they had notice of the proclamation. In such cases the old rules still applied. The effect of the transitional provisions was to create a ripple effect as notice of the change was carried through the fleets and to the Vice Admiralty Courts on foreign stations.

The headline change was to remove one of the three eighths that went to the captains and flag-officers and redistribute it to the lower categories serving on board. The redistribution was carefully targeted, however, amidst a more up-to-date categorisation of those on board. The modernising nature of the drafting is revealed in even minor changes, which reflected the fact

[69] E.g. Lewis, *A Social History of the Navy 1793-1815*, 318; Lavery, *Nelson's Navy*, 131; MacDougall and Coats, *The Naval Mutinies of 1797*, 14.
[70] *London Gazette*, No. 16105, January 1808, p. 21.
[71] *London Gazette*, No. 16155, June 1808, p. 853.

that the Admiralty had thought through the way the navy of 1808 was working. Thus a ship's surgeon was referred to as such, rather than as a 'chirurgeon', the archaic form that had been used hitherto. Schoolmasters made their first express appearance even though they had been serving on board Royal Navy ships since the beginning of the eighteenth century and recognised as such by regulations of 1731 and 1790. Their inclusion in 1808, as petty officers first class, reflects their role under new regulations introduced in 1808 bringing their appointment firmly under Admiralty control and re-defining their duties.[72]

The new categorisation of recipients recognised the increasing complexity of life aboard the now highly developed men-of-war. For the first time two classes of petty officer were recognised. Those who had previously been recognised as naval petty officers were defined as petty officers first class. They were joined by surgeon's assistants, secretary-clerks, captains of the forecastle and the schoolmasters. A new category of petty officers second class, many of whom had not previously even warranted an express mention, elevated a group of skilled men from the previous residual group. This new category included midshipmen, captains of the foretop, maintop, after-guard and of the mast, the ship's cook and the sailmaker's, caulker's and armourer's mates. Corporals of marines and of land forces serving on board, who had previously been part of the general category of petty officers now found themselves in this new category of petty officer second class.

Petty officers and below now had one half of the total proceeds to divide between them, rather than the three eighths they had previously enjoyed. Thus they had the extra eighth that had been taken away from the captain and flag-officers. The way it was distributed, however, benefited the petty officers rather than those below them. Petty officers first class each had 4 ½ shares of the available half of the prize money. Petty officers second class each had 3 shares. All the remaining specified ratings, including able and ordinary seamen had 1 ½ shares each. Landsmen, admiral's domestics, any unspecified ratings and all passengers and other persons carried as supernumeraries and doing duty and assisting on board had 1 share each. The lowly young gentlemen volunteers and boys of every description received only a half share each. Similar changes were made in the provision for crews of smaller vessels, cutters, schooners and other armed vessels, and hired armed vessels.

[72] F. B. Sullivan, The Naval Schoolmaster During the Eighteenth Century and the Early Nineteenth Century, (1976) *The Mariner's Mirror*, 62:4, 311-346.

The impact of these changes was thus different for the different categories of men on board. The precise re-distribution depended on the particular ships on which they served, but an overall picture of the effect can be seen. It is clear that the captain and flag-officers were not the only ones to lose out. The readily replaceable landsmen, the men who had not had enough sea experience to be rated even as ordinary seamen, and the untrained boys lost out as a result of the changes. Commissioned and warrant officers still enjoyed the same quarter share that they had previously had. Seamen and petty officers first class enjoyed a limited increase in the share they received, about 50 per cent and 25 per cent respectively. Petty officers second class, however, received an increase in their share to nearly three times their previous entitlement.[73]

Conclusion

Whilst the headline change was to remove one of the three eighths that went to the captains and flag-officers and redistribute it to the lower categories serving on board, the redistribution was carefully targeted to benefit the skilled men who were in short supply. As has been seen in Chapter 7, the changes were principally aimed at benefiting and encouraging the lower-middle classes on board, whose skills were in demand but easily transferable elsewhere. This interpretation of the research assumes that the Admiralty intended the consequences that have been found. There is an absence of contemporary explanation for the change beyond the wording of the proclamation that:

> "Whereas it has been represented to Us by our Commissioners for executing the Office of the Lord High Admiral, that it will be productive of beneficial Effects to the Service, if instead of the Three Eighth Parts of the neat Produce of Prizes, which have hitherto been granted to the Captains and Flag-Officers serving in Our Fleet, Two Eighth Parts only shall be allocated to them, and the remaining Eighth Part distributed amongst the Petty Officers, Seamen, and Marines, in addition to their present shares."

The detailed nature of the redistribution provisions, however, suggests that their effect had been thought through. The changes do not have the somewhat random appearance of previous amendments. Shortage of manpower was a real problem in the navy at this time. The problem

[73] Daniel K. Benjamin, '*Golden Harvest: The British Naval Prize System, 1793-1815'*.

was not with insufficient officers or unskilled men, but with skilled sailors, those with the specialist practical skills needed to operate men of war.[74] The need to encourage the very people it in fact benefited suggests that the effect of the reform was indeed intended.

That the redistribution of prize money away from captains and flag-officers was a wartime move to deal with the shortage of petty officers, rather than a long term plan for liberalisation, is confirmed by what happened when the war ended. Although the two classes of petty officer were retained, the Admiralty reverted to the three eighths share for captains and flag-officers where prizes were captured in the course of anti-smuggling operations.[75] Prize money from captured smugglers, Barbary pirates and slave ships remained a valuable source of both income and power of patronage for flag-officers into the nineteenth century.[76] It did so without the need to leave the senior officers' additional eighth in the hands of the lower decks. The need in those instances was to induce those in command to accept the risks of often unhealthy postings in areas such as the west coast of Africa. Manning the ships without the problems of a major naval war was less of an issue. The immediate reversion back to the previous distributions indicates that in that regard the 1808 change was a temporary reaction to circumstances, not part of the updating modernisation that can be seen in the division of petty officers into two distinct classes, nor an indication of any particular desire for greater equity going forward.

Prize money was not the only method by which private profit could be made, and patronage exercised, during service in the Royal Navy in the eighteenth century. The next chapter considers other examples of financial bounties as incentives for such public service.

[74] Dancy, *The Myth of the Press Gang*, 131.
[75] *London Gazette* No. 17189, 9th November 1816 p. 2109.
[76] Roger Morriss, *Cockburn and the British Navy in Transition: Admiral Sir George Cockburn, 1772-1853*, (Columbia: University of South Carolina Press, 1997), 213.

Chapter 10, Freight Money, Head Money and Booty Distinguished

Freight Money

Captains of vessels in the Georgian Royal Navy were allowed to earn freight money by carrying gold, silver and jewels both for the government and for private individuals. Unlike prize money the arrangements for such freight payments were not governed by statute, but were a matter of perceived custom and usage. Evidence of such custom and usage emerges from the disputes that found their way to court and into the contemporary law reports.

Article 17 of the Admiralty Articles of War prevented Royal Navy officers from carrying any goods or merchandises other than for the sole use of the ship, to save them from a shipwreck, or under express orders from the Admiralty. The purpose of the Article was to prevent Royal Navy ships from being used for private trade at public expense. The temptation to save on wages by remunerating officers through allowing them to use voyages for trade had proved detrimental to the development of fighting navies in the past.[1] Gold, silver and jewels, however, were exempt from the prohibition.[2] In common parlance such items were referred to as treasure, and gold or silver in the form of coinage was termed specie. Not only did the Admiralty give orders for Royal Navy ships to carry bullion and specie, but captains could agree to carry bullion and specie for merchants in return for payment of freight.

Prize money was governed by statute and Royal Proclamations made by Order-in-Council at the outbreak of each war. Payment of freight by the government was not governed by those same provisions, but by decisions of the Treasury to pay a percentage commission to captains given the task of carrying government money. Unlike prize money, with freight payments none of the money went to the officers and crew. It went only to the captain or commander, whether the payments were from the government or from private arrangements with merchants.

[1] See the example of the Portuguese navy, C. B Boxer, Admiral Joao Pereira Corte-Real and the Construction of Portuguese East-Indiamen in the Early Seventeenth Century, *The Mariner's Mirror* 1940 Vol 26:4, p. 388-406.

[2] A similar provision governed the US navy, see article 23 of "An Act for the better government of the Navy of the United States," 6th Congress: 1st sess., chapt. 33, 2 U.S. Stat. 45, March 3, 1800, Homans, *The Laws of the United States, in Relation to the Navy and Marine Corps,* 62. See Ch. 11.

Britain's Need for Cash

The encouragement and protection of private trade, whilst important in itself, was not the only reason for allowing Royal Navy ships to carry private wealth. Nor was it simply a matter of finding ways to enrich and encourage the commanders of vessels to do their duty. Britain needed the cash. As the War Secretary Henry Dundas, later Lord Melville, had expressed it to the Prime Minister, William Pitt, at the outbreak of war: 'All modern Wars are a Contention of Purse'.[3] The total cost to Britain of the wars between 1793 and 1815 was around £830 million, of which some £59 million was paid in cash subsidies to keep Britain's various coalition partners in the field against France.[4] War in the Iberian peninsula meant that cash was required to keep British forces in the field, with Wellington complaining to the Prime Minister that he would have to withdraw from the field for want of cash.[5] The British had even become involved in operations to smuggle cash around the world to provide money where it was required.[6] Thus there were good economic and military reasons to encourage merchants to repatriate specie in the relative security of His Majesty's ships.

Insurance

Prudent merchants insured their treasure in transit even if it was being carried on board a Royal Navy ship. It was not an idle precaution. In 1799 the Bank of England was trying to bolster the merchants of Hamburg who had used their reserves to support Britain during a run on the pound in 1797. Admiral Lord Duncan, commander-in-chief of the North Sea fleet, was ordered to make a vessel available to transport consignments of cash from Gravesend to the Elbe. The first vessel that he sent, the armed cutter *Nile*, set sail with cash received from the house of Messrs Goldsmid and Co. Although she got through, she had left before the considerable sums from other merchants had arrived. Duncan therefore dispatched a second vessel, the 32 gun frigate *HMS Lutine*. She set off with over £1 million on board. As she approached the Dutch coast she was met by a NNW'ly gale and was driven on to an outer bank near Vlieland where she was destroyed by the tide. The single survivor died on the way back to Britain and all the gold was lost. Lloyd's paid the insurance on the lost bullion in full. The *Lutine*'s bell was

[3] Updating Cicero's maxim 'nervos belli, pecuniam infinitam', Niall Ferguson, *The House of Rothschild*, (London: Penguin, 1998) p. 83.
[4] Ibid page 84.
[5] Ibid page 83.
[6] Ibid page 87.

salvaged with some of the gold in 1859 and hangs in the Underwriters' room at Lloyd's, where it is rung to mark special occasions.[7]

Changes in Freight Payments

Before 1801 it was the usual custom of the Treasury to pay 1 per cent freight for the carriage of bullion or specie by the Royal Navy. If a captain received freight for the carriage of either private or public specie then they were expected to pay one third of the sum received to the commander-in-chief under whose orders they sailed, as if it were prize money.[8] Where there was more than one flag-officer on a station then the junior flag-officers took a share of the monies in the same proportions as if it was prize money.

Admiral Sir John Jervis had tried to deny a share to his junior flag-officers of freight money received by him from his captains while commander-in-chief of the American station, in charge of the Leeward Island fleet undertaking combined operations with the army under Sir Charles Grey. The dispute joined the plethora of disputes and litigation that arose from that campaign.[9] It came to a head in court in 1801 in an action brought by Rear-Admiral Sir William Parker against Benjamin Tucker. Jervis had by then become the Earl of St Vincent, after the battle of that name in which both he and Parker had fought. Tucker was St Vincent's secretary and prize agent. A number of admirals were called to give evidence in support of the universal practice of sharing freight money with junior flag-officers back to the time of Sir George Rooke and the war of Spanish succession. Parker recovered his share, and established the right for the other junior flag-officers. The right of a commander-in-chief to be paid the one third flag-share by the captain was not in dispute in that case since everyone's claim depended on its existence.[10]

In 1801 the government stopped routine payment of freight to captains of Royal Navy ships carrying public bullion or specie. The public was, after all, already paying for the services of the ship and her captain. The stoppage was neither appreciated, nor accepted by Royal Navy captains and in March 1807 the Treasury gave in to pressure to resume the payment of freight. On 5th March 1807 the Treasury wrote to the Admiralty saying that they were prepared to pay

[7] Geoffrey L. Green, *The Royal Navy & Anglo-Jewry 1740-1820*, page 75/76.
[8] Montagu v Janvarin, (1813) 3 Taunt. 442, 445.
[9] see Michael Duffy, *Soldiers, Sugar and Seapower*, pp 106-114, and J. M. Fewster, Prize money and the British Expedition to the West Indies of 1793-4, *Journal of Imperial and Commonwealth History* (1983) Vol 12 pp1-28.
[10] Montagu v Janverin (1813) 3 Taunt. 442, 452. The account there recited was from Serjeant Shepherd, who had appeared as counsel in the case of Parker v Tucker in 1801.

½ per cent of the value of bullion cargoes as freight. The change of heart came about as there was evidence that captains had been refusing to give a receipt for the amount of bullion taken on board and had been withholding their freight money from the cargo when they discharged it 'under the pretence of a right founded upon ancient usage, to a charge, in the nature of a poundage on the sum shipped, for their care and trouble during the time that such specie was on board".[11] By this time Benjamin Tucker had been appointed Second Secretary to the Admiralty by St Vincent. In that role he replied to the Treasury on 10th March 1807 recognising that naval officers had no right or claim to demand payment for the freight of any public items put on board their ships and that it was the duty of every naval officer to execute his orders without any claim of freight and accepting the payment of ½ per cent as a bounty rather than a right. Thereafter payment of freight for public bullion resumed. The normal rate was set at the reduced rate of ½ per cent, although more was still allowed on occasion, including the remittance of captured specie from the River Plate in 1807, as will be seen below, where 2 per cent was paid.

With the resumption of payment of freight came the resumption of demands by flag-officers for their one third share. One of those who claimed a flag-share was Captain Home Popham, who claimed as commodore of an expedition that had set out to capture the Cape in 1805, and thereafter sailed to conquer the River Plate. Commodores counted as flag-officers for the purposes of prize money if they were entitled to a captain under them on their flag ship.[12] Popham had appointed a captain of his flag ship under him assuming that he had a right to do so. On the assumption that he was entitled to a one third share of any prize money earned by each captain under his command, Popham also claimed the same one third share of freight money that Captain Ross Donnelly earned for bringing back the captured specie Popham had consigned to his care. In fact Popham's orders did not contain any authority to appoint a captain under him and in 1807 the Court of Common Pleas held that as he had appointed his captain under him without authority to do so he was not entitled to share as a flag-officer.[13] Donnelly was represented in his action against Popham by an experienced team of counsel, Serjeants Shepherd and Best, with the future Lord Chief Justice Charles Abbott as their junior. None of them argued that a flag-officer was not, in any event, entitled to a share of freight money in the way that he was entitled to a share of prize money. It mattered not to the outcome in that case,

[11] Recited in Monagu v Janvarin (1813) 3 Taunt. 442, 446.
[12] See Ch. 8.
[13] Anon, *A Correct Account of The Trial at Large between Ross Donnelly, Esq. a Post Captain in His Majesty's Navy, Plaintiff and Sir Home Popham, Knt. Defendant.* see also Donnelly v Popham (1807) 1 Taunt. 1.

as Donnelly won on the alternative argument that Popham was not a flag-officer for prize purposes.

The entitlement to a flag-share of freight would be raised, however, in a later claim by Admiral Sir George Montagu against Richard Janvarin, commander of *HMS Pluto*. On this occasion, Shepherd and Best were on opposite sides. Shepherd was for the admiral claiming a 'customary' admiral's share of freight money, but was met with an argument advanced by Best that there was no right to such a share. Although the point had not been argued in Donnelly v Popham, it was open to be argued now. If correct then it would deprive Montagu of his claim.

On 16th July 1808, as a result of an order from the Admiralty the previous day, Montagu had ordered Janvarin to carry 500,000 dollars from Spithead to the British agent in Gijon in Northern Spain. Janvarin was chosen for this lucrative task by Montagu as the vessel specified by the Admiralty order, *HMS Solebay*, was no longer at Spithead. Having safely delivered the money, Janvarin was paid the sum of £548 9s as freight by the Treasury. Montagu claimed his one third, the sum of £182 18s 4d. At a trial in the Court of Common Pleas held at Guildhall before Chief Justice Sir James Mansfield and a jury in 1810 judgment was given for Montagu, but with permission to apply to the full court of judges of the King's Bench to overturn the judgment.[14] The matter came before the King's Bench, presided over by Mansfield, in the autumn of 1810, and in May 1811 they eventually ruled that there could be no custom to divide money given by way of a bounty. The Admiralty, they held, had intended the freight money to be given to the commander of the ship that carried the cargo. Thus, the court held, Montagu and other admirals who gave effect to admiralty orders for the carriage of bullion were not entitled to a share.[15]

Payment of freight by merchants for the carriage of private bullion was not affected by the changes in arrangements for carriage of public specie. That, as Mansfield observed in Montagu v Janvarin, was governed by the contractual terms negotiated with the merchant and between captains and their commanders-in-chief.

[14] For the relationship between the Court of Common Pleas and the King's Bench see Grahame Aldous, Nelson and St Vincent: Prize Fighters, *The Mariner's Mirror*, 2015, 101:2 149 and 152.
[15] Montagu v Janvarin (1813) 3 Taunt. 442, 455.

Recovery of Flag-shares paid in Error?

The decision in Montagu v Janvarin caused some consternation both to those captains who had paid over a share of their freight money and to their commanders-in-chief who had received, and often spent, the money. The captains now tried to obtain repayment. One such captain was Sir Charles Brisbane. In April 1808 Brisbane had been serving under Admiral Dacres in Jamaica as captain of the 38 gun frigate *HMS Arethusa*. Dacres ordered Brisbane to carry 700,000 dollars of public money to Portsmouth. Brisbane also took on board 1,530,000 dollars belonging to private individuals for delivery to the Bank of England.[16] In November 1808 Brisbane received £7,438 18s 5d from the Bank of England as agents for the private individuals as payment of freight for the carriage of their dollars. In March 1809 Brisbane received £850 from the Treasury as payment of freight on the public monies that he had carried.[17] Under the belief that Dacres was entitled to one third of each of the payments that he had received, Brisbane paid £2,500 to his Admiral.

When Brisbane discovered what had happened in Montagu v Janvarin he instructed Janvarin's counsel, Serjeant Best, to try and recover the money he had paid over. Admiral Dacres had died by this time, and so Brisbane brought his action in the Court of Common Pleas against Dacres' widow and executrix seeking repayment out of Dacres' estate. When judgment was given by the full court in July 1813 Brisbane not only met with disappointment, but the very entitlement to earn money by private arrangements came under threat.[18]

The court held that it was illegal for a commander of a Royal Navy ship to carry private bullion without an order from the Admiralty or one of his commanding officers to do so. As such, it held, the private freight was tainted by illegality and the court would not assist in its recovery. The effect of this judgment was to hand back to admirals in command of a station considerable power. As Mansfield had foreseen in his judgment in Montagu v Janvarin, where an admiral had a financial interest in selecting the captain for carriage of bullion it left that captain open to abuse and could lead commanding officers into the temptation to dispatch ships away from their station in pursuit of private bullion to carry. In Montagu v Janvarin the court had heard evidence about such a practice, which Mansfield described as 'a very dangerous practice'.

[16] The total value being carried at today's values was therefore over £32 million.
[17] Payment having been authorised by the Treasury 5 months earlier on 15th November 1808.
[18] Brisbane v Dacres (1815) 5 Taunt. 143. Mansfield CJ, Chambre J. and Heath J.

That was not the worst of the news for Brisbane, however. The court also held that Brisbane could not recover the money that he had paid to Dacres as he had authorised the payment of the money to Dacres in full knowledge of the facts. Brisbane's mistake as to the law and as to Dacres' entitlement to the money did not mean that it was recoverable. Accordingly Brisbane recovered none of the money that he had paid to Dacres as a share of the freight money that he had received.

The history of this legal finding since 1813 has a lesson for those who may be tempted to feel that with modern sensibilities these arguments about taking liberties with public money for private profit are a scandalous historical anachronism. The principle identified in Brisbane v Dacres, that a mistake of law did not render a transaction void so as to lead to repayment of sums paid under the mistake, remained good law until overturned by the House of Lords in 1998. In Kleinwort Benson v Lincoln CC the House of Lords allowed recovery of sums paid as a result of 'swap' agreements entered into by local authorities with merchant banks involving public monies.[19] The agreements had been thought to be legal, but were held to be ultra vires and illegal in Hazell v Hammersmith and Fulham LBC.[20] The local authorities then tried to recover the profits that the banks had made at public expense. They were met with the same argument that had defeated Brisbane's claim, but after a lengthy court battle the House of Lords reversed the Brisbane decision. The principles of law established in the eighteenth century were far from being maverick decisions of their time. Even where they have been altered recently it has only been after having been accepted as good law for many a year.

Easy Money? Hodgson v Fullerton

In the course of submissions to the King's Bench by Serjeant Best on behalf of Janverin in 1810 Mansfield C.J. pointed out that 'If the captain takes on board merchants' bullion, he signs a bill of lading for it, like the captain of a merchant ship, by which he incurs a dreadful responsibility, and is therefore entitled to freight from the merchant".[21] Serjeant Best and his new client, a Lt. Foulerton late of *HMS Cheerly*, were about to discover what that responsibility meant in practice.

[19] [1998] 2 A. C. 349
[20] [1992] 2 A.C. 1
[21] Montagu v Janverin (1813) 3 Taunt. 442,450.

HMS Cheerly in Buenos Aires, 1809

When the gun brig *HMS Cheerly* sailed for home from the river Plate in October 1809 there were good reasons for her commander, Lieutenant Thomas Foulerton, to be satisfied. 1809 was an interesting time for a Royal Navy ship to be in the river Plate. The river now forms the border between Argentina and Uruguay and houses on its banks Buenos Aires and Montevideo, the respective capitals of each. In 1809 it was nominally a key part of the Spanish Vice-royalty of Peru. When Napoleon forced the abdication of the Spanish Royal family and put his brother Joseph uneasily on the Spanish throne in 1808, however, Spanish authority in South America slipped. The local civic authorities had been emboldened by their success in repelling the British invasions of the Rio de la Plata in 1806-7. Initiated controversially, and without express written orders, by Commodore Sir Home Popham after his re-capture of Cape Town in 1806, the invasions had been unsustainable and were abandoned in the face of local resistance.[22] The failure of the invasions was a set back for some British merchants who had received direct appeals from Popham to support his military action, but it did not put an end to British trade in the area. Whether out of loyalty to the deposed Bourbon Royal family or, more likely, to their own interests the locals had engaged in trade with the British despite the continuing war in Europe, as the story of the *Cheerly* confirms.[23]

Foulerton and the Spanish Dollars

Among those who had made use of the opportunity to trade created by the political vacuum in South America was the South Sea Company. The Company had been granted a monopoly of the trade with South America by Queen Anne in 1711 during the negotiations with France to end the War of Spanish Succession that led to the Treaty of Utrecht in 1713.[24] While Spain had controlled much of the South American trade the monopoly had served little purpose, apart from fuelling the well-known bubble. A scam involving the use of insider information about the national debt to ramp up the value of shares in the Company, the bubble had ruined many and brought the Company under government control. With renewed interest in trade in the South Sea, as the trading area of South America was called, the Company granted a licence to

[22] Popham, *A Damned Cunning Fellow*, 144–65; Grainger, *British Campaigns in the South Atlantic, 1805-1807*, 69ff.
[23] See also *Nations and Nationalism; A Global Historical Overview*, Alberto Spektorowski, (California: University of Notre Dame Press, 2008), p. 269.
[24] Statute of 1711, 9 Ann. C. 21, S. 49.

a Mr Hodgson and his ship the *Braganza*.[25] The licence was for 18 months from February 1809 for the ship to sail, trade, navigate, and adventure to all and every port or ports within the company's limits.[26] On the sale of the outward cargo the *Braganza* had the enormous sum of nearly £15,000 in Spanish dollars to remit home.[27] To get them home safely they were loaded in 21 casks on board the *Cheerly* and entrusted to the care of Thomas Foulerton. In return it was agreed that Foulerton was to receive 'the usual' commission of 2 ½ per cent, a sum of nearly £369.

While his men were picking fibres from old junk rope in the Rio Plata to keep them busy, Thomas Foulerton had been arranging to make some serious money. He had reason to think, in the words of Patrick O'Brian, that:

> "freight money, that charming unlooked-for, unlaborious, almost unearned shower of gold…..Although it was far rarer than prize money … it was surer; it had no possible legal difficulties attached."[28]

Delivery

HMS Cheerly arrived at Spithead in March 1810 and entered Portsmouth harbour to discharge her valuable cargo.[29] When the dollars were counted it was found that two out of the twenty-one casks were not there. 5,865 dollars, to a value of £1,407 6s 4d had gone missing. Hodgson sued, and Foulerton turned to Serjeant Best and his colleague Searjeant Vaughan to find a defence. The sum claimed was the full £1,407, nearly four times the value of the freight that Foulerton was due to get for his trouble. The matter came before Mansfield C.J. in the autumn of 1812. He heard the evidence and gave judgment for the plaintiff, Hodgson, but reserved the legal argument to the judges of the King's Bench, who gave their judgment in May 1813.[30]

Best argued that as the licence to trade had been given by the South Sea Company to the *Braganza*, use of *Cheerly* to remit the dollars amounted to a breach of that licence and of the Company's monopoly. Thus, it was argued, the transaction was illegal and Hodgson could not

[25]The family name of the Portuguese royal family, whose court had fled to Brazil in 1807 under the protection of the Royal Navy in the face of Napoleon's conquest of the Iberian Peninsula.
[26] Hodgson v Fullerton (1813) 4 Taunt. 787. Foulerton's name is misspelled in the law report.
[27] Worth nearly £1 million today, see Gregory Clark, The Annual RPI and Average Earnings for Britain, 1209 to Present, www.MeasuringWorth.com.
[28] Patrick O'Brian, *HMS Surprise*, London 1973, p. 334.
[29] TNA, ADM 51/2170
[30] In this instance Heath, Chambre and Gibbs JJ.

recover the value of the missing dollars as the loss resulted from an illegal transaction. The court was having none of it. They pointed out that parliament had guarded against a literal meaning of the Act of Queen Anne by outlawing acts 'contrary to the true meaning of this act'. They held that sending the proceedings of licenced trading back by a Royal Navy ship was no breach of the intended monopoly on trade, and thus the transaction was lawful. Foulerton was liable for the failure to deliver the missing dollars.[31] He had learned the hard way that there is no such thing as easy money at sea.

Head Money

In addition to prize money from the proceeds of captured enemy ships and their cargoes, the officers and crew of both ships of war and privateers were eligible for payments for enemy ships of war that they captured, sunk, burnt or otherwise destroyed. The payments applied to both enemy state ships of war and enemy privateers. The payments were made by the treasurer of the navy under statute and were calculated by the number of men living on board any destroyed ship at the beginning of the engagement. Head Money in England dated back to the prize act of 1708 under Queen Anne. Before that, a prize bounty had been paid on the number of guns that had been carried by ships destroyed in combat. The gun money bounty was introduced during the interregnum as part of the reforms to professionalise the navy and bind it to the commonwealth cause.[32] In common with a number of attempts at reform of prize law both in England and the US it was introduced first as a hasty reform and then followed up with a more considered provision.

An Act for the encouragement of Officers and Mariners was passed by the Rump Parliament on 22 February 1649, within a month of the execution of Charles I. The Act provided for payment of gun money by the treasury where commonwealth ships shall 'sink, fire, or in any other ways or means destroy' the Admiral, Vice-Admiral or Rear-Admiral of 'the Revolted Ships, or other Fleet in hostility against this Commonwealth' at a rate of £20, £16 and £12 respectively for each piece of ordinance.[33] Two days later, having realised that provision had only been made for the destruction of flag ships, a further act provided for gun money at the

[31] Hodgson v Fullarton (1813) 4 Taunt. 787, Foulerton's name is misspelled in the law report.
[32] Capp, *Cromwell's Navy*, 57.
[33] Firth, and Rait, (Eds.). *Acts and Ordinances of the Interregnum 1642-1660*. vol. II, 10.

rate of £10 'for each piece of ordnance above Minion'[34] in each non-flag ship destroyed.[35] These and other temporary arrangements were then confirmed in a consolidating act of 17th April 1649.[36] The gun money was distributed to the captain or captains and other officers and mariners of the ship or ships acting in the destruction of the enemy ships. The payment of gun money continued after the interregnum, but was extended to include captured ships. The Trade with France Act of William and Mary in 1692 provided a bounty of £10 for each gun on the taking or destroying of any enemy man of war, whether naval or privateer.[37]

Queen Anne's Cruisers and Convoys Act of 1708 did away with gun money, but awarded the whole proceeds of prizes to the captors and introduced the additional bounty of head money for captured ships, but not those destroyed, at a rate of £5 per head for every man living on board the captured ship at the beginning of the engagement.[38] Although such bounty is sometimes referred to rather floridly as 'blood money', the bounty was paid whether the enemy sailors were killed, injured or survived unharmed. There was no need for blood to be spilled for the entitlement to arise, although there had to be an 'engagement', i.e. combat.

Head money continued in the wars between 1793 and 1815. The Prize Act of 1793 allowed a payment of £5 per head.[39] From then on it was payable where ships were 'taken' (i.e. captured) ***or*** destroyed. As before, the payment was made on each head, whether the man survived the engagement or not. Where there were survivors then the number of men was required to be proved by the oaths of three or more of the chief officers of the enemy ship, or of those who had survived if less than three. The bounty was only payable on commissioned ships of the enemy, be they naval ships or privateers. Dutch armed transports and a Spanish armed packet were held not to qualify as they did not hold commissions as ships of war.[40] Where an enemy ship had been captured while in commission but then recaptured and sent in with a salvage crew, she was held still to be a commissioned ship of war when she was then captured again, and so head money was payable.[41] Combat could include forcing a fleeing enemy ship onto the shore, but the destruction had to be complete. Even where the damage from the grounding and

[34] A small cannon of 3 inch bore and 5lb shot that was principally used as an anti-personnel weapon but remained in use as quarterdeck armament until 1716.
[35] Firth and Rait, II:18.
[36] Firth and Rait, II:72.
[37] 4 & 5 Will. And Mary c. 25, Christopher Robinson, *Collectanea Maritima*, 193.
[38] 6 Annae c. 13, s. 8.
[39] 33 Geo. III c. 66 s. 40.
[40] Several Dutch Schyts, (1814) 6 Rob. 48.
[41] The Matilda, (1814) 1 Dods. 367, a claim involving a US privateer.

an attempt to set fire to the ship meant that the French broke up the stranded vessel a claim for head money was refused as she was neither captured nor destroyed by the Royal Navy.[42]

Head money was distributed among those officers and crew entitled to it in accordance with the rules for prize money. In that way it resembled prize money, but the courts took a different, and more restrictive, approach when assessing those who were entitled. It was regarded as more of a 'reward for real and active service, and for meritorious personal exertion' and thus only those ships who had brought about the destruction of the enemy were entitled.[43]

Whereas another naval ship being 'in sight' at the time would be presumed to have played a part in a capture for the purposes of prize money, the same did not apply to claims for head money from a capture or destruction. Entitlement to head money had been held to apply only to those ships who were actually engaged with the captured ships in the cases of the *Superb* in 1710, the *Thoulouse* in 1715 and the *Dange* in 1761.[44] Those precedents were followed strictly in later cases. As Sir William Scott expressed it from the Admiralty Court bench, 'It is not even an honest and anxious endeavour to share in the peril that shall bring the parties within the extent of the beneficial title, if the endeavour does not bring them within the capacity for actually sharing in that peril'.[45] Combat on its own did not suffice to complete the entitlement to head money. The combat had to lead to a completed capture or destruction.[46]

Like prize money, head money continued into the twentieth century. It was expressly continued in S. 42 of the Naval Prize Act 1864, which was given effect to in the First World War by an Order-in-Council of 2nd March 1915. The rate remained at £5 per head despite 200 years of inflation. As a result the amounts, when distributed among those entitled were sometimes quite small. Nevertheless, the law reports contain a number of claims made on behalf of the ships' crews involved in action. They include claims for depth charged U boats where there was proof of destruction.[47] The destruction of four German mine sweepers by a squadron of 15 Royal Navy ships produced a total award of £535 that had to stretch among all the officers and crew involved, though the admiral agreed to forgo his share.[48] At Jutland in 1916 151 Royal Navy ships fought the German fleet and 11 enemy ships were recorded as destroyed. Given the

[42] La Clorinde, (1814) 1 Dods. 436; L'Elise, (1814) 1 Dods. 442.
[43] Ville de Varsovie (1818) 2 Dods. 301, 302
[44] Quoted in La Clorinde, (1814) 1 Dods. 436, 438.
[45] Ville de Varsovie (1818) 2 Dods. 301, 303.
[46] La Clorinde, (1814) 1 Dods. 436.
[47] See e.g. 'U. 61' [1921] 7 LLR 229.
[48] [1921] 7LLR 228.

difficulty in showing whose action had brought about the destruction of any particular enemy ship, the Grand Fleet agreed to treat the battle as a joint and common enterprise, an approach that was approved by the Admiralty Court in 1920 when Admirals Viscount Jellicoe and Earl Beatty applied for head money. Based on a calculation of 4,537 men on the destroyed German ships, a sum of £22,685 was awarded, with the Admiralty Court judge, Sir Henry Duke, declaring that 'the record of these proceedings will be one of the most cherished documents in the archives of this Court'.[49]

Booty Distinguished

Prize money is sometimes confused with 'booty'. If ships and cargo, or any other assets of the enemy, were seized by land forces, or by conjoint expeditions of sea and land forces then they were not covered by the distribution provisions of the prize acts and proclamations. Although the Admiralty Court had jurisdiction to condemn such captures as the property of His Majesty (rather than the captors), it was reserved to the King to distribute the proceeds as he saw fit by royal warrant.[50] Strictly it was such assets that were properly described as 'booty'.[51]

The Admiralty Court had no jurisdiction over property captured on land exclusively by land forces until the Admiralty Court Act 1840. It was then given jurisdiction to make awards on the same principles as for prize awards.[52]

Where ships of the Royal Navy were involved in captures then in practice the share that the King allocated to the Navy was distributed in line with the distribution of prize money, but the entitlement arose under the specific royal warrant for the expedition, rather than the prize acts and proclamations. Such warrants might be given in advance of a planned operation, but if there was no advance provision then the commanders-in-chief of the navy and the army forces involved in the captures could agree a division in writing and if confirmed by the king then it became binding on all concerned.[53] Prizes taken during a voyage out to a joint operation against a land fortress belonged to the naval captors and no share went to the army as such. Army personnel only received a share as persons on board doing their duty at the time of capture.[54]

[49] In the matter of the Battle of Jutland [1920] P. 408.
[50] See e.g. Prize Act 1793 s. 3.
[51] Per Sir William Scott, see Admiralty Court judgment in Genoa and its Dependencies , Spezzia, Savonna, and other towns (1820) 2 Dods. 444.
[52] 3&4 Vic. C.65 s. 22, see Judgment of Dr Lushington in *The Banda and Kirwee Booty*, 1866.
[53] See e.g. Prize Act 1793 s. 4.
[54] See e.g. Prize Act 1793 s. 5.

Conclusion

This chapters shows that prize money was not the only means of rewarding the Royal Navy for service in time of war. Freight money had a different jurisprudential basis, being a grant by the Treasury, rather than a statutory or customary right, whatever the officers of the Royal Navy may have thought. In determining the grant, however, the Treasury could not in practice ignore the expectations of the Royal Navy. Although Head money had a similar statutory basis as prize money, the courts were willing and able to take a more restrictive approach to such awards in order to try and reflect the policy reasons behind the awards. Not only were the courts ready and willing to intervene and supervise these areas, but the Admiralty Court was so successful at creating a coherent body of law that when parliament made provision for a court to have jurisdiction over awards of booty it was to the Admiralty Court that it looked.

Britain was not alone in awarding prize money to its navy. The next chapter considers the experience of the US in adapting the British rules to its own use.

Chapter 11, United States of America Prize Distribution

Rules for the distribution of prize money from prizes captured on behalf of the American rebel United Colonies that were to form the United States of America predated the Declaration of Independence in 1776. They even pre-dated the resolution of the Continental Congress of 13th October 1775 that is recognised by the US navy as establishing a Continental Navy.[1]

The Continental Navy

Realising the need for a naval force, George Washington issued his first orders for a ship of the continental navy on 2nd September 1775. Captain Nicholson Broughton was ordered to take command of the schooner *Hannah,* which has gone down in history as the first ship of the US navy.[2] News that two 'north country built brigs' had sailed from England in August loaded with arms, powder and other stores for Quebec without a convoy then prompted the Continental Congress to resolve on 5th October 1775 that they should be intercepted by Washington's naval force to secure the cargo for the continental army. In doing so they also resolved that to encourage success in the enterprise 'on this occasion, that the master, officers and seamen, shall be entitled to one half of the value of the prizes by them taken, the wages they receive from the respective colonies notwithstanding'. John Hancock, the President of the Continental Congress, wrote to George Washington the same day telling him of the congressional authority to send two ships to intercept the British store ships, and of the entitlement to one half of the value of prizes.[3]

Three days later, on 8th October 1775, at his headquarters at Cambridge, Massachusetts, George Washington issued orders to Captain Sion Martingale to command the armed brig *Washington*.[4] The *Washington* had been fitted out and equipped at the Continental expense, i.e. from funds provided by the rebel colonies jointly through the Continental Congress. She was armed with six six-pounders, four four-pounders, ten swivel guns and carried a crew of seventy-four. She

[1] Journals of the Continental Congress, 1774-1789, Friday October 13, 1775, p. 294, John B. Hattendorf, The US Navy and the 'Freedom of the Seas', 1775-1917 in Rolf Hobson, ed., *Navies in Northern Waters, 1721 - 2000*, Cass Series Naval Policy and History 26 (London: Cass, 2004), 153.
[2] NDAR Vol. 1, Pt. 8. pp 1287-89.
[3] NDAR Vol. 2, p.311
[4] NDAR Vol 2, Pt 3, 354-5. The instructions were captured with the *Washington* and sent to the Admiralty by Admiral Graves. TNA Adm1/484 and are recited in 'The Private Papers of John, Earl of Sandwich, First Lord of the Admiralty 1775-1782' (NRS) and D. Bonner Smith 'The Capture of the Washington', *The Mariner's Mirror* 20, No. 4 (1934) pp. 420-425.

had originally been intended to be a schooner by the name of *Eagle* and the orders were originally drafted with those details included. In fact, however, the vessel was rigged as a brig and given the name *Washington* and the orders were amended accordingly.

Neither the orders issued to Broughton nor Martingale contained the encouragement of half the value of prizes captured, however. The instructions to both were to 'cruize against such Vessels as may be found on the High Seas or elsewhere bound inward or outward to or from Boston in the service of the Ministerial Army and to take and seize all such Vessels laden with Soldiers, Arms, Ammunition or Provisions for or from said Army or which you shall have good reason to suspect are in such service'. The 'design of this enterprize' was 'to intercept the supplies of the Enemy' and accordingly they were 'particularly charged to avoid any engagement with any armed vessel of the Enemy, tho' you may be equal in strength, or have some small advantage'. They were also 'to be extremely careful and frugal of your Ammunition; by no means to waste any of it in any salutes or for any purpose but what is absolutely necessary'.

Broughton and Martingale held commissions in the Continental Army, but their instructions included a provision that in addition to their army pay the officers and crew of their ships were granted a one third share of any cargo on board the vessels taken and brought into port, rather than the one half that Congress had approved. Even this grant of a prize share was not as generous as might first appear. Not only were any captured vessels and their 'apparel' excluded from the grant of the one third share, but so were military and naval stores, which were expressly reserved for public use. Although needed for public service, such cargoes still needed to be captured. As the authority to capture vessels at all was specifically aimed at vessels with such excluded stores, any prize share for the crew would in practice be necessarily limited. Even if there were items of cargo that were not excluded, two-thirds of the value was to go to the continental authority who had fitted out and equipped the ship, and who needed funds for the fight against the British. Of such one third share as there might be, the distribution among the officers and crew was to be as follows:

Captain	6 shares
1st Lieutenant	5 shares
2nd Lieutenant	4 shares

Surgeon[5]	4 shares
Master	3 shares
Steward	2 shares
Mate	1 ½ shares
Gunner	1 ½ shares
Boatswain	1 ½ shares
Gunner's Mate and Serjeant	1 ½ shares
Privates,	1 share each

Thus, out of a total of 94 1/2 shares the individual sailors would get one share each and the captain would get 6 shares. All of the officers and petty officers between them would get about one third of the available prize money and the 'privates', i.e. the ordinary sailors, would account for about two thirds of the total between them.

This was a more egalitarian distribution than that which was to operate in the ships of the Royal Navy who they were to face. In 1775 parliament reacted to the American rebellion by prohibiting trade with the rebellious colonies.[6] Ships found trading in breach of the prohibition were to be forfeit to the crown 'as if the same were the ships and effects of Open Enemies' and subject to condemnation as prizes in the Admiralty Court. Since 1708 the entirety of the net proceeds from the sale of prizes had been payable to captors. A royal proclamation of 22nd December 1775 provided for the distribution of prize money from ships captured during the American rebellion. Three eighths went to the Captain and Flag Officers, an eighth to the other officers, an eighth to the warrant officers, an eighth to the petty officers and everyone else shared the remaining quarter. [7]

By comparison, therefore, the senior officers in the Royal Navy received a much greater share of the spoils than their American counterparts. An American captain's share was just over 6

[5] The surgeon was named in the orders for the *Washington*, but not for the *Hannah*. Otherwise the orders were the same.
[6] The colonies of New Hampshire, Massachuset's Bay, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, the Three Lower Counties on Delaware, Maryland, Virginia, North Carolina, South Carolina and Georgia.
[7] *London Gazette* December 1775, No. 11626 p.1. For later distribution proclamations see chapter 6.

per cent of the prize fund, only 2 per cent of the total value of that part of the cargo that was eligible to be treated as a prize. That compared with a Royal Navy captain's share of a quarter of the total value of the prize ship and its cargo, even after he had accounted for the share that was taken by the flag-officers. Instead of the two thirds share that the ordinary American crewmen shared between them, their counterparts in the Royal Navy shared a mere quarter. The significant difference in the proportion of the prize proceeds that went to the ship as a whole, however, meant that the ordinary sailors in the Royal Navy were still better off when comparing ships with similar crews. Between them they received nine-thirty-sixths (9/36, or 25 per cent) of the proceeds, whereas their US counterparts received only eight-thirty-sixths (8/36, or 22.5 per cent). Whilst the senior officers received more of the proceeds in the Royal Navy, they did so at the expense of the state, who granted it to them, rather than the lower decks when compared with comparable ships of the early American navy. In larger ships of the line where there was a higher ratio of ordinary sailors the comparison became harder, but the early US navy had no such ships.

A more egalitarian distribution of prize money as between the officers and crew was no substitute for adequate ships. On 5th December 1775 the *Washington* was captured off Cape Ann, near Boston, by *HMS Fowey* under Captain George Montagu after a two and a half hour chase. She was the first American naval ship to be captured by the Royal Navy. Being short of vessels, Admiral Graves at first intended to take her into the King's service, but she failed a survey. A board of survey consisting of Captain Symons of *HMS Cerberus*, Captain Robinson of *HMS Preston* and Captain Linzee of *HMS Falcon* condemned the ship as unseaworthy. In the words of the carpenter who inspected her, she was 'totally unserviceable…unfit for war…not fit for sea.'[8] Graves thought this an understatement, informing the Admiralty that 'she exceeds their description of her badness'.[9] The 'thin veneer of American sea power' at the start of the war of independence was thus exposed to the British.[10]

Stung by the 'lawless manner, without even the semblance of just authority' in which the Royal Navy had seized American shipping and taken it into Boston and other ports, further ships were authorised by the Continental Congress to take retaliatory action against British supplies.[11] They included those of private individuals, individual colonies and the Continental Congress. When the Continental Congress came to consider the regulation of their new navy (as well as

[8] *NDAR* Vol III: 112n.
[9] D. Bonner Smith, 'The Capture of the Washington', *The Mariner's Mirror* 20, no. 4 (1934): 420–25.
[10] Willis, *The Struggle for Sea Power*, 101.
[11] *Journals of the Continental Congress*, 1774-1789, 25th November 1775, page 372.

of captures made by privateers and colonial vessels) in debates held during November 1775, they repeated the egalitarian distribution between the officers and crew that George Washington had provided for and also continued the idea of sharing the spoils where the United Colonies had paid the outlay for the voyage.[12] Privateers took the whole benefit of their prizes and distributed the proceeds according to the agreements between their owners and their crew. Where a merchant prize was captured by a vessel fitted out at the expense of any of the united colonies, or at the communal expense of the United Colonies, then two-thirds of the proceeds went to the colony or to the use of the United Colonies as appropriate, and one-third went to the captors. Where a ship of war was captured, however, then the captors were to be entitled to one half of the value rather than one-third. Thus was introduced the concept of graded levels of prize entitlement for the officers and crew dependent upon the supposed effort required in making a capture. This was a feature introduced by the Americans, but not adopted by the British. As with the British system, the prize distribution was made after costs of obtaining a court order declaring the capture to be a prize had been paid.

The New Republic

The new American navy did not distinguish itself during the war of independence and once independence was obtained, the navy was disbanded. The new republic distrusted the idea of a permanent navy. A navy did not fit in easily with the military ideas of the new republic that its defence should be entrusted to the people, serving in local militias for their own defence. Privateers fitted the model, but a federal navy did not. Inland colonies who were not immediately dependent on sea-borne trade distrusted the idea of spending money that would largely benefit seaboard states. Although federalists favoured a strong central government, including a centralised navy, there were many voices who distrusted the very idea of the federal expense of a navy. Such expense might cripple the new country with its cost and a large navy would create the risk of it providing work for itself by encouraging involvement in foreign wars.[13]

Among the more federalist-minded politicians who were emerging in the new republic was a young admiralty lawyer, John Adams. Adams was a keen navalist and took an interest in the development of a US navy from its early days in the Continental Congress through his time as

[12] *Journals of the Continental Congress* 1774-1789, 25th November 1775, p. 375 (as modified on 19th December 1775), affirmed 28th November 1775, p. 386.
[13] Parrillo, *Against the Profit Motive*, 316–18.

second President in succession to Washington, and beyond.[14] Indeed Adams as president kept up an active correspondence with his Navy Secretary, Benjamin Stoddert, about the operational deployments of the US navy, but would later complain that 'When in 1797, 8 and 9 I promoted the Fortification of our Seaports, the purchase of Navy yards, the Building [of] a Navy &tc. I think I was more prudent than those whom opposed me: though my popularity was Sacrificed to it, and my enemies rose to power by their imprudent opposition'.[15]

For all his rebellious fervour against the British in America, Adams considered that the success of British militarism was worthy of importing into the new republic. He would not have been the first or last lawyer to cast round for a precedent to copy when faced with a drafting exercise, but in his case his respect for precedent went deeper. When considering with Jefferson what their committee, formed to consider the articles of war to govern naval discipline, should report to Congress in 1776 Adams noted:

'There was extant, I observed, one system of Articles of War which had carried two empires to the head of mankind. The Roman and the British; for the Articles of War are only a literal translation of the Roman. It would be vain for us to seek our own invention or the records of warlike nations [for] a more complete system of military discipline. I was, therefore, for reporting the British Articles of War totidem verbis [*word for word*]…'[16]

Although there is disagreement as to the precise sources of the eventual Articles of War submitted to the Continental Congress, it is clear that they came from various versions of the British Articles of War between 1661 and 1772 and Adams reminded his colleagues of the desperate position that they faced and that 'nothing short of Roman and British discipline can save us'.[17]

During the Continental Congress, however, there had been little time to do more than follow the lead that Washington's instructions had given as to the distribution of prize money. As Adams had written to one correspondent while the navy debates were being undertaken:

'I am really engaged in constant business from seven to ten in the morning in committee, from ten to four in Congress, and from six to ten again in committee. Our assembly is scarcely

[14] McKee, *A Gentlemanly and Honorable Profession*, 5–6.
[15] Letter John Adams to Benjamin Rush 1st September 1807, tps://founders.archives.gov/documents/Adams/99-02-02-5211.
[16] Valle, *Rocks & Shoals*, 40–41. Diary of John Adams Vol. 3 Monday August 19, 1776, Founding Families: Digital Editions of the Winthrops and the Adamses, ed. C. James Taylor, Boston: Massachusetts Historical Society, 2017, www.masshist.org/apde2/
[17] Valle, 41.

numerous enough for the business; everybody is engaged, all day in Congress, and all the morning and evening in committees'.[18]

The disbanding of the continental navy by 1785, however, gave the opportunity to re-design the navy when the need for it next arose. By then Adams was President.

The Quasi-War: Birth of the US Navy

The outbreak of war between Britain and France in 1793 placed the young US republic in a difficult position. Trade with Britain and the Caribbean was crucial to the US. It had continued after independence despite the efforts of enthusiastic young British naval Captains like Nelson and Collingwood to curb the trade by enforcing the Navigation Act provisions that banned US ships from carrying trade with Britain and her remaining colonies now that they were no longer British colonies.[19] Many revolutionaries in the US sympathised with the revolution against the monarchy in France, however, and were grateful for the support that the French navy had given in the past. The US tried to maintain a trading neutrality that would keep the seas open to her ships. Like all small and militarily weak nations, however, her neutrality became squeezed between the might of the powerful belligerents at war with each other.

The United States of America had been forged in war against Britain. They had succeeded in part due to the assistance of the French and their navy. The first naval war to be fought by the US, however, would be an undeclared war against their old allies, the French. It has become known as the Quasi-War of 1798-1801. In 1794 Congress had authorised the building of six frigates to protect US shipping against the depredations of the corsairs of Algiers.[20] The Algerine crisis had been resolved, however, by negotiation in 1796. The authority of Congress to build six frigates expired with the coming of peace and the construction of all but three of the frigates was cancelled.[21] The US made cash payments and gifts to Algiers, including the *Crescent*, a 36 gun frigate built for the purpose by James Hackett in Portsmouth and launched on 29th June 1797.[22] In return for a settlement of almost a million dollars and the promise of

[18] John Adams to Mrs Mercy Warren, 25th November 1775, Journals of the Continental Congress 1774-1789, p. 376 n1.
[19] Knight, *The Pursuit of Victory*, 91–95.
[20] Act of 27th March 1794, Homans, *Laws of the United States, in Relation to the Navy and Marine Corps, to The*, 31.
[21] Act of 20th April 1796, Homans, 33.
[22] *NDQW* Vol. 1, 6.

annual tribute, 85 American hostages had been released and promises given for the safety of US shipping in the Mediterranean.[23]

The Jay Treaty between the US and Britain in 1795 resolved a number of issues left over from the Treaty of Paris in 1783, which had ended the war of independence. It also provided for trade between the US and Britain, which pushed the increasingly violent revolutionaries in the French Directory to favour a belligerent approach towards the US. Since 1778 the US and the French had had a Treaty of Amity and Commerce providing for respect for free trade. A decree of the Directory of 2nd July 1796 declared that France would treat neutrals in the same manner that those neutrals allowed Britain to treat them, but the ambiguity of that did little to ease the tension on the high seas. When John Adams defeated the Francophile Thomas Jefferson in the presidential election in 1796 the French responded to his inauguration with a decree of 2nd March 1797 renouncing the free trade principle that goods carried in neutral ships were neutral goods. The practical effect was that US ships and cargoes were at risk of seizure by French ships of war and privateers. An undeclared guerre de course, or commerce war, had started.

The US armed itself for a naval war while at the same time negotiating for peace. A three man diplomatic mission was sent to Paris, but a coup in France on 4th September 1797 swept the last of those in favour of a negotiated settlement with America from power. A further French decree of 18th January 1798 proclaimed that any ship carrying British goods would be considered as a good prize by the French. The diplomatic mission was then rebuffed in an ignominious manner that has become known as the XYZ Affair, in which a bribe of $220,000 was demanded by the French negotiator before talks could even begin. US trade was at risk. In 1797 300 US ships had been lost to French prize captures, 6 per cent of its foreign trade vessels. Diplomatic moves had failed. It was time for a US navy.[24]

Until 1798 there was no separate US Navy Department. Such naval matters as there were had been overseen by the War Department. With the advent of a naval conflict the War Department struggled to cope with its burden. On 1st July 1797 Congress authorised the three frigates that had been built, the *United States*, *Constitution* and *Constellation*, to be manned and employed.[25] In the absence of any other body of rules readily available to regulate this new navy, section 8 of the act of Congress expressly adopted the rules that had been approved by Congress back in

[23] Toll, *Six Frigates*, 65, 165–66.
[24] Palmer, *Stoddert's War*, 3–6.
[25] Homans, *Laws of the United States, in Relation to the Navy and Marine Corps*, 34.

November 1775. Further vessels were authorised on 27th April 1798.[26] As yet, however, there was no executive body up to the task of managing them. On 30th April 1798 John Adams, as president, signed an Act to establish the Department of the Navy.[27]

The first Secretary of the Navy to take up the office was Benjamin Stoddert, appointed by Adams in May 1798. Stoddert was a Maryland merchant who had fought, and been wounded, at the battle of Brandywine during the war of independence. He would prove to be an effective and conscientious administrator of the new navy.[28] He was not, however, a lawyer. He sat in the cabinet of a somewhat fastidious lawyer president. A president, furthermore, who had a keen interest in the navy and the drafting of its regulations. The fingerprints of both Adams and Stoddert can be detected on the Navy Acts that emerged in 1799 and 1800, and which governed the regulation of the US navy for the next century and a half.[29] Although Adams favoured a permanent US navy he did so primarily as a permanent force to protect US commerce. Stoddert was a fellow navalist, but he went further and saw a navy as not just about protecting commerce but also acting as a deterrent to European naval states and increasing American prestige with the European powers.[30] It was this last function that the antinavalists feared most, as they were concerned that it might become self-fulfilling and involve the US in European affairs that they could otherwise avoid.

Whereas the British parliament had left the distribution of prize money to be determined by the executive through Orders-in-Council, the US treated it as a matter to be decided by Congress and incorporated expressly into an act of Congress. Adams and Stoddert aspired to a comprehensive act of Congress providing central, Congressional authority for the distribution of prize money. Before they could get to their first attempt in the Navy Act of 1799, however, events intervened in the form of the undeclared naval conflict with France. It was a conflict that provided an opportunity to put in place a permanent structure for a navy in response to increased support for naval action that suppressed the antinavalist objections. As BJ Armstrong, a naval historian at the US Naval Academy, has pointed out, although the barbary

[26] Homans, 37.
[27] Homans, 37.
[28] Palmer, *Stoddert's War*, 7–11.
[29] The naval Articles of War contained in the Acts remained in force with few modifications until replaced by the US Uniform Code of Military Justice in 1950. Valle, *Rocks & Shoals*, 44.
[30] Symonds, *Navalists and Antinavalists*, 72–73.

wars are sometimes referred to as the birth of the US navy, they were preceded by the Quasi-War with France 1789-1801.[31]

Although the US did not declare war against France, Congress did authorise military action against French ships threatening US trade.[32] The provisions dribbled out during the summer of 1798 in a manner that, in hindsight at least, appears somewhat ad hoc. On 28th May 1798 a resolution of Congress noted that 'armed vessels sailing under authority or pretence of authority from the Republic of France, have committed depredations of the commerce of the United States, and have recently captured the vessels and property of citizens thereof, on and near the coasts, in violation of the law of nations, and treaties between the United States and the French nation'. As a result Congress authorized the president to 'instruct and direct the commanders of the armed vessels belonging to the United States to seize, take and bring into any port of the United States, to be proceeded against according to the laws of nations, any such armed vessel which shall have committed or which shall be found hovering on the coasts of the United States, for the purpose of committing depredations on the vessels belonging to the citizens thereof'. On the same day Adams issued instructions to commanders of US armed vessels in just such terms.[33]

On 25th June 1798 Congress authorised any US merchant ships to defend themselves against, and to capture, hostile ships under French colours. The President was authorized to regulate the actions of armed US merchant ships. Private enterprise was to be harnessed to the US guerre de course.

On 28th June 1798 Congress turned its attention to what was to happen to French armed vessels brought into US ports under the provisions it had just introduced. District Courts in the area where the vessels were brought into the US were authorised to condemn the vessels as prizes, or to restore them to their US owners on payment of salvage if they had previously been captured by the French. The act extended the differential prize distribution depending on the nature of the capture and its deemed difficulty. If a prize was of superior or equal force to the public armed vessel of the US which captured it then the captors took the whole value of the

[31] Peter Hore and 1805 Club, *The Trafalgar Chronicle. Journal of the 1805 Club 2 2*, 2017, 48.
[32] The captain of a French privateer taken by a US ship in 1798 '*seemed astonished when he went on board of Capt. Decatur's sloop of war, at his being taken by an American vessel, and said he knew of no war between the two republics*', Report in *Columbian Centinel* newspaper, Boston, July 14 and Aug. 8 1798, *NDQW*, Vol III, 176.
[33] For the resolution and the Instruction, see *NDQW*, Vol. III, 87-88.

prize. If it was of inferior force then the captors were to receive one half and the United States one half.[34] No definition of superior or inferior force was set out in the act.

On 9th July 1798 Congress extended the area of conflict to take in 'any armed French vessel, which shall be found within the jurisdictional limits of the United States, or elsewhere on the high seas'.[35] In other words, any French vessel that was not found in the territorial waters of another state was now fair game. On the following day the president gave the necessary instructions to US navy commanders.[36] The scene was set for the US navy to test itself against the French navy, one of the great European maritime powers. By the time the efforts of the US navy came to court in 1799, however, the first of the Stoddert/Adams attempts at a comprehensive act for the regulation of the navy had been passed.

The hostilities with the French had created a belated swell of patriotic naval fervour in Congress. On the 25th February 1799 Congress passed three acts which provided for the expansion of the navy. It did so despite lengthy debate about the wisdom of naval expansion and sustained objection from the antinavalists who still regarded a large, permanent navy as a threat to the future of the US and an expense that it could not afford and would be unwise to attempt.[37] Nevertheless, Congress passed an Act for the Augmentation of the Navy, which provided for six 74-gun ships of the line to be built, an Act authorising the establishment of two naval docks at a cost of $50,000 and an Act providing for $200,000 to be spent on acquiring timber lands to provide timber for future naval construction.[38] The sum authorised for the construction of the 74-gun ships was the large sum of $1,000,000, but even that sum was less than the expected cost of construction. In fact the Act did not result in the ships being built, and they would have taken years and a much larger budget to build and man in any event.[39] Of more immediate use was a sum of $35,000 that the President was authorised to spend on acquiring smaller ships in the meantime.

Although the 74-gun ships would not be built for many a year, on 2nd March 1799 Congress passed an Act for the government of the navy of the United States that would attempt to put in place a permanent structure for a fleet in being. Its provisions included regulation of prize distribution under Congressional authority. Although the process of creating a system of

[34] Homans, *Laws of the United States, in Relation to the Navy and Marine Corps*, 40.
[35] *NDQW*, Vol. III, 181.
[36] *NDQW*, Vol. III, 187.
[37] *Annals of Congress*, 5th Congress, 3rd Session, 8th February 1799 pp. 2832-2854.
[38] Homans, 46-47
[39] Symonds, *Navalists and Antinavalists*, 74.

governance for the navy would have lasting effect, the Navy Act passed by Congress on 2nd March 1799 would itself prove to be a temporary provision, replaced by a new Act only a year later. It remains of considerable interest, however, and in 1841 when the former Chief Clerk to the Navy Department, Benjamin Homans, produced a compilation of the Laws of the United States Navy and Marine Corps to be published by authority of the Navy Department he included the Act of 1799, along with that of 1800, in his work.[40]

Section 5 of the 1799 Act introduced the idea that 'captured national ships or vessels of war shall be the property of the United States'. Property in such ships was thus vested in the United States. Where a ship was captured by the Royal Navy, by comparison, it became the property of the captors following condemnation. If that ship was bought into service by the Royal Navy it was surveyed and valued and the value thus assessed was then paid over to the captors. The Royal Navy thus had an incentive to capture enemy ships of war, even though the price of doing so might be greater than capturing an unarmed merchant ship with a valuable cargo. A similar system had operated with the prize shares previously awarded to US navy ships, but the 1799 Act sought to change that. Instead of a share of the value of the prize, section 13 of the 1799 Act provided for a bounty to be paid to the US captors of any national ship of war that was taken from the enemy and brought into port. The bounty payable depended on the number and weight of cannon mounted on the captured ship and the number of officers and men taken on board:

For each cannon of 24 lbs or above	$200
For each cannon of 18lbs	$150
For each cannon of 12 lbs	$100
For each cannon of 9 lbs	$75
For each man	$40

Any additional payment of prize money for the capture of a national ship or vessel of war over and above the bounty was therefore left to the discretion of Congress rather than as a matter of right.

[40] Homans, *Laws of the United States, in Relation to the Navy and Marine Corps*, 47.

The idea of bounty paid on guns or head of enemy crew was not new. During the interregnum after the civil war in England the Rump Parliament had introduced a bounty based on the number of guns on ships destroyed in combat. Under William and Mary this was extended to captured ships. The Cruisers and Convoy Act of Queen Anne in 1708 did away with gun money in favour of head money at a rate of £5 per man. Initially this was for captured ships in addition to prize money. It was later extended to include ships destroyed in combat and head money was still payable in the Royal Navy in 1799 and would remain so into the twentieth century.[41]

The 1799 Act did not remove prize money completely from the US navy. Where a US ship or ships captured a ship that was not a 'national ship or vessel of war', i.e. was a merchant ship or privateer, then prize money was still payable. If the captured ship was of inferior size in men *or* guns then the proceeds were to be divided equally between the United States and the officers and men of the vessel or vessels making the capture. Should they capture a ship of superior force in men or guns, however, then the ship became the sole property of the captors and once condemned as a prize they were entitled to the entire net proceeds.

The prize share that went to the United States was intended to pay for the half-pay life pension for disabled officers, sailors and marines that was provided for by section 8 of the act of 1799. This too had been tried before in England during the interregnum. The acts of the Rump Parliament had provided for one half of the prize share from ships of war and one third of the prize share from merchant ships to go to the treasury 'for the relief of the sick or maimed seamen, and the widows, children and impotent parents of the slain'.[42] Though the money was not expressly hypothecated by the US act of 1799, it was a form of self-funding of a change from payment by bounty to payment by salary and pension. This reflected a change that was underway in Britain[43] and would also be implemented in America.[44]

By the time that the act was passed in March 1799, the first capture of a significant French naval ship of war had just occurred.[45] The issue of the prize money payable for her capture would prove an awkward one to resolve. In February 1799 the *USS Constellation* under Captain Thomas Truxton had captured the French frigate *L'Insurgente* in the Caribbean. She

[41] See Ch. 10
[42] Firth, and Rait, (Eds.). *Acts and Ordinances of the Interregnum 1642-1660*. II:10.
[43] John R. Breihan, 'William Pitt and the Commission on Fees 1785-1801'.
[44] Parrillo, *Against the Profit Motive*, 183, 307–58.
[45] The schooner *Croyable* that had been captured earlier, on 7th July 1798, was a French privateer that had been added to the US fleet the following month as the USS Retaliation, Letter from US Navy Secretary Benjamin Stoddert to President John Adams 3rd August 1798, Founders Online, National Archives, http://founders.archives.gov/documents/Adams/99-02-2783.

was brought back to Norfolk, Virginia, arriving in May 1799. Arrangements were already being made to bring her into the US navy and in June she was condemned as a prize by the District Court under the act of 28th June of the previous year, 1798. The capture was made before the act of 1799 was passed and there was thus no bar to a claim for prize payments for a national ship of war. If *L'Insurgente* was deemed to be of superior force then the crew would get the entire proceeds. If inferior, then they would get one half.

Truxton had a reputation as being rapacious when it came to acquiring prize money. He naturally contended that he had captured a ship of superior strength. By the time the claim came before the District Court in Norfolk in June 1799 the provisions of the act of 1799 had been passed, although they did not apply to captures that had occurred before the act came into effect. There was now, however, a congressional provision that defined what amounted to superior force. The French ship had had 409 men on board. Even allowing for the fact that 50 of them had been passengers, the number of men was superior to the American's 316. The French ship also carried 40 guns against the American's 38. Numerically the French had enjoyed superiority of guns. The reality was somewhat different, however. *L'Insurgente* was 30 per cent lighter than her captor by tonnage and was armed accordingly. Whilst *L'Insurgente's* main battery consisted of 12-pounders, *Constellation's* consisted of 24 pounders.[46]

The District Court took sworn evidence from the *Constellation*'s First Lieutenant, John Rogers. Rogers recited the number of men and guns on each ship and was not questioned further by the court. On this evidence the court ruled that a superior ship had been captured, and awarded the entire proceeds to the captors. It has been suggested that the court was misled by Rogers or that there was collusion between the officers and the court. Truxton's local influence was certainly considerable. A fellow captain in Norfolk at the time, Alexander Murray, wrote to Stoddert about Truxton that 'There is one thing Certain, that his Word is Law here, which may not be his fault, as Mankind will sometimes be Blinded in radiance of Glory'.[47] It has even been suggested that Rogers, a future US naval hero, had 'tried to defraud the navy, and to do so in a way that would deprive disabled veterans of their pensions'.[48] The court had, however, simply applied a test that had just been approved by Congress.

[46] Palmer, *Stoddert's War*, 134; Toll, *Six Frigates*, 123.
[47] Toll, *Six Frigates*, 123.
[48] Toll, 123.

When Dudley Knox, a retired captain of the US navy in charge of the US office of Naval Records assembled his digest of the naval documents related to the Quasi-War in 1935 under the authority of Congress in an initiative supported by President Franklin Roosevelt, he included Stoddert's letters suggesting criticism of the court ruling.[49] Stoddert, however, was in the uncomfortable position of having to deal with a ruling that was entirely consistent with a congressional provision that had just been passed on his own watch. His frustration is understandable, but its expression in a readily available source may have clouded subsequent judgements as to the propriety of the court proceedings.

L'Insurgente, or *USS Insurgent* as she had now become, was assessed by a panel chaired by navy agent William Pennock and valued at $120,000. Whatever the position in Norfolk, however, Stoddert was not to be blinded by the radiance of Truxton's glory. Stoddert sought an alternative valuation from Joshua Humpheys, the builder of the US navy's frigates.[50] The 'desktop' valuation came in at $84,500. Stoddert, who was not convinced by the court ruling as to the superiority of the prize, offered Truxton the full amount of the lower valuation rather than appeal the District Court decision.[51] Truxton accepted.[52] The dispute between the Navy Department, its hero and the courts had proved an uncomfortable one. An executive discretion on prize awards for captured national ships of war would not be an easy prerogative to handle in practice. Within a year it would be gone, along with the attempt to define superiority of force.

The share of prizes and bounty awarded to the officers and crew of capturing ships under the act of 1799 was to be distributed between them as set by section 6 of the act:

Captain actually on board at the time	3/20ths
If under the command of a commander-in-chief or commander of a squadron having a captain on board	One of the captain's 3/20ths to such commander
Sea lieutenants and sailing master	2/20ths

[49] *NDQW*. See below.
[50] *NDQW*, Vol. III, 450.
[51] *NDQW*, Vol. III, 480.
[52] Toll, *Six Frigates*, 124; Palmer, *Stoddert's War*, 134.

Marine officers, surgeon, purser, boatswain, gunner, carpenter, master's mate and chaplain	2/20ths
Midshipmen, surgeon's mates, captain's clerk, clergyman or schoolmaster, boatswain's mates, gunner's mates, carpenter's mates, ship's steward, sailmaker, master-at-arms, armourer and coxswain	3/20ths
Gunner's yeoman, boatswain's yeoman, quarter-masters, quarter-gunners, cooper, sailmaker's mates, sergeant of marines, corporal of marines, drummer and fifer, extra petty officers	3/20ths
Seamen, ordinary seamen, marines and boys	7/20ths

The captain's share of the prize money therefore rose from the 3/46ths that applied in the continental navy to 3/20ths. Still well short of the 3/8ths that applied in the Royal Navy, but a doubling of his share. For the first time the idea of a flag-officer's share was introduced. The early US navy had no admirals and early attempts to introduce them were rebuffed by Congress, who distrusted the idea of a permanent body of naval heavyweights who might want to pursue a navalist political agenda. It would be the start of the civil war before the US Congress approved the appointment of admirals, in 1861.

The 1799 act recognised, however, that US ships might act in concert under the overall command of a commodore. The 1799 act incorporated the same idea of a commodore with a captain under him being a flag-officer as had been applied to the Royal Navy. As with the Royal Navy, the 'flag-officer's' share was set at one third of the captain's entitlement, deducted from his share. Captains sailing under specific orders from the navy department were expressly (by section 12 of the 1799 act) to be treated as acting separately from any superior officer. As with a Royal Navy captain under orders direct from the Admiralty, therefore, a captain under direct navy department orders did not have to account to a flag-officer for one third of his prize share. Section 11 of the act of 1799 also made provision to define the rights and privileges of

'flag-officers' that in part reflect the provisions in the royal proclamations applicable to the Royal Navy. Thus, 'flag-officers' only received a share of prize money where the capturing ships had been put under their immediate command and they were not entitled to a share of prizes taken before the capturing ship was put under their command and had acted under their immediate orders. A 'flag-officer' returning from any station where they had command had no share of any prizes taken by ships left on the station after they had got out of the limits of the station.

Section 7 of the 1799 act also set the rates of salvage to be paid where a ship of the US or its allies was recaptured from an enemy. A recapture within 24 hours earned 1/8th of the value of the vessel and cargo, within 48 hours 1/5th, within 96 hours 1/3rd and after 96 hours one half. The US government did not claim any part of the salvage payments paid by the shipowners as a result of recaptures of their vessels. The officers and crew of US navy ships took the whole sum, distributed between them in the same proportions as prize money.[53] The commander still had to submit a full list of officers and men under section 6, Article 10 of the Act, however, in order that the agents recovering the salvage payment on behalf of the captors could make the proper payments. Until this provision was made by Congress it had been thought appropriate to limit claims for salvage for the recapture of friendly English ships to the one eighth that English law allowed to English ships.[54]

The more generous salvage rates payable in US courts would later cause complaint from English courts that joint re-captures were being taken to the US for adjudication, rather than being brought before English prize courts. Protestations that English captains should ensure that joint recaptures by anti-piracy patrols were brought by them before English courts rather than agreeing that a joint-captor American ship could conduct the vessel to the US stood little chance against the contrary economic argument, however.[55]

1800: A New Navy Act

The act of 1799 was repealed and replaced by a new act on 23rd April 1800.[56] There is a frustrating lack of evidence of the discussions that lead to such a rapid change. United States

[53] For this interpretation of section 7 see Benjamin Stoddert's letter to Capt. Samuel Nicholson 12th June 1799 *NDQW*, Vol III, 330. The matter had been expressly dealt with in section 3 of the act of 28th June 1798 Homans, *Laws of the United States, in Relation to the Navy and Marine Corps, to The*, 40.
[54] Capt. Thomas Truxton to Lt. Josias Speake, 3rd May 1799, *NDQW*, Vol. III, 129.
[55] See The Calypso (1828) 2 Hag. Adm. 209, 217-8.
[56] Homans, *Laws of the United States, in Relation to the Navy and Marine Corps*, 59.

archivists have dedicated themselves to preserving the evidence of their founding for posterity. Even notes by John Adams about how he grew his cabbages are preserved and made available online. Neither the records of Congressional debates nor the Adams or Stoddert archives allow a glimpse into the reasons for the new Act. It seems likely that the pressures of work of which Adams had complained in 1775 were still present, and that the drafting discussions were not minuted in a form that has survived. The changes that were introduced, however, furthered Adams' agenda of creating an elitist officer corps of gentlemen for the navy.[57] They thus provide their own evidence of the reasons for change.

Adams had been thwarted in his suggestion that the US president should be called 'His Majesty the President', but his belief that titles and status should be the rewards for public service remained.[58] In addition to the requirement that commanders set a good example of 'honor and virtue' the amended Articles of War enacted by Congress required commanders to set good examples of 'patriotism and subordination'.[59] Not only was divine service to be performed on board twice a day, but it was to be performed 'in a solemn, orderly, and reverent manner' and 'all, or as many of the ship's company as can be spared from duty' were to 'attend at every performance of the worship of Almighty God'.[60] This sat somewhat uncomfortably with the requirement in the First Amendment to the US constitution adopted in 1791 that 'Congress shall make no law respecting the establishment of religion, or the free exercise thereof'.[61] The contrast between the spirit of the Articles of War and that of the First Amendment emphasises that Adams, and Congress, intended the US Navy to be a separate world, apart from civilian life.

Officers could not be flogged, but under Article 3 officers guilty of scandalous offences were liable to be cashiered or suffer such other punishment as a court martial may adjudge. By a new Article 30, however, no commanding officer had the power on his own authority to discharge a commissioned or warrant officer, nor could he strike him, nor punish him otherwise than by suspension or confinement. Gone was the previous power in Article 2 for a captain to order

[57] Valle, *Rocks & Shoals*, 43.
[58] David G McCullough, *John Adams* (New York: Simon & Schuster, 2008), 406. Ironically Adams would later criticize his successors as a 'Monarchical, Antirepublican Administration' concealing information from 'Us the people': Letter, John Adams to Benjamin Rush, 1st September 1807, http://founders.archives.gov/documents/Adams/99-02-5211.
[59] Article 1
[60] Article 2
[61] As Herman Melville would later point out in his polemical work White Jacket: Herman Melville, *White Jacket, or The World in a Man-of-War* (New York and London: 1850) Chapt. 38.

forfeiture of 2 days' pay for an officer. At least in theory, therefore, the disciplining of officers was reserved to court martial.

Even the common seaman benefited, however, from a particularly lawyerly amendment to Article 3. Sailors who misbehaved by way of profane swearing or drunkenness, had been liable to be put in irons until sober and then flogged if the captain thought proper. This allowed for the double punishment of confinement in irons and flogging. After 1800 they could only be put in irons *or* flogged at the discretion of the captain, but not exceeding 12 lashes, unless a court martial ordered a more severe punishment.

Prize money distribution after 1800 was tweaked as follows:[62]

Captain	3/20ths
If under the command of a commander-in-chief or commander of a squadron having a captain on board	One of the captain's 3/20ths to such commander
Sea lieutenants, *captains of marines* and sailing master	2/20ths
Marine *lieutenants*, surgeons, pursers, boatswains, gunners, carpenters, master's mates and chaplains	2/20ths, save that if a ship had a captain but no lieutenant of marines then one third of a 20th was deducted from this class and added to the class above which included the captain of marines
Midshipmen, surgeon's mates, captain's clerk, clergyman or schoolmaster, boatswain's mates, gunner's mates, carpenter's mates, ship's steward, sailmaker, master-at-arms, armourer and coxswain and *coopers*	3 ½ /20ths

[62] The act of 1800 s. 6 Homans, *Laws of the United States, in Relation to the Navy and Marine Corps, to The*, 68.

Gunner's yeoman, boatswain's yeoman, quarter-masters, quarter-gunners, sailmaker's mates, sergeants and corporals of marines, drummers and fifers, extra petty officers	2 ½ /20ths
Seamen, ordinary seamen, marines and others doing duty on board	7/20ths

Thus captains of marines were moved to rank with sea lieutenants and the sailing master rather than with the marine lieutenants in the class below. If there was a captain but no lieutenant of marines, however, then one third of one of the two twentieths that would have been shared with the class that would have included lieutenants of marines was deducted and added to the class that included the captain of marines. The cooper (responsible in particular for the vital job of maintaining the barrels for storage of a ships' water and beer) was moved up one class but he brought with him an additional half of a twentieth to be shared between the class of personnel into which he was moving, taken from the class below from which he had come.

In 1800 the definition of the property on which prize money was payable changed. The effect was to increase the amount of prize money that the officers and crew would receive. From 1800 national ships of war were no longer excluded and the proceeds of all ships and vessels and the goods taken on board of them adjudged to be good prize were eligible for prize money.[63] If the captured vessel was of equal or superior force to its captors then it became the sole property of the captors. If the captured vessel was of inferior force then the proceeds were divided equally between the United States and the officers and men making the capture. The definition of superiority of force by reference to the number of men or guns that had appeared in section 5 of the act of 1799 was not replicated in the act of 1800. The problems with *L'Insurgente* had shown that it was more trouble than it was worth.

The bounty that had previously been paid on captured ships was abolished, but a new head money bounty was payable. This was set at $20 for each person on board any ship of an enemy at the commencement of an engagement which was sunk or destroyed by any ship or vessel belonging to the United States of equal or inferior force. The bounty was to be distributed

[63] The act of 1800 s. 5 Homans, 67.

among the officers and men of the capturing vessel or vessels in the same manner as prize money.[64] Although no prize money was claimable as of right, one potential advantage of a ship being sunk or destroyed was that it made it harder to prove that the vessel was not of equal or superior force. This was especially the case in the early days of the War of 1812 where a willing public (and government) were happy to accept that US naval forces had prevailed over a superior enemy, particularly a superior British enemy of the Royal Navy, and to reward them as a matter of discretion.[65]

19th Century: To Empire and Abolition

US distribution of prize money to its navy survived through the nineteenth century, but unlike the European powers they did not quite make it into the twentieth century. When the US abolition came it was endorsed by the naval establishment, but for the most particular of reasons.

An opportunity to reconsider the taking of prizes and the nature of commerce war had arisen in the middle of the nineteenth century during the peace process to end the Crimean War of 1853-56. In order to ensure the goodwill of strategically situated neutrals such as Sweden, Britain and France voluntarily gave up the right to use privateers against neutral shipping for the duration of the war.[66] At the end of the war the belligerent powers agreed in the Declaration of Paris in 1856 to abandon privateering for good and, within limitations, to recognise neutral goods. This proposal presented the US with a diplomatic dilemma. The US had positioned itself as the defender of freedom of the seas throughout its history. As early as 1776 the Continental Congress had drawn up a template for treaties to give effect to the philosophy of 'free ships, free goods'. By 1785 the US had agreed such treaties with France, Holland, Sweden and Prussia. Her neutral shipping had benefited from the wars between Britain and France after 1793 and the War of 1812 between the US and Britain had, at least in part, been brought about by a professed desire to enforce the freedom of the seas for American shipping.[67] Although attempts by the US in the 1820s to achieve international agreement for respect for freedom of the seas had failed, the desire for such agreement had remained US policy. It did so despite the fact that the defence of US commerce in times of war would rely, in the absence of a large US

[64] The act of 1800, S.7 Homans, 68.
[65] Lambert, *The Challenge*, 78. For the ensuing later disputes, especially between William James and Theodore Roosevelt, see Lambert, 450 and Toll, *Six Frigates*, 463–64.
[66] Parrillo, *Against the Profit Motive*, 314.
[67] Parrillo, 321–22.

standing navy, on the efforts of privateers engaged in commerce war, just as the US proposed to rely on militias called up in times of war for their land defence.

On the face of it the Declaration granted the US its cherished freedom of the seas, but at the same time it would deprive the US of a key ingredient of its naval defence strategy. The US therefore renewed an earlier, unsuccessful proposal for a complete immunity for all neutral goods, whatever their nature and whatever the flag under which they were being carried. When that was, inevitably, rejected by the European powers the US refused to sign the Declaration of Paris on the purported ground that it did not go far enough. Dismissing the European Declaration as a ploy, the US 'preserved their cherished self-image as the champions of individual rights and of commerce-based human brotherhood against the warring states' as well as their primary defence strategy.[68]

At the outbreak of the American Civil War, however, the American decision not to sign up to the Declaration of Paris backfired.[69] The Union found itself in the unusual position of having a greater naval strength than its enemy, the confederate rebels. A belated attempt to sign up to the Declaration of Paris to cover the dispute with the southern rebels so that European powers would treat confederate privateers as pirates was rebuffed by the British.[70] Nevertheless the US eventually declared that it would respect the principles of the Declaration of Paris relating to neutral goods for the duration of hostilities, in an effort to avoid giving neutrals reason to support the confederate cause.[71] When British policy permitted the confederates to obtain the *CSS Alabama*, built in Britain, to attack Union shipping, the US sought damages from Britain and won $15,500,000 in an international arbitration that set the precedent for handling such claims.[72] At the same time, however, the Union used the lure of prize money to enforce a blockade against Confederate shipping and goods.[73] Lincoln insisted throughout the civil war that the Union remained undissolved and that the confederate government was not a legitimate authority.[74] Nevertheless, he maintained that the blockade, traditionally open to nations at war, was also theoretically legitimate, even if he chose to ignore the idea of closing southern ports

[68] Parrillo, 325.
[69] Nicholas Tracy, *Attack on Maritime Trade* (Basingstoke: Macmillan, 1991), 90.
[70] Craig L. Symonds, *Lincoln and His Admirals: Abraham Lincoln, the U.S. Navy, and the Civil War* (Oxford: Oxford University Press, 2010), 42.
[71] Lemnitzer, *Power, Law and the End of Privateering*, 115–53.
[72] T. H. Bingham, *Lives of the Law: Selected Essays and Speeches 2000-2010* (Oxford ; New York: Oxford University Press, 2011), 13–40.
[73] Insurgent vessels found at sea were forfeit to the United States, Act of Congress 13th July 1861, 37th Congress, Sess. 1, Ch. 3, 12 Stat 257.
[74] Symonds, *Lincoln and His Admirals*, 39.

to foreign ships that had been approved by Congress.[75] In a fit of pragmatism the US Supreme Court held that the Union blockade ordered by Abraham Lincoln against his fellow countrymen was constitutional and permissible.[76]

By the Navy Act 1862 Congress provided for the distribution of prizes taken by the Union navy during the civil war. It followed a similar pattern to the earlier provisions.[77] Once again, the captors took the whole benefit if the captured vessel was of equal or superior force, but only half if it was of inferior force.[78] The captain of the capturing ship took a 3/20th share, with one of the twentieths going to the officer in command of the fleet where the capture was 'under the immediate command of the commanding officer of the fleet'. The remainder of the prize fund was distributed to all the others serving on board the capturing ship according to their rates of pay.[79] Whilst Congress regulated the distribution of prize money, the concept of prize money enjoyed widespread acceptance as a method of encouraging officers and men in the execution of their duty.[80] Even an attempt to collectivise prize funds so that they were distributed across the navy rather than to the specific captors failed in Congress in 1882.[81]

By 1899, however, the US had abolished the prize money system. Britain would not abandon prize payments until 1945. It did so as it lost its empire and felt that a profit motive for its navy was 'inappropriate under modern conditions of war'.[82] This reflected Britain's new role in the world. It was no longer going to be an Imperial power and the undisputed master of the seas. It had just won a world war, but it had done so with the help of the new world powers, the US and the Russians. It would pay prize money for the captures made in that war, but it would not do so again.

What prompted the US to abandon prize payments when its naval power was on the rise? The US navy had begun to change during the last two decades of the nineteenth century. The intellectual drive for this change came from Alfred Thayer Mahan at the US War College, who saw the British navy as the instrument through which global market domination had been achieved and a powerful fleet navy as the way for the US to advance its own interests in a

[75] Lemnitzer, *Power, Law and the End of Privateering*, 128.
[76] The Brig Amy Warwick, the Schooner Crenshaw, the Barque Hiawatha, the Schooner Brilliante, Prize Cases (1863) 67 US 635.
[77] An Act for the better government of the Navy of the United States, 17th July 1862, 37th Congress, Sess. 2, Ch. 204, 12 Stat 600,606.
[78] Ibid. S. 2.
[79] Ibid S. 3.
[80] Parrillo, *Against the Profit Motive*, 327.
[81] Parrillo, 329.
[82] *Hansard* HC Deb. 19.12.1945 Vol. 417 Col. 1313.

similar way. Mahan's views found favour with the Navy Secretary, Benjamin Tracy, and in 1889 Congress authorised the building of four capital ships, although disguised by their description as sea-going coast-line battleships in a way that would become all too familiar to navies answerable to democratic parliaments. Then in 1898 a combination of revulsion at Spain's oppression of its Cuban civilians and the mysterious explosion of the *USS Maine* on a visit to Havana provided the impetus for a US war against Spain in the Caribbean and the Pacific. Even though the US navy was still in the minor league, the decrepit Spanish navy proved no match for it, and success in the Pacific led to the acquisition of a US empire out of the blue.[83] A global empire needed a global navy and the transition of US naval policy was properly underway. The potential maritime state that had existed in the eastern seaboard rebel colonies that joined the young USA had given way to a new continental power. The call now was for a large warfighting fleet, not to protect trade, but to challenge potential rivals.[84] The US navy welcomed its expansion and new-found status, but recognised that in order to achieve the necessary congressional support it should abandon the appearance of self-interest that prize money provided. Without complaint from its navy the US abandoned payment of prize money to its naval personnel in 1899.

Similar sentiments were voiced in Britain. In the build up to the First World War many Royal Navy officers, whilst urging the retention of a right to capture at sea, thought that the prize payment system should be abolished for the good of the service.[85] Such arguments did not prevail, however. Britain would abandon prize money payments nearly half a century after the US, when it lost its empire and ceased to be the world's leading naval power. The US had abandoned them because it gained an empire as a continental power, and wanted political cover to take over a new role; not that of a maritime seapower, but that of a dominant military naval power.[86]

[83] Parrillo, *Against the Profit Motive*, 332.
[84] Scott Mobley, *Progressives in Navy Blue: Maritime Strategy, American Empire, and the Transformation of U.S. Naval Identity, 1873-1898*, Studies in Naval History and Sea Power (Annapolis, Maryland: Naval Institute Press, 2018), 179.
[85] Corbett and Lambert, *21st Century Corbett*, 89.
[86] Lambert, *Seapower States*, 289ff.

US Freight Money

As in the Royal Navy, prize money was not the only way in which a ship's commander could supplement his income. He could also receive freight money for the carriage of gold, silver or jewels. Article 23 of the Articles of War approved by Congress in the Navy Act of 1800 made it an offence for any commander or other officer to receive or permit to be received on board his vessel any goods or merchandise except gold, silver or jewels, other than for the sole use of his vessel, without the permission of the President or the Navy Department unless it was to save a cargo of another ship from shipwreck.[87] An officer found to be in breach of the article at court martial was to be cashiered and banned for life from service in the navy. The exception for gold, silver or jewels implied that the permission of the Navy Department was not required to carry such items, including specie. As a result, US captains regarded it as their perquisite to be able to carry private treasure.

Some officers had sought, and obtained, permission from the Navy Department to carry treasure for private merchants. The fact that it had been granted, however, was seen as a sign that it was unnecessary to trouble the Secretary of the Navy for his permission. In 1811 James Lawrence in command of *USS Hornet* and preparing to depart for Europe made arrangements to take on board nearly $200,000 in Spanish gold for merchants desperate to get their specie to Europe. When President Madison and Paul Hamilton, the then Navy Secretary, heard of Lawrence's arrangement they wrote and told him that conveyance of the specie would be 'wholly inadmissible' and that any application by Lawrence to convey the specie abroad would be rejected. Lawrence therefore had to return the specie to his disappointed clients.[88] A sum of over $8,000 in freight money would have been very welcome to a master commandant on $60 per month. Not only did Lawrence have to forgo his payments, but he felt that he had broken his word to the merchants and was at their mercy as a result. His letters of protest to the Navy Department were of no avail, however.

There were strong diplomatic reasons to intervene to prevent a large shipment of specie arriving in Europe with untold consequences. By 1811 Britain was desperate for specie to fund its war

[87] Homans, *Laws of the United States, in Relation to the Navy and Marine Corps, 62.*
[88] McKee, *A Gentlemanly and Honorable Profession, 340.*

in Europe, a desperation that would increase with the Peninsular campaign the following year when the US would also be at war with Britain ostensibly over the right of freedom of the seas for US ships and seamen. The desperation to get specie to Europe is confirmed by the estimate that Lawrence intended to charge 4.5 per cent by way of freight rather than the more usual 1 per cent or less.[89] *Hornet*'s mission to Europe was intended, however, to be a diplomatic attempt to persuade the French and British to repeal their measures against American shipping that had been introduced as a result of the continental system of blockade. The mission would not succeed with either the French or the British, and war with Britain would follow in 1812.[90] Madison and his cabinet knew what Lawrence may not have, that war with Britain was a real possibility. In those circumstances the US government did not want Lawrence's private ventures to further the British war effort by providing much needed specie.[91] Nor would being discovered by the French to be doing so have been any better for furthering the mission to Europe. Ultimately, therefore, political considerations trumped the implication of the wording of the Articles of War.

Conclusion

The US thus applied, but adapted, the British system of prize money distribution. They did so because they understood that it was part of the reason behind British naval superiority. It worked. Initial attempts at a more equitable distribution were soon changed to reflect the British system as a result. They also adopted the freight payment system, but it too was subject to political considerations in the way that it was operated.

[89] McKee, *341.*
[90] Lambert, *The Challenge, 55.*
[91] Albert Gleaves, *James Lawrence, Captain, United States Navy, Commander of the Chesapeake* (New York: G.P. Putnam's Sons, 1904), 81–84.

Chapter 12, Conclusions

In the 5th century St Augustine related the story of a man who, when brought before Alexander the Great for robbery, asked 'What thou meanest by seizing the whole earth; but because I do it with a petty ship, I am called a robber, whilst thou who dost it with a great fleet art styled emperor?' What made the difference, according to St Augustine, was the application of the law.[1] And so it was in the long eighteenth century and beyond.

State Piracy?

Prize-taking in the eighteenth century was not simply 'piracy enlarged', the 'pillage and plunder' of the public imagination from the time of Drake. As this study shows, the Royal Navy was not given a free hand to seize and pillage the goods of the enemy for its own benefit as it saw fit. The taking of prizes was controlled not merely by Admiralty orders, but by statute and Orders-in-Council making detailed provisions, including for regulation of the distribution of shares. The application of these provisions was subject to the rule of law.

The practical application of the rule of law can be seen in those cases that came before the English courts, not just the Admiralty Court, but also courts such as the Court of Common Pleas and the Court of King's Bench. The reports considered in chapters 6 to 10 of this study contain a wealth of accurate information about life in the Georgian Royal Navy, much of it unavailable elsewhere. As this study shows, the cases reveal what officers at the time considered to be the 'custom and usage' of the service. They also show how the courts regulated the service by showing great respect for the views of serving officers, but not following them slavishly. The Royal Navy operated within a framework provided by the common law, but the common law was influenced by the economic and cultural pressures of the time, including the expectations and usage of naval personnel.

Municipal or International law?

The English courts applied municipal law to the resolution of the prize disputes they faced. Although they were not afraid to hold the government to account in its dealings with the Royal

[1] St. Augustine, *The City of God*, Book IV.

Navy where they saw fit, the municipal courts shared the objectives of the government in winning the war. It was a war that was seen as being not just for the survival of the nation, but for the survival of world civilisation, a fight to the death where success was not as certain as might appear in hindsight.

As Lord Devlin put it in 1968:

'it is asking a great deal of even the most conscientious judicial mind to invite it to condemn as illegal the measures which its government is taking for the prosecution of a war in which the nation's life is at stake. It is not necessary to suppose that on such an issue a conflict of duty arises in the judge's mind; it is simply that he is predisposed to find the same sort of reasons for justifying the measure as his government has found.'[2]

As explored in Chapters 2, 4 and 5, there have been previous attempts to explain the role of the law of nations in the jurisprudence of the eighteenth century. Sir William Scott's judgments have been at the heart of these attempts. Indeed, for Bourguignon the law of nations was part of Scott's 'unshakeable bedrock'.[3] What this research shows, however, is that to try and understand the role of the law of nations requires an understanding of the dynamics of the times. In particular, the context of the developing exigencies of the wars and the problem of dealing with the demands of neutrals as well as the British war effort. They do more to explain how the courts viewed the law of nations than any legal gymnastics trying to fit all the decisions into a single static rationale. The law is a developing instrument of society and does not operate in a vacuum. Once that is appreciated then seeming conflicts of view expressed in court judgments can be rationalised rather than finessed. To do so, however, requires looking in detail into the judgments and their context.

The courts worked with the government to achieve shared objectives, but that did not mean that they were dictated to in what they did. Indeed, the ability to be independent made their work acceptable and effective. It meant that the Admiralty could avoid having to enter into the bitter disputes that could arise between its senior officers. It also attempted to earn the respect of neutral ship-owners, merchants and governments.

As has been noted in Chapters 4 and 5 above, the English courts looked to concepts of international law as sources for English municipal law where they thought it appropriate. That

[2] See Chapter 5 above.
[3] Bourguignon, *Sir William Scott, Lord Stowell*, 257.

did not mean, however, that they were subject to international law as has been regularly suggested since the mid-nineteenth century efforts to root a new concept of international law in historical precedent. Indeed, the English approach to international law was as much an attempt to create and influence international law as to follow it. Once the Victorian embroidery over the state of eighteenth-century prize law is removed, it is easier to see the pattern of the original in context. The so-called fathers of international law such as Grotius were no more devoid of self-interest than the municipal courts of England. Despite their reputation as 'law-givers', even the most acclaimed of such jurists created arguments to persuade, not laws to be bound by. The courts looked to such sources where they appeared to support the arguments that they favoured as to what the law should be, rather than as a binding guide to what the law was. In doing so they also used the legal concepts of the day that the courts, in particular Lord Mansfield, had been developing as part of English commercial law. Ideas such as deviation from voyage and the scope of authority from master to servant found their way seamlessly into the allied naval setting. Concepts of international law, or the law of nations, formed part of the creative process of the common law, but were not themselves law administered by the English courts.

The realisation that international law as we currently understand it is of more recent invention than sometimes pretended matters. As has been seen above, we need to peel away later concepts of international law to understand what was happening in the eighteenth century properly. This process reveals the shallow, under-developed roots and the need to tend to the frail shoots of international law rather than take it for granted as so old and immutable that it can withstand any shocks that the world may throw at it. To regard the eighteenth-century Admiralty courts as beacons of innovation in international law risks perpetuating the notion that international law is something that Britain gives, rather than receives.

Women and the Royal Navy

The cases studied in this research also reveal unexpected aspects of Georgian social life. So, for example, Susannah, the widow of Admiral Lord Gardner, claimed prize shares through the courts in her own name as executrix of his estate, confounding the idea that in Jane Austen's time women would not take on such roles.[4] Austen had two beloved brothers in the Royal Navy and understood their world through their eyes. In *Mansfield Park*, published in 1814, the Royal

[4] See Chapter 7.

Navy appears in the form of Fanny Price's impoverished family as something to be admired at a distance, but ultimately something to be escaped from. By the time of her last completed novel, *Persuasion* published in 1817 after her death earlier that year, the Royal Navy appears in a more positive light through the amiable and wise Admiral and Mrs Croft, and the gallant Captain Wentworth. They come to save genteel society from itself, despite the new-found nature of their wealth, rather than undermine it. Austen's novels did not lack spirited women, and Mrs Croft is quite capable of financial management, as sailors' wives had to be. Even in *Persuasion*, however, women, are seen as the victims of probate disputes rather than capable protagonists. Mrs Smith is oppressed by the calculating Mr Elliot, the executor of her husband's estate. We do not know what Austen might have made of a character such as Susannah Gardner. Austen died in 1817 aged only 41 leaving a distinct image of women in the eighteenth century trapped by the expectations of society and the power of men. Many fields of research are re-discovering the 'lost' women of the age.[5] Naval history is part of this process, yet as Lincoln noted in 2017 'Women's contribution to British naval supremacy in the long eighteenth century tends to be neglected or sensationalised'.[6] The cases discussed in this thesis open up more material for a more nuanced view.

Equity?

Although the Admiralty was closely involved in supervising the forces that made prize captures, it was prepared, indeed happy, to leave the resolution of disputes between officers to the courts. The Admiralty took steps to change the law from time to time, but left it to the courts to apply that law. It did not attempt to rule over prize disputes by executive order. The rules of prize distribution in Britain were promulgated through secondary legislation in the form of Royal Proclamations, and were passed by the Privy Council and given authority by statute. Although the US reserved such law-making to Congress, in reality there is no more evidence of public discussion, even within Congress, than in Britain. Congress and the American public certainly argued about whether to fund a navy and if so for what purpose and to what extent,

[5] E.g. Art, see Baumgärtel et al., *Angelica Kauffman* (Düsseldorf: Kunstpalast, 2020).

[6] Margarette Lincoln, in Fury, *The Social History of English Seamen, 1650-1815*, 71; despite her own work: *Naval Wives and Mistresses* (Stroud: History, 2011); For later contributions, see e.g. Elaine Chalus, 'Mr Dearest Tussy' about Betsy Freemantle in Colville and Davey, *A New Naval History*, 47–69; Ellen Gill, *Naval Families, War and Duty in Britain, 1740-1820* and *The Trafalgar Chronicle: New Series 3* (2018), a volume dedicated to women and the sea.

but the framing of regulatory provisions was left to members of the executive as much as in Britain, and the provisions adopted reflected their inheritance from the British rules.

Most of the changes to the rules governing the distribution of prize money were, as has been shown in this study, to clarify the rules and reflect the increasing complexity of the Royal Navy and its ships. They were mainly introduced as and when new provisions were required by virtue of a new declaration of war. The exception to this was in 1808. The 1808 Royal Proclamation contained modernising provisions which redefined the classes of petty officer and, significantly, took a one third share of prize money away from the captains and flag officers and redistributed it to the lower decks, in particular to the petty officers whose skills were in great demand. Although there had been calls for such a reform at the time of the mutinies in 1797, those calls had been ignored. Various governments of differing hues came and went thereafter without addressing the issue of prize shares for the lower decks. In 1808 it was in the realisation that it was going to be a long economic conflict fought at sea by the Royal Navy that Lord Mulgrave's Admiralty finally redistributed prize shares rather than impose further on the merchants whose taxes were paying for the war. When the war ended so did the need for the redistribution, and the change was reversed.

In so far as the 1808 changes have been considered before they have been seen in terms of effecting a greater equity between officers and men. Morriss goes so far as to assert that:

' …the state promoted the principle of equity. This was evident in relations between the state and its employees. The state has had a bad press for its treatment of seamen.'[7]

A narrative based on such ideas of 'equity' needs to be challenged in the light of the research set out above. The state has had a bad press because it treated large numbers of seamen, and their families, badly. At times the law intervened. At others direct action was more effective. Inequity and bad treatment remained, however. The changes that were made to prize distribution in Britain during the eighteenth century were not an example of the state wanting to make the relationship between officers and men more equitable. They were aimed at the practical task of making the conduct of the war run more smoothly and to address practical matters such as the shortage of skilled petty officers. Where the changes coincided with a drift of liberalism, then the Admiralty may have caught that breeze while it suited them, but it was not what fundamentally set the course. However long the arc of history may be, it only tended

[7] Morriss, *The Foundations of British Maritime Ascendancy*, 26.

towards a more equal distribution when it suited the national interest and those in power made it happen. It was not a pre-destined path, but took an alignment of cultural and administrative change with economic and military pressure. A tendency towards equity should not be taken for granted.

Prize money disputes had the potential to create discord and disharmony, but that discord was kept in check, and the system preserved, by the application of the rule of law in cases such as those that have been considered in this study. As a result, the system enjoyed public acceptance and the award of prize money continued in Britain through to 1945.

Bounty

Prize money was an incentive for Royal Navy officers and crew to do their duty. It was a form of bounty producing a private profit for the officers and crew involved. The sums could be enormous. Ranier and Pellew were each said to have made £300,000 out of their command of the Indian station during the Napoleonic War. Nelson bought his country estate at Merton Place for £9,000 relying on prize money and the countryside of the UK is still littered with stately piles paid for out of prize money. Prize money remained a significant financial inducement throughout the wars, providing an average annual supplement of £1.2 million to the navy, as seen in Chapter 2.

Comparison with Freight, Head Money and Booty is instructive. Freight payments to captains for the carriage of bullion had a quite different jurisprudential basis to prize money. As payments that directly affected Britain's affairs with other states, prize money was controlled by Act of Parliament from before the eighteenth century and detailed rules were promulgated under statutory supervision. Although naval officers saw freight payments as part of the 'custom and usage' of the navy, they were actually part of the internal workings of the navy, administered as agreed between the Admiralty and the Treasury. Although abolished in 1801, they were restored in 1807 to regain control from naval officers who were taking matters into their own hands by deducting 'commission' on discharge of their cargoes of public bullion.

Head money calculated at £5 per head of the crew of enemy ships captured or destroyed in battle shared the same statutory jurisprudential basis as prize money, but by the eighteenth century prize money had far outstripped head money in significance. As has been seen in Chapter 10, the courts took a more restrictive approach in claims for head money that in claims

for prize shares. They did so as a matter of statutory interpretation reflecting what they saw as the public policy behind the respective provisions.

Booty, i.e. enemy goods seized by or with land forces, was regulated in a more ad hoc way than prize money. Distribution was governed by specific royal warrants, rather than an overarching Royal Proclamation. Nevertheless, some disputes still ended up before the courts. When in 1840 booty was brought within the formal jurisdiction of the courts, it was to the Admiralty Court that parliament turned, and the rules of naval prize were adopted.

All of these payments were means by which service for the crown could provide a private profit over and above wages. In that sense prize money was not unique in providing a means to private profit from public service. Such payments were widely accepted as a means of rewarding the navy in times of war, and the rule of law was used to provide some independence in resolving disputes and keeping the division of spoils within socially acceptable limits. As a result, prize money survived the reforms following the 1785 Commission on Fees and its successors at the turn of the nineteenth century, which ended a large number of sinecures and private fees for undertaking work in public office.

As can be seen from the study of US prize law, whatever the differences between the old and new nations, British prize law provided the model for the rules that the US would adopt. Early attempts at US provision sought to provide what appeared, superficially at least, to be a more egalitarian system. In doing so, the early provisions echoed those of the cash strapped Stuarts and the leveller instincts of the Commonwealth, but practicalities brought the US back towards the proven system that had been developed by the Georgian Royal Navy. Although coming from different directions, they both abandoned prize money payments to reflect changes in their imperial status and their aspirations as world-leading naval powers. Britain abandoned prize money payments in 1945, nearly half a century after the US, when it lost its empire and ceased to be the world's leading naval power. The US had abandoned them because it gained an empire as a continental power, and wanted political cover to take over a new role; not that of a maritime seapower, but that of a dominant military naval power.

Implications for the Use of Naval Power

How the British government and the courts dealt with prize claims had a significant effect on the conduct of war and international relations. Britain had the most powerful navy in the world and wanted to use that power in times of war. This was especially so in the revolutionary and Napoleonic wars that posed existential threats. As a maritime state Britain depended on trade and had a national interest in maintaining freedom of navigation and trade. This national interest was heightened, rather than reduced, in time of war, as Britain needed continued trade to fund her wars.

As a parliamentary democracy where merchants constituted a significant constituency, the merchants had to be listened to rather than merely taxed. They wanted trade to continue and be protected, but if possible, not taken over by neutrals taking advantage of the effort that Britain was putting into maintaining war for their benefit as well as her own.

Britain's stance on these conflicting interests varied depending on whether she was a belligerent or a neutral. Even when Britain was at war, however, there were limits to what Britain could do to force neutrals into line. Even with the most powerful navy in the world, Britain needed allies and the goodwill of others to defeat its enemies. Upset neutrals were potential enemies. Neutrals, if treated fairly and consistently remained friends. They were friends worth having so long as they were not picking Britain's pockets too conspicuously. Even trading 'enemies' such as Sweden when obliged by France to declare war against Britain in the Baltic after 1810, on paper at least, were kept onside by the naval diplomacy of Saumarez and the refusal to seize Swedish merchant prizes so that Britain's naval power could be used in the Baltic to ensure vital naval supplies for the Royal Navy and to undermine Napoleon's attempted economic isolation of Britain.

What the history recounted in this study demonstrates is that these balances are not matters to be struck on a permanent basis and then taken for granted. They need constant attention and adjustment by people who understand the problems, have a vision for the future and are prepared to learn from the past. The adjustments did not happen in a vacuum. They happened against the background of cultural changes. Naval and economic realities finally brought pressure to a head to create change in 1808 that lasted until the end of the war. The adjustments also reflected and effected cultural change themselves that lasted longer. They redistributed

wealth within the naval community and society at large. They helped to win a war that was not only a war of national survival, but became a war of national self-definition. They preserved a method of reward for naval service into the twentieth century when Britain's focus on its survival as a nation, and how it defined itself, finally changed.

As has been seen, the distribution of prize money to the Royal Navy in the long eighteenth century was not a form of state piracy, nor was it an institution regulated by international law. The truth lies in between. It was part of the practical task of getting a huge naval institution to work efficiently without overburdening state finances or embroiling Britain in more hostilities than it could cope with. In order to achieve this it needed to be flexible, but also to accept the supervision of the rule of law.

Appendices:

App. 1. English Legal Referencing and Abbreviations

App. 2. Table of Cases

App. 3. Table of Royal Proclamations

App. 4. Table of Prize Statutes

App. 5. Prize Distribution Royal Proclamations 1793-1815 comparison tables.

App. 6. Bibliography of References

App. 1: English Legal Referencing and Abbreviations

Statutes

English Statutes are referred to by the year of the reign of the sovereign in whose reign they were passed and then by the chapter number in that year, i.e. what numbered statute it was in that regnal year. To help even more, the names of the sovereigns are Latinised. Today all statutes are given Short Titles that include the year they were passed, e.g. Housing Act 1996, but that was not done in the eighteenth century. Even so, some Acts acquired short titles by usage, for example, the Cruizers and Convoys Act 1708. The regnal reference to that Act is expressed as 6 Annae c. 13, i.e. it is the 13th Act of the 6th year of the reign of Queen Anne.

The Acts and Ordinances of the Interregnum have been collected together and were published in 1911. [1]

Between 1762 and 1807 a series of historical statutes was published in volumes called Statutes at Large, initially edited by Danby Pickering, and funded by subscriptions. These volumes remain the most accessible form of early statutes. They are organised and referred to by their regnal years as described above.

Case Reports

English cases before 2001 are referenced by the volume of the reports that they were published in. The date of the decision might appear in square brackets, e.g. [1800] as part of the reference, or in round brackets, e.g. (1800), simply as an indication of the date of the decision. In the long eighteenth century the round bracket format was the norm. The format of case references is normally as follows, e.g.:

Lindo v Rodney (1781) 2 Doug. 614, 624.

This is a reference to the decision in the claim brought by Lindo versus (i.e. against) Lord Rodney. The judgment was in 1781 and was reported in the 2nd volume of the Douglas Reports at page 614. The particular passage being referred to is at page 624.

[1] C H Firth and R S Rait, *Acts and Ordinances of the Interregnum, 1642-1660* (London: HMSO, 1911).

Square bracket references are used where the reports were published in volumes covering a calendar year, thus:

Davidsson v Hill [1901] 2 KB 606.

Refers to the report of a judgment in a dispute between Davidsson and Hill that is reported in the 2nd volume of the King's Bench reports for 1901 at page 606.

Admiralty Court prize cases are normally referred to by the name of the prize ship, and may also have the name of the master of the captured prize. Thus:

The Flad Oyen, (Martenson) (1799) 1 Rob. 135.

is the report of the case concerning the prize ship The Flad Oyen, whose master was named Martenson, heard by the Admiralty Court in 1799 and reported at page 135 in the 1st volume of Christopher Robinson's Admiralty Reports.

Some cases may be referred to in more than one report, and therefore have more than one reference.

Between 1900 and 1932 many of the older reports up until 1866 were reproduced in 178 volumes known as the English Reports. In addition to their original reference in their original report, they have an ER reference to their place in the English Reports.

One exception to this method of referencing is the judgment in a case referred to as: In The Matter of Banda and Kirwee Booty, (1866). It was a decision of the Admiralty Judge, Dr Stephen Lushington that was so long that it was published separately under its own title.

In 2001 the English courts introduced a system of neutral citation as follows, e.g.:

R (Miller and Dos Santos) v Sec. of State for Exiting the EU [2017] UKSC 5.

This relates to Gina Miller's action over serving Article 50 notice to trigger Brexit. It shows the names of the parties as 'R', short the Regina i.e. The Queen, against the Brexit Secretary. The names in brackets are the parties at whose instigation the judicial review proceedings were brought in the name of the Queen against the Brexit Secretary. The reference is to the decision of the UK Supreme Court numbered 5 in 2017, hence [2017] UKSC 5.

The law report abbreviations referred to in this work are:

A. C.	Appeal Cases Reports
B. & C.	Barnewall & Cresswell's Reports
B.R.	Beavan's Reports
Bing.	Bingham's Reports
Bos. & Pull.	Bosenquet & Puller's Reports
Burrell	Burrell's Admiralty Cases
Campb.	Campbell's Reports
De G. F. and J.	De Gex, Fisher and Jones's Reports
Dods.	Dodson's Admiralty Reports
Dow & Ry. K.B.	Dowling & Ryland's Reports
East	East's Reports
Edw. or Edw. Adm. Rep.	Edwards' Admiralty Reports
ER.	English Reports
Ex. Div.	Exchequer Division Reports
F & F	Foster & Finlayson's Reports
H. Bl.	Henry Blackstone's Reports
Hag. Adm.	Haggard's Admiralty Reports
KB	King's Bench Reports
L.J. Ch. (N.S.).	Law Journal Chancery Reports (New Series)
Ld Raym.	Raymond's Reports
LJ (O.S.) K.B.	Law Journal (Old Series) King's Bench Reports
LLR.	Lloyd's Law Reports
LR QB	Law Reports Queen's Bench Division
M&S.	Maule & Selwyn's Reports
P.	Probate Reports
QB.	Queen's Bench Reports
Rob. or C. Rob.	Christopher Robinson's Admiralty Reports
Taunt.	Taunton's Reports
TR.	Term Reports
Ves.	Vesey's Reports

Other Abbreviations used are:

ADM: The Admiralty Papers, The National Archive, Kew, England

BL: The British Library, London

HC: House of Commons Papers

HCA: The Papers of the High Court of Admiralty, The National Archive, Kew, England

LQR: Law Quarterly Review

NC: The Naval Chronicle

NDAR: Naval Documents of the American Revolution

NDQW: Naval Documents Relating to the Quasi War

NMM: The Caird Library, The National Maritime Museum, Greenwich, London

NRS: Navy Records Society

ONDB: Oxford National Dictionary of Biography

TNA: The National Archive, Kew, England

App. 2: List of Cases

Arthur, The (1814) 1 Dods. 423.
Banda and Kirwee Booty, In The Matter of (1866).
Barclay v Russell (1797) 3 Ves. 424.
Baring v The Royal Exchange Assurance Co. (1804) 5 East 99.

Bolton v Gladstone (1804) 5 East 155.

Brig Amy Warwick, the Schooner Crenshaw, the Barque Hiawatha, the Schooner Brilliante, Prize Cases (1863) 67 US 635.
Brisbane v Dacres (1815) 5 Taunt. 143.
Bruce, Ex p. (1806) 8 East 27.

Calypso, The (1828) 2 Hag. Adm. 209.
Cape of Good Hope, The (1799) 2 Rob. 274.

Cox v Ergo Versicherung AG [2014] UKSC 22.

Davidsson v Hill [1901] 2 KB 606.

Dawkins v Lord Paulet (1869) LR 5 QB 94.

Dawkins v Lord Rokeby (1866) 4 F & F 806 .
De Wutz v Hendricks (1824) 2 Bing. 314.
Dolder v Huntingfield (1805) 11 Ves. 283.
Donelly v Popham (1807) 1 Taunt. 1.
Dordrecht, The (1799) 2 Rob. 55.
Drury v Lady Gardner (1813) 2 M&S 150.
Duckworth v Tucker (1809) 2 Taunt. 7.

Duncan v Mitchell (1815) 4 M&S 105.
Empress, The (1814) 1 Dods. 368.
Esso Malaysia, The [1975] 1 QB 198.

Flad Oyen, The, (Martenson) (1799) 1 Rob. 135.

Forsigheid, The (1801) 3 Rob. 311.
Fox, The [1811] Edw. 311.

France Fenwick Tyne and Wear Co. Ltd. V Procurator General. The Prince Knud [1942] AC 667.
Genoa and its Dependencies , Spezzia, Savonna, and other towns (1820) 2 Dods. 444.
Guillaume Tell, The (1808) Edw. Adm. Rep. 6.
Hamburg-American Line v US 168 F. 2nd 47 (1st Cir. 1948).
Harvey v Cooke (1805) 6 East 220.
Hodgson v Fullerton (1813) 4 Taunt. 787.
Holmes v Rainier (1807) 8 East 502.
Hurtige Hane, The, (Dahl) (1801) 3 Rob. 324.

Island of Trinidad, The (1804) 5 Rob. 92.
Johnstone v Margetson (1789) 1 H. Bl. 261.
Jutland, In the matter of the Battle of [1920] P. 408.
Keith v Pringle (1803) 4 East 262.
L'Elise, (1814) 1 Dods. 442.
L'Etoile (1816) 2 Dods. 106.
La Clorinde, (1814) 1 Dods. 436.
La Henriette (1815) 2 Dods. 96.
La Melanie (1816) 2 Dods. 122.
La Pacifique (1764) Burrell 158.
Lady Gardner v Lyne (1811) 13 East 574.
Lavabre v Wilson (1779) 1 Doug. P. 284.
Lawrence v Sydenham (1805) 6 East 45.
Le Caux v Eden (1781) 2 Douglas Rep. 613.

Lindo v Rodney (1781) 2 Doug. 614.

Lord Middleton, The (1802) 4 Rob. Adm. Rep. 153.
Lumley v Sutton (1799) 8 TR 224.
Maria, The, (Paulsen master) (1799) 1 Rob. 340.
Mars, The 1760, quoted by Sir William Scott in The Vryheid, (1799) 2 Rob. 16, 22.
Marsden v Reid (1803) 3 East 572.
Matilda, The 1 Dods. 367.
Montagu v Janvarin, (1813) 3 Taunt. 442.
Nelson, Lord v Tucker (1802) 3 Bos. & Pull. 257.

Nostra Signora de Cabadonga (1808) 6 Rob. Adm. Rep. 305n.

Novello v Toogood (1823) 1 B. & C. 554, 2 Dow & Ry. K.B. 833, 1 LJ (O.S.) K.B. 181.
Oddy v Bovill (1802) 2 East 473.

Orion, The (1803) 4 Rob. Adm. Rep. 362.
Parker v James (1814) 4 Campb. 112.
Parker v Tucker, see Montagu v Janvarin, (1813) 3 Taunt. 442.
Parr v Anderson (1805) 6 East 202.
Pigot v White, Easter 25 Geo. 3 B.R., noted in Johnstone v Margetson (1789) 1 H. Bl. 265n.
Pill v Taylor (1809) 11 East 414.
R (Miller and Dos Santos) v Sec. of State for Exiting the EU [2017] UKSC 5.

R v Keyn (1876) 1 Ex. Div. 63.

Recovery, The (1807) 6 Rob. 348.
Routh v Thompson (1809) 11 East 428.
San Antonio, The (1804) 5 Rob. Adm. Rep. 209.
Santa Brigada, The (1800) 3 Rob. Adm. Rep. 52.
Several Dutch Schyts, (1814) 6 Rob. 48.
Softly, Ex p. (1801) 1 East 466.

St. Anne, The (1800) 2 C. Rob. 60.
Stella del Norte, The (1805) 5 Rob. 349.
Sutton v Johnstone (1786) 1 TR 510.

Taylor v Lord H. Paulett (1789) 1 H. Bl. 264n.
The Emperor of Austria v Day (1861) 3 De G. F. and J. 217, 30 L.J. Ch. (N.S.) 690.

The Nostra Signora Del Carmen (1808) 6 Rob. Adm. Rep 302.
Turberville v Stampe (1698) 1 Ld Raym. 264; 91 ER 1072.
U. 61 [1921] 7 LLR 229
Ville de Varsovie (1818) 2 Dods. 301.
Vryheid, The (1799) 2 Rob. 16.

Wemys v Linzee (1780) 1 Doug. 324.

West Rand Central Gold Mining Co. v Rex [1905] 2 K.B. 391.

Wolff v Oxholm (1817) 6 M. & S. 92.

Zamora, The [1916] 2 AC 77.

App. 3: Key Royal Prize Proclamations 1793-1815

Date	Hostile State	Notes
17.4.1793	France	
25.1.1797	Spain	Same as 1793
12.2.1800	Genoa, Papal States, Ligurian and Roan Republics	Same as before
7.7.1803	France and Batavia	End of Peace of Amiens Provided for Hired Armed vessels, conjoint allied captors, second masters in line of battle ships and changed flag rules
31.1.1805	Spain & Italian and Ligurian Republics	Amended provision for Lts of cutters
11.11.1807 23.12.1807	Denmark Russia	Omitted amendment for Lts of cutters
15.6.1808	All existing	Significant reforms incl. 2 classes of petty officers, and one eighth taken from captains and flag officers and redistributed to petty officers and below.
26.10.1812	USA	
29.6.1815	France	After escape of Bonaparte from Elba

App. 4: Table of Prize Related Statutes

Year	**Act**
1708 6 Annae	**Cruizers & Convoy Act c. 13**
1776 16 Geo 3	Prize Act c. 5
1778 18 Geo 3	Prize Act c. 15
1779 19 Geo 3	Prize Act c. 5
1780 20 Geo 3	Navy Act c. 23
	Prize Act c. 9
1781 21 Geo3	Prize Act c. 5
	Prize Act c. 44
	Navigation Act c. 19
1782 22 Geo 3	Navigation Act c. 16
	Prize Act c. 15
	Prize Act c. 25
1783 23 Geo 3	Prize Act c. 57
1786 26 Geo 3	Navy Act c. 63
1793 33 Geo 3	Prize Act c. 34 **Prize Act c. 66**
1794 34 Geo 3	Merchant. Shipping Act c. 68

	Prize Act c. 42
1795 35 Geo 3	Manning of the Navy Acts, cc. 5,9,19,29,34 & 121
	Navy Pay Act c. 94,95
1796 36 Geo3	Manning the Navy Act c. 115
	Longitude at Sea Act c. 107
	Merchandize in Neutral Ships Act c. 76
1797 37 Geo3	Manning of Army and Navy Act c. 4, 24,39 (5 Scot)
	Merchandize in Neutral Ships Act c. 12
	Manning Navy Act c. 109
	Naval Courts Martial c. 146
	Navy Pay etc. Act c. 53
1798 38 Geo3	Manning the navy Act c. 46
	Prize Causes Act c. 38
1798 39 Geo3	Annuity to Lord Nelson Act c. 1
1799 40 Geo 3	Shipping Act c. 32
1801 42 Geo3	Merchant Shipping Act c. 19
	Prize Act c. 10
1803 43 Geo3	Chatham Chest Act c. 119 **Prize Act c. 160**
1806 46 Geo3	Navy Act 1806 c. 127

1807 47 Geo3	Prize Act c. 47
1808 48 Geo3	Sale of Prize ship Constantia Maria c. 147
	Prize Goods Act c. 149
	Prize Act c. 100
1809 48 Geo3	Prize Act c. 34
	Prize Money Act c. 123
1810 50 Geo3	Admiralty and Prize Courts Act c. 118
1811 51 Geo3	Prize Goods Act c. 74
1813 53 Geo3	American Prizes Act c. 63
	Settlement of Estate of Lord Nelson Act c. 134

App. 5: Prize Distribution Royal Proclamations 1793-1815 comparison tables.

Amendments in ~~*Red*~~ *Red*

17.4.1793 vs France

Expressly excluded C&E ships, but not conjoint expeditions

The Captain actually on board	Three Eighths
Flag Officers	"under the command of a Flag or Flags, the Flag Officer or Officers actually on Board, or directing and assisting in the Capture" One of the 3/8 *See below for rules as between Flag officers
Captains of Marines and Land Forces Navy, or "Sea" lieutenants, the captain of marines, the master on Board Physician to a Fleet or Squadron shall = Sea Lts if actually on Board at the time of taking	One Eighth between them
Lieutenants and QM of marines Lts, Ensigns and QM of Land Forces Secretaries of Admirals or commodores with capt under them [Warrant officers:] Boatswains Gunners Purser, "Captain" – carpenter?? master's mates "Chirurgeon" – [surgeon] Pilot	One Eighth between them

chaplain on Board,	
[Petty officers:] Midshipmen Captain’s clerk Master sailmaker [Assistants to warrant officers:] Carpenter’s mates Boatswain’s mates Gunner’s mates Master at Arms Corporals Yeomen of the sheets Coxswain QM QM’s mates Chirurgeon’s mates Yeoman of the Powder Room Serjeants of Marines and Land Forces on board	One Eighth between them
[All the rest:] Trumpeters Quarter Gunners Carpenters crew Steward Cook Armourer Steward’s mate Cook’s mate Gunsmith Cooper Swabber Ordinary Trumpeter	Two Eighths between them

Barber Able Seamen Ordinary seamen Marines and other soldiers All other persons doing duty and assisting on board	

Cutters, Schooners and other armed vessels commanded by lieutenants where no HM ship or vessel of war present or within sight and aiding to the encouragement of the captors and terror of the enemy (in which case they share in same proportion as allowed to persons of like rank on board HM ships:

Lt in Command	3 eighths
Flag officers	One of the eighths
Master or other person second in command and the pilot if one on board	1 eighth, divided if pilot: 2 thirds 1 third
chirurgeon or chirurgeon's mate if no chirurgeon, midshipmen clerk and steward	1 eighth
Boatswain's mate Gunner's mate Carpenter's mate Yeoman of the sheets Sailmaker Quartermaster QM mate	1 eighth
Seamen Marines Other persons on board assisting in the capture	2 eighths

***Rules as between Flag Officers**

First, That a Flag Officer, Commander in Chief, when there is but One Flag Officer upon Service, shall have to his own Use the said *One Eighth Part* of the Prizes taken by Ships and Vessels under his Command:
Secondly, That a Flag Officer, sent to command at Jamaica, or elsewhere, shall have no Right to any Share of Prizes taken by Ships or Vessels employed there before he arrives at the Place to which he is sent, and actually takes upon him the Command:

Thirdly, That when an inferior Flag Officer is sent out to reinforce a superior Flag Officer at Jamaica, or elsewhere, the superior Flag Officer shall have no Right to any Share of Prizes taken by the inferior Flag Officer before the inferior Flag Officer shall arrive within the Limits of the Command of the superior Flag Officer, and actually receive some Order from him:

Fourthly, That a Chief Flag Officer returning Home from Jamaica, or elsewhere, shall have no Share of the Prizes taken by the Ships or Vessels left behind to act under another Command:

Fifthly, That if a Flag Officer is sent to command in the Out-Ports of this Kingdom, he shall have no Share of the Prizes taken by Ships or Vessels which have sailed from that Port by Order of the Admiralty:

Sixthly, That when more Flag Officers than One serve together, the Eighth Part of the Prizes taken by any Ships or Vessels of the Fleet or Squadron, shall be divided in the following Proportions, viz. If there be but Two Flag Officers, the Chief shall have *Two Third Parts* of the said One Eighth Part, and the other shall have the remaining *Third Part*: but if the Number of Flag Officers be more than Two, the Chief shall have only *One Half*, and the other *Half* shall be equally divided amongst the other Flag Officers:

Seventhly, That Commodores, with Captains under them, shall be esteemed as Flag Officers with respect to the Eighth Part of Prizes taken, whether commanding in Chief, or serving under Command:

Eighthly, That the First Captain to the Admiral and Commander in Chief of Our Fleet, and also the First Captain to Our Flag Officer appointed, or hereafter to be appointed, to command a Fleet or Squadron of Twenty Ships of the Line of Battle, and also the First Captain to Our Flag Officer appointed, or hereafter to be appointed, to command a Fleet or Squadron of Fifteen Ships of the Line of Battle (provided such last mentioned Fleet or Squadron shall be composed of his Majesty's own Ships) shall be deemed and taken to be a Flag Officer, and shall be entitled to a Part or Share of Prizes as the junior Flag Officer or such Fleet or Squadron,

25.1.1797 vs Spain

No material change from 1793 vs France

Expressly excluded C&E ships, but not conjoint expeditions

The Captain actually on board	Three Eighths
Flag Officers	"under the command of a Flag or Flags, the Flag Officer or Officers actually on Board, or directing and assisting in the Capture" One of the 3/8 *See below for rules as between Flag officers
Captains of Marines and Land Forces [Navy, or] "Sea" lieutenants, the captain of marines, the master on Board Physician to a Fleet or Squadron shall = Sea Lts if actually on Board at the time of taking	One Eighth between them
Lieutenants and QM of marines Lts, Ensigns and QM of Land Forces Secretaries of Admirals or commodores with capt under them [Warrant officers:] Boatswains Gunners Purser, carpenter master's mates "Chirurgeon" – [surgeon] Pilot chaplain on Board,	One Eighth between them
[Petty officers:] Midshipmen	One Eighth between them

Captain's clerk Master sailmaker [Assistants to warrant officers:] Carpenter's mates Boatswain's mates Gunner's mates Master at Arms Corporals Yeomen of the sheets Cockswain QM QM's mates Chirurgeon's mates Yeoman of the Powder Room Serjeants of Marines and Land Forces on board	
[All the rest:] Trumpeters Quarter Gunners Carpenters crew Steward Cook Armourer Steward's mate Cook's mate Gunsmith Cooper Swabber Ordinary Trumpeter Barber Able Seamen Ordinary seamen	Two Eighths between them

Marines and other soldiers All other persons doing duty and assisting on board	

Cutters, Schooners and other armed vessels commanded by lieutenants where no HM ship or vessel of war present or within sight and aiding to the encouragement of the captors and terror of the enemy (in which case they share in same proportion as allowed to persons of like rank on board HM ships:

Lt in Command	3 eighths
Flag officers	One of the eighths
Master or other person second in command and the pilot if one on board	1 eighth, divided if pilot: 2 thirds 1 third
chirurgeon or chirurgeon's mate if no chirurgeon, midshipmen clerk and steward	1 eighth
Boatswain's mate Gunner's mate Carpenter's mate Yeoman of the sheets Sailmaker Quartermaster QM mate	1 eighth
Seamen Marines Other persons on board assisting in the capture	2 eighths

***Rules as between Flag Officers**

First, That a Flag Officer, Commander in Chief, when there is but One Flag Officer upon Service, shall have to his own Use the said *One Eighth Part* of the Prizes taken by Ships and Vessels under his Command:
Secondly, That a Flag Officer, sent to command at Jamaica, or elsewhere, shall have no Right to any Share of Prizes taken by Ships or Vessels employed there before he arrives at the Place to which he is sent, and actually takes upon him the Command:
Thirdly, That when an inferior Flag Officer is sent out to reinforce a superior Flag Officer at Jamaica, or elsewhere, the superior Flag Officer shall have no Right to any Share of Prizes taken by the inferior Flag Officer before the inferior Flag Officer shall arrive within the Limits of the Command of the superior Flag Officer, and actually receive some Order from him:

Fourthly, That a Chief Flag Officer returning Home from Jamaica, or elsewhere, shall have no Share of the Prizes taken by the Ships or Vessels left behind to act under another Command:

Fifthly, That if a Flag Officer is sent to command in the Out-Ports of this Kingdom, he shall have no Share of the Prizes taken by Ships or Vessels which have sailed from that Port by Order of the Admiralty:

Sixthly, That when more Flag Officers than One serve together, the Eighth Part of the Prizes taken by any Ships or Vessels of the Fleet or Squadron, shall be divided in the following Proportions, viz. If there be but Two Flag Officers, the Chief shall have *Two Third Parts* of the said One Eighth Part, and the other shall have the remaining *Third Part*: but if the Number of Flag Officers be more than Two, the Chief shall have only *One Half*, and the other *Half* shall be equally divided amongst the other Flag Officers:

Seventhly, That Commodores, with Captains under them, shall be esteemed as Flag Officers with respect to the Eighth Part of Prizes taken, whether commanding in Chief, or serving under Command:

Eighthly, That the First Captain to the Admiral and Commander in Chief of Our Fleet, and also the First Captain to Our Flag Officer appointed, or hereafter to be appointed, to command a Fleet or Squadron of Twenty Ships of the Line of Battle, and also the First Captain to Our Flag Officer appointed, or hereafter to be appointed, to command a Fleet or Squadron of Fifteen Ships of the Line of Battle (provided such last mentioned Fleet or Squadron shall be composed of his Majesty's own Ships) shall be deemed and taken to be a Flag Officer, and shall be entitled to a Part or Share of Prizes as the junior Flag Officer or such Fleet or Squadron,

12.2.1800 vs Genoa, Papal territories, Ligurian and Roman Republics

Expressly excluded C&E ships, but not conjoint expeditions

No material change from 1793 vs France or 1797 vs Spain

The Captain actually on board	Three Eighths
Flag Officers	"under the command of a Flag or Flags, the Flag Officer or Officers actually on Board, or directing and assisting in the Capture" One of the 3/8 *See below for rules as between Flag officers
Captains of Marines and Land Forces [Navy, or] "Sea" lieutenants, the captain of marines, the master on Board Physician to a Fleet or Squadron shall = Sea Lts if actually on Board at the time of taking	One Eighth between them
Lieutenants and QM of marines Lts, Ensigns and QM of Land Forces Secretaries of Admirals or commodores with capt under them [Warrant officers:] Boatswains Gunners Purser, carpenter master's mates "Chirurgeon" – [surgeon] Pilot chaplain on Board,	One Eighth between them
[Petty officers:] Midshipmen Captain's clerk	One Eighth between them

Master sailmaker [Assistants to warrant officers:] Carpenter's mates Boatswain's mates Gunner's mates Master at Arms Corporals Yeomen of the sheets Cockswain QM QM's mates Chirurgeon's mates Yeoman of the Powder Room Serjeants of Marines and Land Forces on board	
[All the rest:] Trumpeters Quarter Gunners Carpenters crew Stewards Cook Armourer Steward's mate Cook's mate Gunsmith Cooper Swabber Ordinary Trumpeter Barber Able Seamen Ordinary seamen Marines and other soldiers	Two Eighths between them

All other persons doing duty and assisting on board	

Cutters, Schooners and other armed vessels commanded by lieutenants where no HM ship or vessel of war present or within sight and aiding to the encouragement of the captors and terror of the enemy (in which case they share in same proportion as allowed to persons of like rank on board HM ships:

Lt in Command	3 eighths
Flag officers	One of the eighths
Master or other person second in command and the pilot if one on board	1 eighth, divided if pilot: 2 thirds 1 third
chirurgeon or chirurgeon's mate if no chirurgeon, midshipmen clerk and steward	1 eighth
Boatswain's mate Gunner's mate Carpenter's mate Yeoman of the sheets Sailmaker Quartermaster QM mate	1 eighth
Seamen Marines Other persons on board assisting in the capture	2 eighths

***Rules as between Flag Officers**

First, That a Flag Officer, Commander in Chief, when there is but One Flag Officer upon Service, shall have to his own Use the said *One Eighth Part* of the Prizes taken by Ships and Vessels under his Command:
Secondly, That a Flag Officer, sent to command at Jamaica, or elsewhere, shall have no Right to any Share of Prizes taken by Ships or Vessels employed there before he arrives at the Place to which he is sent, and actually takes upon him the Command:
Thirdly, That when an inferior Flag Officer is sent out to reinforce a superior Flag Officer at Jamaica, or elsewhere, the superior Flag Officer shall have no Right to any Share of Prizes taken by the inferior Flag Officer before the inferior Flag Officer shall arrive within the Limits of the Command of the superior Flag Officer, and actually receive some Order from him:

Fourthly, That a Chief Flag Officer returning Home from Jamaica, or elsewhere, shall have no Share of the Prizes taken by the Ships or Vessels left behind to act under another Command:

Fifthly, That if a Flag Officer is sent to command in the Out-Ports of this Kingdom, he shall have no Share of the Prizes taken by Ships or Vessels which have sailed from that Port by Order of the Admiralty:

Sixthly, That when more Flag Officers than One serve together, the Eighth Part of the Prizes taken by any Ships or Vessels of the Fleet or Squadron, shall be divided in the following Proportions, viz. If there be but Two Flag Officers, the Chief shall have *Two Third Parts* of the said One Eighth Part, and the other shall have the remaining *Third Part*: but if the Number of Flag Officers be more than Two, the Chief shall have only *One Half*, and the other *Half* shall be equally divided amongst the other Flag Officers:

Seventhly, That Commodores, with Captains under them, shall be esteemed as Flag Officers with respect to the Eighth Part of Prizes taken, whether commanding in Chief, or serving under Command:

Eighthly, That the First Captain to the Admiral and Commander in Chief of Our Fleet, and also the First Captain to Our Flag Officer appointed, or hereafter to be appointed, to command a Fleet or Squadron of Twenty Ships of the Line of Battle, and also the First Captain to Our Flag Officer appointed, or hereafter to be appointed, to command a Fleet or Squadron of Fifteen Ships of the Line of Battle (provided such last mentioned Fleet or Squadron shall be composed of his Majesty's own Ships) shall be deemed and taken to be a Flag Officer, and shall be entitled to a Part or Share of Prizes as the junior Flag Officer or such Fleet or Squadron,

7.7.1803 vs France & Batavia

Expressly excluded conjunct expeditions with the army, but not C&E ships

Provided for hired armed vessels used as cruizers

Provided for conjoint allied captors

Changed Flag rules

Added second master in line of battle ships

Changed some plurals

The Captain actually on board	Three Eighths
Flag Officers	"under the command of a Flag or Flags, the Flag Officer or Officers actually on Board, or directing and assisting in the Capture" One of the 3/8 *See below for rules as between Flag officers
Captains of Marines and Land Forces [Navy, or] "Sea" lieutenants, the captain of marines, the master on Board Physician to a Fleet or Squadron shall = Sea Lts if actually on Board at the time of taking	One Eighth between them
Lieutenants and QM of marines Lts, Ensigns and QM of Land Forces Secretaries of Admirals or commodores with capt under them *Second masters of line of battle ships* [Warrant officers:] Boatswains Gunners Pursers, carpenters master's mates "Chirurgeon" – [surgeon]	One Eighth between them

Pilots chaplains on Board,	
[Petty officers:] Midshipmen Captains' clerk Master sailmaker [Assistants to warrant officers:] Carpenters' mates Boatswains' mates Gunners' mates Master at Arms Corporals Yeomen of the sheets Cockswain QM QMs' mates Chirurgeons' mates Yeoman of the Powder-Room Serjeants of Marines and Land Forces on board	One Eighth between them
[All the rest:] Trumpeters Quarter Gunners Carpenters' crew Stewards Cook Armourers Stewards' mates Cooks' mates Gunsmiths Coopers Swabbers	Two Eighths between them

Ordinary Trumpeters Barbers Able Seamen Ordinary seamen Marines and other soldiers All other persons doing duty and assisting on board	

Cutters, Schooners and other armed vessels commanded by lieutenants where no HM ship or vessel of war present or within sight and aiding to the encouragement of the captors and terror of the enemy (in which case they share in same proportion as allowed to persons of like rank on board HM ships, *and 'shall not, in respect of such captures convey any interest or share in the Flag eighth to the FO)* :

Lt in Command	3 eighths
Flag officers	One of the 3 eighths
Master or other person second in command and the pilot if one on board *NB amended to incorporate provisions for sub-Lts as from 31.1.1805 by the Procl of that date.* *London Gazette 2-5 Feb 1805 15777 p. 158 col. 2*	1 eighth, divided if pilot: 2 thirds 1 third
chirurgeon or surgeon's mate if no chirurgeon, midshipmen clerk and steward	1 eighth
Boatswain's mate Gunner's mate Carpenter's mate Yeoman of the sheets Sailmaker Quartermaster QM mate	1 eighth
Seamen Marines Other persons on board assisting in the capture	3 eighths

Hired Armed vessels

Commissioned commanding officer on board	*3 eighths*
Flag officers	*One of the 3 eighths*
Any commissioned sea Lts in king's pay	*1 eighth*
Master *Mate* *Unless there are midshipmen or those classed above with midshipmen in the pay of the king in which case:* *Master* *Mate* *Midshipmen etc*	*1 eighth viz: 2 thirds* *1 third* *Master 1 half of the eighth* *)Share equally the remaining half* *) of the eighth*
Other officers and the rest of the crew	*3 eighths*

If no commissioned officer in command:

Flag officers if under command of a flag	*1 eighth*
Master *Mate*	*2 eighths viz: 2 thirds* *1 third*
Other officers and crew	*3 eighths*
surplus	*Remain at king's disposal and if not disposed of within 1 year after final adjudication then to the Greenwich Hospital*

If joint capture of Hired vessel and HM ships of war then:

Commissioned officers on board hired vessel	*Share with commissioned officers of same rank on HM ships as joint captors*
Master of hired vessel	*Share with warrant officers of HM ships*
Mate of hired vessel	*Share with petty officers of HM ships*
Seamen of hired vessel	*Share with the seamen on HM ships*
Unless the vessel is commanded by a commissioned Master and Commander with no commissioned Lts o/b or by the Master, then:	
Master	*Share with Lts of HM ship*
Mate	*Share with warrant officers of HM ships*

NB: in case of dispute re the above then to be referred to the Lords of the Adm and their direction to be final as if inserted in the proclamation.

Conjoint captures with allied ships:

A share of such prizes equal to what they would have been entitled to if they had been HM ships shall be set apart and be at the King's disposal

***Rules as between Flag Officers**

First, *That a Captain shall be deemed:*

a) to be under the Command of a Flag when he shall actually have received some order directly from, or be acting in the execution of some order issued by a Flag Officer and
b) to continue under the command of such Flag so long as the Flag Officer by whom the Order was issued, or any other Flag Officer acting upon the same station shall continue upon such station or until such Captain shall have received some Order issued by some other Flag Officer or the Admiralty

~~***First,***~~ ***Second*** That a Flag Officer, Commander in Chief, when there is but One Flag Officer upon Service, shall have to his own Use the said *One Eighth Part* of the Prizes taken by Ships and Vessels under his Command:

~~***Secondly,***~~ ***Thirdly*** That a Flag Officer, sent to command ~~*at Jamaica, or elsewhere*~~ *on any station*, shall have no Right to any Share of Prizes taken by Ships or Vessels employed there before he arrives ~~*at the Place to which he is sent*~~ *within the limits of such station*, and actually takes upon him the Command *by communicating orders to the Flag Officer previously in command, save only that he shall be entitled to a share of prizes taken by those particular ships to which he shall actually have given some order and taken under his command within the limits of such station:*

Fourthly*, That a C in C or other Flag Officer, appointed or belonging to any station and passing through or into any other station shall not be entitled to share in any prize taken out of the limits of the station to which he is appointed or belongs, by any ship or vessel under the command of a FO of any other station, or under Adm orders unless such CinC or FO is expressly authorised by the Lords Cmmrs of the Adm to take upon him the command in that station in which the prize is taken and shall actually have taken upon him such command, in Manner aforesaid.*

~~***Thirdly***~~, ***Fifthly*** That when an inferior Flag Officer is sent out to reinforce a superior Flag Officer ~~*at Jamaica, or elsewhere*~~ *on any station*, the superior Flag Officer shall have no Right to any Share of Prizes taken by the inferior Flag Officer before the inferior Flag Officer shall arrive within the Limits of the ~~*Command of the superior Flag Officer*~~ *station*, and *moreover shall* actually receive some Order from him *or be acting in Execution of some Order issued by him:*

~~***Fourthly,***~~ ***Sixthly*** That a Chief Flag Officer ~~*returning Home from Jamaica, or elsewhere*~~ *quitting a Station either to return Home, or to assume another command, or otherwise, except*

upon some particular urgent Service, with the Intention of returning to the Station as soon as such service is performed, shall have no Share of the Prizes taken by the Ships or Vessels left behind ~~*to act under another Command*~~, *after he shall have passed the limits of the station, or after he shall have surrendered the Command to another FO appointed by the Admiralty to be C in C upon such station*:

***Seventhly**, That an inferior FO quitting a station, except when detached by Orders from his CinC out of the limits thereof upon a special service, with orders to return to such station as soon as such service is performed, shall have no share in prizes taken by the ships and vessels remaining on the station, after he shall have passed the limits thereof; and in like manner the FOs remaining on the station shall have no share in prizes taken by such inferior FO, or by any ships and vessels under his immediate command, after he shall have quitted the limits of the station, except when detached as aforesaid*

***Eighthly**; That when vessels under the command of a Flag, which belong to separate Stations shall happen to be joint captors, the Captain of each ship shall pay one third of the share to which he is entitled to the FOs of the station to which he belongs; but the captains of vessels under Adm Orders, being joint captors with other vessels under a Flag shall retain the Whole of their share.*

~~***Fifthly***~~**,** ***Ninthly*** That if a Flag Officer is sent to command in the Out-Ports of this Kingdom, he shall have no Share of the Prizes taken by Ships or Vessels which have sailed, *or shall sail*, from that Port by Order of the Admiralty:

~~***Sixthly***~~ ***Tenthly,*** That when more Flag Officers than One serve together, the Eighth Part of the Prizes taken by any Ships or Vessels of the Fleet or Squadron, shall be divided in the following Proportions, viz. If there be but Two Flag Officers, the Chief shall have *Two Third Parts* of the said One Eighth Part, and the other shall have the remaining *Third Part*: but if the Number of Flag Officers be more than Two, the Chief shall have only *One Half*, and the other *Half* shall be equally divided amongst the other Flag Officers:

~~***Seventhly***~~ ***Eleventhly,*** That Commodores, with Captains under them, shall be esteemed as Flag Officers with respect to the Eighth Part of Prizes taken, whether commanding in Chief, or serving under Command:

~~***Eighthly***~~**,** ***Twelfthly,*** That the First Captain to the Admiral and Commander in Chief of Our Fleet, and also the First Captain to Our Flag Officer appointed, or hereafter to be appointed, to command a Fleet or Squadron of ~~*Twenty*~~ *Ten* Ships of the Line of Battle *or upwards*, ~~*and also the First Captain to Our Flag Officer appointed, or hereafter to be appointed, to command a Fleet or Squadron of Fifteen Ships of the Line of Battle (provided such last mentioned Fleet or Squadron shall be composed of his Majesty's own Ships)*~~ shall be deemed and taken to be a Flag Officer, and shall be entitled to a Part or Share of Prizes as the junior Flag Officer or such Fleet or Squadron,

31.1.1805 vs Spain & Italian and Ligurian Republics

The Captain actually on board	Three Eighths
Flag Officers	"under the command of a Flag or Flags, the Flag Officer or Officers actually on Board, or directing and assisting in the Capture" One of the 3/8 *See below for rules as between Flag officers
Captains of Marines and Land Forces [Navy, or] "Sea" lieutenants, the captain of marines, the master on Board Physician to a Fleet or Squadron shall = Sea Lts if actually on Board at the time of taking	One Eighth between them
Lieutenants and QM of marines Lts, Ensigns and QM of Land Forces Secretaries of Admirals or commodores with capt under them Second masters of line of battle ships [Warrant officers:] Boatswains Gunners Pursers, carpenters master's mates "Chirurgeon" – [surgeon] Pilots Chaplains, on Board,	One Eighth between them
[Petty officers:] Midshipmen Captains' clerk	One Eighth between them

Master sailmakers [Assistants to warrant officers:] Carpenters' mates Boatswains' mates Gunners' mates Masters at Arms Corporals Yeomen of the sheets Coxswain QM QMs' mates Chirurgeons' mates Yeoman of the Powder-Room Serjeants of Marines and Land Forces on board	
[All the rest:] Trumpeters Quarter Gunners Carpenters' crew Stewards Cook Armourers Stewards' mates Cooks' mates Gunsmiths Coopers Swabbers Ordinary Trumpeters Barbers Able Seamen Ordinary seamen Marines and other soldiers	Two Eighths between them

All other persons doing duty and assisting on board	

Cutters, Schooners and other armed vessels commanded by lieutenants where no HM ship or vessel of war present or within sight and aiding to the encouragement of the captors and terror of the enemy (in which case they share in same proportion as allowed to persons of like rank on board HM ships, and 'shall not, in respect of such captures convey any interest or share in the Flag eighth to the FO):

Lt in Command	3 eighths
Flag officers	One of the 3 eighths
Sub-Lt, Master ~~*or other person second in command*~~ and the pilot if one on board	1 eighth, divided if *all 3*: 2 fourths 1 fourth 1 fourth *If only 2 then: 2 thirds to person second in command and 1 third to the other* *If only a sub-Lt or Master then the whole eighth to them*
chirurgeon or surgeon's mate if no chirurgeon, midshipmen clerk and steward	1 eighth
Boatswain's mate Gunner's mate Carpenter's mate Yeoman of the sheets Sailmaker Quartermaster QM mate	1 eighth
Seamen Marines Other persons on board assisting in the capture	4 eighths

Hired Armed vessels

Commissioned commanding officer on board	3 eighths
Flag officers	One of the 3 eighths
Any commissioned sea Lts in king's pay	1 eighth
Master Mate	1 eighth viz: 2 thirds 1 third

Unless there are midshipmen or those classed above with midshipmen in the pay of the king in which case: Master Mate Midshipmen etc	Master 1 half of the eighth)Share equally the remaining half) of the eighth
Other officers and the rest of the crew	3 eighths

If no commissioned officer in command:

Flag officers if under command of a flag	1 eighth
Master Mate	2 eighths viz: 2 thirds 1 third
Other officers and crew	3 eighths
surplus	Remain at king's disposal and if not disposed of within 1 year after final adjudication then to the Greenwich Hospital

If joint capture of Hired vessel and HM ships of war then:

Commissioned officers on board hired vessel	Share with commissioned officers of same rank on HM ships as joint captors
Master of hired vessel	Share with warrant officers of HM ships
Mate of hired vessel	Share with petty officers of HM ships
Seamen of hired vessel	Share with the seamen on HM ships
Unless the vessel is commanded by a commissioned Master and Commander with no commissioned Lts o/b or by the Master, then:	
Master	Share with Lts of HM ship
Mate	Share with warrant officers of HM ships

NB: in case of dispute re the above then to be referred to the Lords of the Adm and their direction to be final as if inserted in the proclamation.

Conjoint captures with allied ships:

A share of such prizes equal to what they would have been entitled to if they had been HM ships shall be set apart and be at the King's disposal

***Rules as between Flag Officers**

First, That a Captain shall be deemed:

c) to be under the Command of a Flag when he shall actually have received some order directly from, or be acting in the execution of some order issued by a Flag Officer , and
d) to continue under the command of such Flag so long as the Flag Officer by whom the Order was issued, or any other Flag Officer acting upon the same station shall continue upon such station or until such Captain shall have received some Order issued by some other Flag Officer or the Admiralty

Second That a Flag Officer, Commander in Chief, when there is but One Flag Officer upon Service, shall have to his own Use the *One Eighth Part* of the Prizes taken by Ships and Vessels under his Command:

Thirdly That a Flag Officer, sent to command on any station, shall have no Right to any Share of Prizes taken by Ships or Vessels employed there before he arrives within the limits of such station, and actually takes upon him the Command by communicating orders to the Flag Officer previously in command, save only that he shall be entitled to a share of prizes taken by those particular ships to which he shall actually have given some order and taken under his command within the limits of such station:

Fourthly, That a C in C or other Flag Officer, appointed or belonging to any station and passing through or into any other station shall not be entitled to share in any prize taken out of the limits of the station to which he is appointed or belongs, by any ship or vessel under the command of a FO of any other station, or under Adm orders unless such CinC or FO is expressly authorised by the Lords Cmmrs of the Adm to take upon him the command in that station in which the prize is taken and shall actually have taken upon him such command, in Manner aforesaid.

Fifthly That when an inferior Flag Officer is sent ~~out~~ to reinforce a superior Flag Officer on any station, the superior Flag Officer shall have no Right to any Share of Prizes taken by the inferior Flag Officer before the inferior Flag Officer shall arrive within the Limits of the station, and moreover shall actually receive some Order from him or be acting in Execution of some Order issued by him:

Sixthly That a Chief Flag Officer quitting a Station either to return Home, or to assume another command, or otherwise, except upon some particular urgent Service, with the Intention of returning to the Station as soon as such service is performed, shall have no Share of the Prizes taken by the Ships or Vessels left behind, after he shall have passed the limits of the station, or after he shall have surrendered the Command to another FO appointed by the Admiralty to be CinC upon such station:

Seventhly, That an inferior FO quitting a station, except when detached by Orders from his CinC out of the limits thereof upon a special service, with orders to return to such station as soon as such service is performed, shall have no share in prizes taken by the ships and vessels remaining on the station, after he shall have passed the limits thereof; and in like manner the

FOs remaining on the station shall have no share in prizes taken by such inferior FO, or by any ships and vessels under his immediate command, after he shall have quitted the limits of the station, except when detached as aforesaid

Eighthly; That when vessels under the command of a Flag, which belong to separate Stations shall happen to be joint captors, the Captain of each ship shall pay one third of the share to which he is entitled to the FOs of the station to which he belongs; but the captains of vessels under Adm Orders, being joint captors with other vessels under a Flag shall retain the Whole of their share.

Ninthly That if a Flag Officer is sent to command in the Out-Ports of this Kingdom, he shall have no Share of the Prizes taken by Ships or Vessels which have sailed, or shall sail, from that Port by Order of the Admiralty:

Tenthly, That when more Flag Officers than One serve together, the Eighth Part of the Prizes taken by any Ships or Vessels of the Fleet or Squadron, shall be divided in the following Proportions, viz. If there be but Two Flag Officers, the Chief shall have *Two Third Parts* of the said One Eighth Part, and the other shall have the remaining *Third Part*: but if the Number of Flag Officers be more than Two, the Chief shall have only *One Half*, and the other *Half* shall be equally divided amongst the other Flag Officers:

Eleventhly, That Commodores, with Captains under them, shall be esteemed as Flag Officers with respect to the Eighth Part of Prizes taken, whether commanding in Chief, or serving under Command:

Twelfthly, That the First Captain to the Admiral and Commander in Chief of Our Fleet, and also the First Captain to Our Flag Officer appointed, or hereafter to be appointed, to command a Fleet or Squadron of Ten Ships of the Line of Battle or upwards, shall be deemed and taken to be a Flag Officer, and shall be entitled to a Part or Share of Prizes as the junior Flag Officer or such Fleet or Squadron,

11.11.1807 vs Denmark

23.12.1807 vs Russia

Over looked sub-lt amendment for cutters etc introduced in 1805

The Captain actually on board	Three Eighths
Flag Officers	"under the command of a Flag or Flags, the Flag Officer or Officers actually on Board, or directing and assisting in the Capture" One of the 3/8 *See below for rules as between Flag officers
Captains of Marines and Land Forces [Navy, or] "Sea" lieutenants, the captain of marines, the master on Board Physician to a Fleet or Squadron shall = Sea Lts if actually on Board at the time of taking	One Eighth between them
Lieutenants and QM of marines Lts, Ensigns and QM of Land Forces Secretaries of Admirals or commodores with capt under them Second masters of line of battle ships [Warrant officers:] Boatswains Gunners Pursers, carpenters master's mates "Chirurgeon" – [surgeon] Pilots Chaplains, on Board,	One Eighth between them
[Petty officers:] Midshipmen	One Eighth between them

Captains' clerk Master sailmakers [Assistants to warrant officers:] Carpenters' mates Boatswains' mates Gunners' mates Masters at Arms Corporals Yeomen of the sheets Coxswain QM QMs' mates Chirurgeons' mates Yeoman of the Powder-Room Serjeants of Marines and Land Forces on board	
[All the rest:] Trumpeters Quarter Gunners Carpenters' crew Stewards Cook Armourers Stewards' mates Cooks' mates Gunsmiths Coopers Swabbers Ordinary Trumpeters Barbers Able Seamen Ordinary seamen	Two Eighths between them

Marines and other soldiers All other persons doing duty and assisting on board	

Cutters, Schooners and other armed vessels commanded by lieutenants where no HM ship or vessel of war present or within sight and aiding to the encouragement of the captors and terror of the enemy (in which case they share in same proportion as allowed to persons of like rank on board HM ships, and 'shall not, in respect of such captures convey any interest or share in the Flag eighth to the FO):

Lt in Command	3 eighths
Flag officers	One of the 3 eighths
~~*Sub-Lt*~~, Master or other person second in command and the pilot if one on board	1 eighth, divided if ~~*all 3 both*~~: 2 thirds 1 third ~~2 fourths~~ ~~1 fourth~~ ~~1 fourth~~ ~~*If only 2 then: 2 thirds to person second in command and 1 third to the other*~~ ~~*If only a sub-Lt or Master then the whole eighth to them*~~
chirurgeon or surgeon's mate if no chirurgeon, midshipmen clerk and steward	1 eighth
Boatswain's mate Gunner's mate Carpenter's mate Yeoman of the sheets	1 eighth

Sailmaker Quartermaster QM mate	
Seamen Marines Other persons on board assisting in the capture	5 eighths

Hired Armed vessels

Commissioned commanding officer on board	3 eighths
Flag officers	One of the 3 eighths
Any commissioned sea Lts in king's pay	1 eighth
Master Mate Unless there are midshipmen or those classed above with midshipmen in the pay of the king in which case: Master Mate Midshipmen etc	1 eighth viz: 2 thirds 1 third Master 1 half of the eighth)Share equally the remaining half) of the eighth
Other officers and the rest of the crew	3 eighths

If no commissioned officer in command:

Flag officers if under command of a flag	1 eighth
Master	2 eighths viz: 2 thirds

Mate	1 third
Other officers and crew	3 eighths
Surplus	Remain at king's disposal and if not disposed of within 1 year after final adjudication then to the Greenwich Hospital

If joint capture of Hired vessel and HM ships of war then:

Commissioned officers on board hired vessel	Share with commissioned officers of same rank on HM ships as joint captors
Master of hired vessel	Share with warrant officers of HM ships
Mate of hired vessel	Share with petty officers of HM ships
Seamen of hired vessel	Share with the seamen on HM ships
Unless the vessel is commanded by a commissioned Master and Commander with no commissioned Lts o/b or by the Master, then:	
Master	Share with Lts of HM ship
Mate	Share with warrant officers of HM ships

NB: in case of dispute re the above then to be referred to the Lords of the Adm and their direction to be final as if inserted in the proclamation.

Conjoint captures with allied ships:

A share of such prizes equal to what they would have been entitled to if they had been HM ships shall be set apart and be at the King's disposal

***Rules as between Flag Officers**

First, That a Captain shall be deemed:

e) to be under the Command of a Flag when he shall actually have received some order directly from, or be acting in the execution of some order issued by a Flag Officer and
f) to continue under the command of such Flag so long as the Flag Officer by whom the Order was issued, or any other Flag Officer acting upon the same station shall continue upon such station or until such Captain shall have received some Order issued by some other Flag Officer or the Admiralty

Second That a Flag Officer, Commander in Chief, when there is but One Flag Officer upon Service, shall have to his own Use the said *One Eighth Part* of the Prizes taken by Ships and Vessels under his Command:

Thirdly That a Flag Officer, sent to command on any station, shall have no Right to any Share of Prizes taken by Ships or Vessels employed there before he arrives within the limits of such station, and actually takes upon him the Command by communicating orders to the Flag Officer previously in command, save only that he shall be entitled to a share of prizes taken by those particular ships to which he shall actually have given some order and taken under his command within the limits of such station:

Fourthly, That a C in C or other Flag Officer, appointed or belonging to any station and passing through or into any other station shall not be entitled to share in any prize taken out of the limits of the station to which he is appointed or belongs, by any ship or vessel under the command of a FO of any other station, or under Adm orders unless such CinC or FO is expressly authorised by the Lords Cmmrs of the Adm to take upon him the command in that station in which the prize is taken and shall actually have taken upon him such command, in Manner aforesaid.

Fifthly That when an inferior Flag Officer is sent *[no 'out']* to reinforce a superior Flag Officer on any station, the superior Flag Officer shall have no Right to any Share of Prizes taken by the inferior Flag Officer before the inferior Flag Officer shall arrive within the Limits of the station, and moreover shall actually receive some Order from him or be acting in Execution of some Order issued by him:

Sixthly That a Chief Flag Officer quitting a Station either to return Home, or to assume another command, or otherwise, except upon some particular urgent Service, with the Intention of returning to the Station as soon as such service is performed, shall have no Share of the Prizes taken by the Ships or Vessels left behind, after he shall have passed the limits of the station, or after he shall have surrendered the Command to another FO appointed by the Admiralty to be CinC upon such station:

Seventhly, That an inferior FO quitting a station, except when detached by Orders from his CinC out of the limits thereof upon a special service, with orders to return to such station as soon as such service is performed, shall have no share in prizes taken by the ships and vessels remaining on the station, after he shall have passed the limits thereof; and in like manner the

FOs remaining on the station shall have no share in prizes taken by such inferior FO, or by any ships and vessels under his immediate command, after he shall have quitted the limits of the station, except when detached as aforesaid

Eighthly; That when vessels under the command of a Flag, which belong to separate Stations shall happen to be joint captors, the Captain of each ship shall pay one third of the share to which he is entitled to the FOs of the station to which he belongs; but the captains of vessels under Adm Orders, being joint captors with other vessels under a Flag shall retain the Whole of their share.

Ninthly That if a Flag Officer is sent to command in the Out-Ports of this Kingdom, he shall have no Share of the Prizes taken by Ships or Vessels which have sailed, or shall sail, from that Port by Order of the Admiralty:

Tenthly, That when more Flag Officers than One serve together, the Eighth Part of the Prizes taken by any Ships or Vessels of the Fleet or Squadron, shall be divided in the following Proportions, viz. If there be but Two Flag Officers, the Chief shall have *Two Third Parts* of the said One Eighth Part, and the other shall have the remaining *Third Part*: but if the Number of Flag Officers be more than Two, the Chief shall have only *One Half*, and the other *Half* shall be equally divided amongst the other Flag Officers:

Eleventhly, That Commodores, with Captains under them, shall be esteemed as Flag Officers with respect to the Eighth Part of Prizes taken, whether commanding in Chief, or serving under Command:

Twelfthly, That the First Captain to the Admiral and Commander in Chief of Our Fleet, and also the First Captain to Our Flag Officer appointed, or hereafter to be appointed, to command a Fleet or Squadron of Ten Ships of the Line of Battle or upwards, shall be deemed and taken to be a Flag Officer, and shall be entitled to a Part or Share of Prizes as the junior Flag Officer or such Fleet or Squadron,

15.6.1808 amendments

Cutting the FO and captain's share from 3/8 to 2/8 and redistributing it lower down

The Captain actually on board	~~*Three*~~ *Two* Eighths
Flag Officers	"under the command of a Flag or Flags, the Flag Officer or Officers actually on Board, or directing and assisting in the Capture" ~~*One of the 3/8*~~ *One third of the 2/8* *See below for rules as between Flag officers
[Navy, or] "Sea" lieutenants, Captains of Marines and Land Forces the captain of marines, the master on Board Physician to a Fleet or Squadron shall = Sea Lts if actually on Board at the time of taking	One Eighth between them
Lieutenants and QM of marines Lts, Ensigns and QM of Land Forces Secretaries of Admirals or commodores with capt under them Second masters of line of battle ships [Warrant officers:] "~~*Chirurgeon"*~~ *surgeon* Boatswains Gunners Pursers, carpenters master's mates Pilots	One Eighth between them

Chaplains, on Board,	
Petty officers *first class*: Midshipmen *Surgeon's assistants* *Secretaries-clerks* Captains' clerk *Schoolmasters* Masters at Arms *Captain's* Coxswain Gunners' mates Yeoman of the Powder-Room Boatswains' mates Yeomen of the sheets Carpenters' mates QM QMs' mates *Ships* Corporals *Captains of the forecastle* Master sailmakers Master caulkers Master ropemakers Armourers Serjeants of Marines and Land Forces ~~*on board*~~	~~*One Eighth between them*~~ *4 ½ shares each of the remaining 4/8s*
Petty Officers second class *Midshipmen, ordinary* *Captains of the foretop* *Captains of the Maintop* *Captains of the After Guard* *Captains of the Mast* *Sailmaker's Mates* *Caulker's Mates*	*3 shares each of the remaining 4/8*

Armourer's Mates *Ship's Cook* *Corporals of Marines and of Land forces*	
~~*[All the rest:]*~~ Quarter Gunners Carpenters' crew Sailmakers' crew Coxswains' mates Yeomen of the Boatswain's store room Gunsmiths Coopers Trumpeters Able Seamen Ordinary seamen Drummers Private Marines Other soldiers if doing duty on board in place of Marines ~~*Stewards*~~ ~~*Cook*~~ ~~*Armourers*~~ ~~*Stewards' mates*~~ ~~*Cooks' mates*~~ ~~*Swabbers*~~ ~~*Ordinary Trumpeters*~~ ~~*Barbers*~~ ~~*Marines and other soldiers*~~ ~~*All other persons doing duty and assisting on board*~~	~~*Two Eighths between them*~~ *1 ½ shares each of the remaining 4/8*

Landsmen *Admiral's domestics* *All other Ratings not enumerated above, together with all passengers and other persons borne as supernumeraries and doing duty and assisting on board* *NB Officers acting by Order are to receive the share of that rank in which they are acting*	*1 share each of the remaining 4/8*
Young gentlemen volunteers by order and boys of every description	*½ a share each of the remaining 4/8*

Cutters, Schooners and other armed vessels commanded by lieutenants where no HM ship or vessel of war present or within sight and aiding to the encouragement of the captors and terror of the enemy (in which case they share in same proportion as allowed to persons of like rank on board HM ships, and 'shall not, in respect of such captures convey any interest or share in the Flag eighth to the FO):

Lt in Command	~~*3*~~ *2* eighths
Flag officers	~~*One of the 3 eighths*~~ *1/3 of the 2 eighths share*
Sub-Lt, Master ~~*or other person second in command*~~ and the pilot if one on board	1 eighth, divided if all: *2 fourths* *1 fourth* *1 fourth* *If only 2 then: 2 thirds to person second in command and 1 third to the other* *If only a sub-Lt or Master then the whole eighth to them* *If there be only a pilot then the pilot to have one half of the eighth and the remainder to go to the Greenwich Hospital*

	~~*3 both*~~: ~~2 thirds~~ ~~1 third~~
~~*chirurgeon*~~ *surgeon* or surgeon's *assistant* ~~*mate*~~ if no *surgeon* ~~*chirurgeon*~~, midshipmen clerk and steward	1 eighth
Boatswain's mate Gunner's mate Carpenter's mate Yeoman of the sheets Sailmaker Quartermaster QM mate *Serjeant of Marines*	~~*1 eighth*~~ *4 ½ shares each of the remaining 4/8*
Corporals of marines	*3 shares each of the remaining 4/8*
Able Seamen *Ordinary* seamen Marines	~~*2 Eighths*~~ *1 ½ shares each of the remaining 4/8*
Landsmen together with passengers and other persons borne as supernumeraries doing Duty and assisting on board	*1 share each of the remaining 4/8*
Boys of all descriptions	*½ share each*

Hired Armed vessels

Commissioned commanding officer on board	~~*3*~~ *2* eighths
Flag officers	~~*One of the 3 eighths*~~ *1/3 of the 2 eighths share*
Any commissioned sea Lts in king's pay	1 eighth
Master Mate Unless there are midshipmen or those classed above with midshipmen in the pay of the king in which case: Master Mate Midshipmen etc	1 eighth viz: 2 thirds 1 third Master 1 half of the eighth)Share equally the remaining half) of the eighth
Other officers and the rest of the crew	~~*3*~~ *4* eighths *distributed as above*

If no commissioned officer in command:

Flag officers if under command of a flag	1 eighth
Master Mate	~~*2*~~ *1* eighths viz: 2 thirds 1 third
Other officers and crew	~~*3*~~ *4* eighths divided as above
Surplus	Remain at king's disposal and if not disposed of within 1 year after final adjudication then to the Greenwich Hospital

If joint capture of Hired vessel and HM ships of war then:

Commissioned officers on board hired vessel	Share with commissioned officers of same rank on HM ships as joint captors
Master of hired vessel	Share with warrant officers of HM ships
Mate of hired vessel	Share with *first class of* petty officers of HM ships
Seamen, *landsmen and boys* of hired vessel	Share with ~~*the seamen*~~ *persons of the same description* on HM ships
Unless the vessel is commanded by a commissioned Master and Commander with no commissioned Lts o/b or by the Master, then:	
Master	Share with Lts of HM ship
Mate	Share with warrant officers of HM ships

NB: in case of dispute re the above then to be referred to the Lords of the Adm and their direction to be final as if inserted in the proclamation.

Conjoint captures with allied ships:

A share of such prizes equal to what they would have been entitled to if they had been HM ships shall be set apart and be at the King's disposal

***Rules as between Flag Officers**

First, That a Captain shall be deemed:

a) to be under the Command of a Flag when he shall actually have received some order directly from, or be acting in the execution of some order issued by a Flag Officer and *in the event of his being directed to join a FO on any station he shall be deemed to be under the Command of such FO from the time he arrives within the Limits of the station, and*

b) to continue under the command of ~~*such Flag*~~ *the FO of such station* ~~*so long as the Flag Officer by whom the Order was issued, or any other Flag Officer acting upon the same station shall continue upon such station or*~~ until such Captain shall have received some Order issued by some other Flag Officer or the Admiralty

Second That a Flag Officer, Commander in Chief, when there is but One Flag Officer upon Service, shall have to his own Use the said ~~*One Eighth Part*~~ *One Third Part of the said Two Eighths* of the Prizes taken by Ships and Vessels under his Command:

Thirdly That a Flag Officer, sent to command on any station, shall have ~~no~~ a Right to ~~any~~ Share *as CinC* ~~*of*~~ Prizes taken by Ships or Vessels employed there ~~*before*~~ *from the time* he arrives within the limits of such station, ~~*and actually takes upon him the Command by communicating orders to the Flag Officer previously in command, save only that he shall be entitled to a share of prizes taken by those particular ships to which he shall actually have given some order and taken under his command within the limits of such station:*~~ *but if a junior FO be sent to relieve a senior , he shall not be entitled to share as CinC in any prizes taken by the squadron until the command shall be resigned to him but shall share only as a junior FO until he assumes the Command.*

Fourthly, That a C in C or other Flag Officer, appointed or belonging to any station and passing through or into any other station shall not be entitled to share in any prize taken out of the limits of the station to which he is appointed or belongs, by any ship or vessel under the command of a FO of any other station, or under Adm orders ~~*unless such CinC or FO is expressly authorised by the Lords Cmmrs of the Adm to take upon him the command in that station in which the prize is taken and shall actually have taken upon him such command, in Manner aforesaid*~~.

Fifthly That when an inferior Flag Officer is sent *[no 'out']* to reinforce a superior Flag Officer on any station, the superior Flag Officer shall have no Right to any Share of Prizes taken by the inferior Flag Officer before the inferior Flag Officer shall arrive within the Limits of the station, *or* ~~*and moreover*~~ shall actually receive some Order *directly* from him, or be acting in Execution of some Order issued by him. *And such inferior FO shall be entitled to his Proportion of all the Captures made by the Squadron which he is sent to reinforce, from the Time he shall arrive within the limits of the Command of such Superior FO.*

Sixthly That a Chief Flag Officer quitting a Station either to return Home, or to assume another command, or otherwise, except upon some particular urgent Service, with the Intention of returning to the Station as soon as such service is performed, shall have no Share of the Prizes taken by the Ships or Vessels left behind, ~~*after he shall have passed the limits of the station, or*~~ after he shall have surrendered the Command to another FO appointed by the Admiralty to be CinC upon such station *or after he shall he shall have passed the Limits of the Station, in the Event of his leaving the Command without being superseded:*

Seventhly, That an inferior FO quitting a station, except when detached by Orders from his CinC out of the limits thereof upon a special service, with orders to return to such station as soon as such service is performed, shall have no share in prizes taken by the ships and vessels remaining on the station, after he shall have passed the limits thereof; and in like manner the FOs remaining on the station shall have no share in prizes taken by such inferior FO, or by any ships and vessels under his immediate command, after he shall have quitted the limits of the station, except when detached as aforesaid

Eighthly; That when vessels under the command of a Flag, which belong to separate Stations shall happen to be joint captors, the Captain of each ship shall pay one third of the share to

which he is entitled to the FOs of the station to which he belongs; but the captains of vessels under Adm Orders, being joint captors with other vessels under a Flag shall retain the Whole of their share.

Ninthly That if a Flag Officer is sent to command in the Out-Ports of this Kingdom, he shall have no Share of the Prizes taken by Ships or Vessels which have sailed, or shall sail, from that Port by Order of the Admiralty:

Tenthly, That when more Flag Officers than One serve together, the ~~*Eighth*~~ *One Third* Part *of the Two Eighth Parts* of the Prizes taken by any Ships or Vessels of the Fleet or Squadron, shall be divided in the following Proportions, viz. If there be but Two Flag Officers, the Chief shall have Two Third Parts of the said ~~*One Eighth Part*~~ *Third of Two-Eighths*, and the other shall have the remaining Third Part: but if the Number of Flag Officers be more than Two, the Chief shall have only One Half, and the other Half shall be equally divided amongst the other Flag Officers:

Eleventhly, That Commodores, with Captains under them, shall be esteemed as Flag Officers with respect to the ~~*Eighth Part*~~ *One Third Part of the Two Eighth Parts* of Prizes taken, whether commanding in Chief, or serving under Command:

Twelfthly, That the First Captain to the Admiral and Commander in Chief of Our Fleet, and also the First Captain to Our Flag Officer appointed, or hereafter to be appointed, to command a Fleet or Squadron of Ten Ships of the Line of Battle or upwards, shall be deemed and taken to be a Flag Officer, and shall be entitled to a Part or Share of Prizes as the junior Flag Officer or such Fleet or Squadron,

26.10.1812 vs USA

The Captain actually on board	Two Eighths
Flag Officers	"under the command of a Flag or Flags, the Flag Officer or Officers actually on Board, or directing and assisting in the Capture" One third of the 2/8 *See below for rules as between Flag officers
[Navy, or] "Sea" lieutenants, Captains of Marines and Land Forces the captain of marines, the master on Board Physician to a Fleet or Squadron shall = Sea Lts if actually on Board at the time of taking	One Eighth between them
Lieutenants and QM of marines Lts, Ensigns and QM of Land Forces Secretaries of Admirals or commodores with capt under them Second masters of line of battle ships [Warrant officers:] Surgeons Chaplains Pursers, Gunners Boatswains carpenters master's mates Pilots *on board*	One Eighth between them
Petty officers first class:	4 ½ shares each of the remaining 4/8s

Midshipmen Surgeon's assistants Secretaries-clerks Captains' clerk Schoolmasters Masters at Arms Captain's Coxswain Gunners' mates Yeoman of the Powder-Room Boatswains' mates Yeomen of the sheets Carpenters' mates QM QMs' mates Ships Corporals Captains of the forecastle Master sailmakers Master caulkers Master ropemakers Armourers Serjeants of Marines and Land Forces	
Petty Officers second class Midshipmen, ordinary Captains of the foretop Captains of the Maintop Captains of the After Guard Captains of the Mast Sailmaker's Mates Caulker's Mates Armourer's Mates Ship's Cook Corporals of Marines and of Land forces	3 shares each of the remaining 4/8

Quarter Gunners Carpenters' crew Sailmakers' crew Coxswains' mates Yeomen of the Boatswain's store room Gunsmiths Coopers Trumpeters Able Seamen Ordinary seamen Drummers Private Marines Other soldiers if doing duty on board in place of Marines	1 ½ shares each of the remaining 4/8
Landsmen Admiral's domestics All other Ratings not enumerated above, together with all passengers and other persons borne as supernumeraries and doing duty and assisting on board NB Officers acting by Order are to receive the share of that rank in which they are acting	1 share each of the remaining 4/8
Young gentlemen volunteers by order and boys of every description	½ a share each of the remaining 4/8

Cutters, Schooners and other armed vessels commanded by lieutenants where no HM ship or vessel of war present or within sight and aiding to the encouragement of the captors and terror of the enemy (in which case they share in same proportion as allowed to persons of like rank on board HM ships, and 'shall not, in respect of such captures convey any interest or share in the Flag eighth to the FO):

Lt in Command	2 eighths
Flag officers	1/3 of the 2 eighths share
Sub-Lt, Master and the pilot if one on board	1 eighth, divided if all: 2 fourths 1 fourth 1 fourth *If only 2 then: 2 thirds to person second in command and 1 third to the other* *If only a sub-Lt or Master then the whole eighth to them* *If there be only a pilot then the pilot to have one half of the eighth and the remainder to go to the Greenwich Hospital*
-surgeon or surgeon's assistant if no surgeon, midshipmen clerk and steward	1 eighth
Boatswain's mate Gunner's mate Carpenter's mate Yeoman of the sheets Sailmaker Quartermaster QM mate Serjeant of Marines	4 ½ shares each of the remaining 4/8
Corporals of marines	3 shares each of the remaining 4/8
Able Seamen	1 ½ shares each of the remaining 4/8

Ordinary seamen Marines	
Landsmen together with passengers and other persons borne as supernumeraries doing Duty and assisting on board	1 share each of the remaining 4/8
Boys of all descriptions	½ share each

Hired Armed vessels

Commissioned commanding officer on board	2 eighths
Flag officers	1/3 of the 2 eighths share
Any commissioned sea Lts in king's pay	1 eighth
Master Mate Unless there are midshipmen or those classed above with midshipmen in the pay of the king in which case: Master Mate Midshipmen etc	1 eighth viz: 2 thirds 1 third Master 1 half of the eighth)Share equally the remaining half) of the eighth
Other officers and the rest of the crew	4 eighths distributed as above

If no commissioned officer in command:

Flag officers if under command of a flag	1 eighth
Master Mate	1 eighths viz: 2 thirds 1 third

Other officers and crew	4 eighths divided as above
Surplus	Remain at king's disposal and if not disposed of within 1 year after final adjudication then to the Greenwich Hospital

If joint capture of Hired vessel and HM ships of war then:

Commissioned officers on board hired vessel	Share with commissioned officers of same rank on HM ships as joint captors
Master of hired vessel	Share with warrant officers of HM ships
Mate of hired vessel	Share with first class of petty officers of HM ships
Seamen, landsmen and boys of hired vessel	Share with ~~the seamen~~ persons of the same description on HM ships
Unless the vessel is commanded by a commissioned Master and Commander with no commissioned Lts o/b or by the Master, then:	
Master	Share with Lts of HM ship
Mate	Share with warrant officers of HM ships

NB: in case of dispute re the above then to be referred to the Lords of the Adm and their direction to be final as if inserted in the proclamation.

Conjoint captures with allied ships:

A share of such prizes equal to what they would have been entitled to if they had been HM ships shall be set apart and be at the King's disposal

***Rules as between Flag Officers**

First, That a Captain shall be deemed:

a) to be under the Command of a Flag when he shall actually have received some order directly from, or be acting in the execution of some order issued by a Flag Officer and in

the event of his being directed to join a FO on any station he shall be deemed to be under the Command of such FO from the time he arrives within the Limits of the station, and

b) to continue under the command of the FO of such station until such Captain shall have received some Order issued by some other Flag Officer or the Admiralty

Second That a Flag Officer, Commander in Chief, when there is but One Flag Officer upon Service, shall have to his own Use the said One Third Part of the said Two Eighths of the Prizes taken by Ships and Vessels under his Command:

Thirdly That a Flag Officer, sent to command on any station, shall have a Right to Share as CinC ~~of~~ Prizes taken by Ships or Vessels employed there from the time he arrives within the limits of such station, but if a junior FO be sent to relieve a senior , he shall not be entitled to share as CinC in any prizes taken by the squadron until the command shall be resigned to him but shall share only as a junior FO until he assumes the Command.

Fourthly, That a C in C or other Flag Officer, appointed or belonging to any station and passing through or into any other station shall not be entitled to share in any prize taken out of the limits of the station to which he is appointed or belongs, by any ship or vessel under the command of a FO of any other station, or under Adm orders

Fifthly That when an inferior Flag Officer is sent to reinforce a superior Flag Officer on any station, the superior Flag Officer shall have no Right to any Share of Prizes taken by the inferior Flag Officer before the inferior Flag Officer shall arrive within the Limits of the station, or shall actually receive some Order directly from him, or be acting in Execution of some Order issued by him. And such inferior FO shall be entitled to his Proportion of all the Captures made by the Squadron which he is sent to reinforce, from the Time he shall arrive within the limits of the Command of such Superior FO.

Sixthly That a Chief Flag Officer quitting a Station either to return Home, or to assume another command, or otherwise, except upon some particular urgent Service, with the Intention of returning to the Station as soon as such service is performed, shall have no Share of the Prizes taken by the Ships or Vessels left behind, after he shall have passed the limits of the station, or after he shall have surrendered the Command to another FO appointed by the Admiralty to be CinC upon such station or after he shall he shall have passed the Limits of the Station, in the Event of his leaving the Command without being superseded:

Seventhly, That an inferior FO quitting a station, except when detached by Orders from his CinC out of the limits thereof upon a special service, with orders to return to such station as soon as such service is performed, shall have no share in prizes taken by the ships and vessels remaining on the station, after he shall have passed the limits thereof; and in like manner the FOs remaining on the station shall have no share in prizes taken by such inferior FO, or by any

ships and vessels under his immediate command, after he shall have quitted the limits of the station, except when detached as aforesaid

Eighthly; That when vessels under the command of a Flag, which belong to separate Stations shall happen to be joint captors, the Captain of each ship shall pay one third of the share to which he is entitled to the FOs of the station to which he belongs; but the captains of vessels under Adm Orders, being joint captors with other vessels under a Flag shall retain the Whole of their share.

Ninthly That if a Flag Officer is sent to command in the Out-Ports of this Kingdom, he shall have no Share of the Prizes taken by Ships or Vessels which have sailed, or shall sail, from that Port by Order of the Admiralty:

Tenthly, That when more Flag Officers than One serve together, the One Third Part of the Two Eighth Parts of the Prizes taken by any Ships or Vessels of the Fleet or Squadron, shall be divided in the following Proportions, viz. If there be but Two Flag Officers, the Chief shall have Two Third Parts of the said Third of Two-Eighths, and the other shall have the remaining Third Part: but if the Number of Flag Officers be more than Two, the Chief shall have only One Half, and the other Half shall be equally divided amongst the other Flag Officers:

Eleventhly, That Commodores, with Captains under them, shall be esteemed as Flag Officers with respect to the One Third Part of the Two Eighth Parts of Prizes taken, whether commanding in Chief, or serving under Command:

Twelfthly, That the First Captain to the Admiral and Commander in Chief of Our Fleet, and also the First Captain to Our Flag Officer appointed, or hereafter to be appointed, to command a Fleet or Squadron of Ten Ships of the Line of Battle or upwards, shall be deemed and taken to be a Flag Officer, and shall be entitled to a Part or Share of Prizes as the junior Flag Officer or such Fleet or Squadron,

29.6.1815 by Prince Regent at Carlton House vs France

After escape of Bonaparte from Elba

The Captain actually on board	Two Eighths
Flag Officers	"under the command of a Flag or Flags, the Flag Officer or Officers actually on Board, or directing and assisting in the Capture" One third of the 2/8 *See below for rules as between Flag officers
[Navy, or] "Sea" lieutenants, Captains of Marines and Land Forces the captain of marines, the master on Board Physician to a Fleet or Squadron shall = Sea Lts if actually on Board at the time of taking	One Eighth between them
Lieutenants and QM of marines Lts, Ensigns and QM of Land Forces Secretaries of Admirals or commodores with capt under them Second masters of line of battle ships [Warrant officers:] Surgeons Chaplains Pursers, Gunners Boatswains carpenters master's mates Pilots on board	One Eighth between them

Petty officers first class: Midshipmen Surgeon's assistants Secretaries-clerks Captains' clerk Schoolmasters Masters at Arms Captain's Coxswain Gunners' mates Yeoman of the Powder-Room Boatswains' mates Yeomen of the sheets Carpenters' mates QM QMs' mates Ships Corporals Captains of the forecastle Master sailmakers Master caulkers Master ropemakers Armourers Serjeants of Marines and Land Forces	4 ½ shares each of the remaining 4/8s
Petty Officers second class Midshipmen, ordinary Captains of the foretop Captains of the Maintop Captains of the After Guard Captains of the Mast Sailmaker's Mates Caulker's Mates Armourer's Mates Ship's Cook Corporals of Marines and of Land forces	3 shares each of the remaining 4/8

Quarter Gunners Carpenters' crew Sailmakers' crew Coxswains' mates Yeomen of the Boatswain's store room Gunsmiths Coopers Trumpeters Able Seamen Ordinary seamen Drummers Private Marines Other soldiers if doing duty on board in place of Marines	1 ½ shares each of the remaining 4/8
Landsmen Admiral's domestics All other Ratings not enumerated above, together with all passengers and other persons borne as supernumeraries and doing duty and assisting on board NB Officers acting by Order are to receive the share of that rank in which they are acting	1 share each of the remaining 4/8
Young gentlemen volunteers by order and boys of every description	½ a share each of the remaining 4/8

Cutters, Schooners and other armed vessels commanded by lieutenants where no HM ship or vessel of war present or within sight and aiding to the encouragement of the captors and terror of the enemy (in which case they share in same proportion as allowed to persons of like

rank on board HM ships, and ‘shall not, in respect of such captures convey any interest or share in the Flag eighth to the FO):

Lt in Command	2 eighths
Flag officers	1/3 of the 2 eighths share
Sub-Lt, Master and the pilot if one on board	1 eighth, divided if all: 2 fourths 1 fourth 1 fourth *If only 2 then: 2 thirds to person second in command and 1 third to the other* *If only a sub-Lt or Master then the whole eighth to them* *If there be only a pilot then the pilot to have one half of the eighth and the remainder to go to the Greenwich Hospital*
-surgeon or surgeon’s assistant if no surgeon, midshipmen clerk and steward	1 eighth
Boatswain’s mate Gunner’s mate Carpenter’s mate Yeoman of the sheets Sailmaker Quartermaster QM mate Serjeant of Marines	4 ½ shares each of the remaining 4/8
Corporals of marines	3 shares each of the remaining 4/8

Able Seamen Ordinary seamen Marines	1 ½ shares each of the remaining 4/8
Landsmen together with passengers and other persons borne as supernumeraries doing Duty and assisting on board	1 share each of the remaining 4/8
Boys of all descriptions	½ share each

Hired Armed vessels

Commissioned commanding officer on board	2 eighths
Flag officers	1/3 of the 2 eighths share
Any commissioned sea Lts in king's pay	1 eighth
Master Mate Unless there are midshipmen or those classed above with midshipmen in the pay of the king in which case: Master Mate Midshipmen etc	1 eighth viz: 2 thirds 1 third Master 1 half of the eighth)Share equally the remaining half) of the eighth
Other officers and the rest of the crew	4 eighths distributed as above

If no commissioned officer in command:

Flag officers if under command of a flag	1 eighth
Master Mate	1 eighths viz: 2 thirds 1 third

Other officers and crew	4 eighths divided as above
Surplus	Remain at king's disposal and if not disposed of within 1 year after final adjudication then to the Greenwich Hospital

If joint capture of Hired vessel and HM ships of war then:

Commissioned officers on board hired vessel	Share with commissioned officers of same rank on HM ships as joint captors
Master of hired vessel	Share with warrant officers of HM ships
Mate of hired vessel	Share with first class of petty officers of HM ships
Seamen, landsmen and boys of hired vessel	Share with ~~the seamen~~ persons of the same description on HM ships
Unless the vessel is commanded by a commissioned Master and Commander with no commissioned Lts o/b or by the Master, then:	
Master	Share with Lts of HM ship
Mate	Share with warrant officers of HM ships

NB: in case of dispute re the above then to be referred to the Lords of the Adm and their direction to be final as if inserted in the proclamation.

Conjoint captures with allied ships:

A share of such prizes equal to what they would have been entitled to if they had been HM ships shall be set apart and be at the King's disposal

***Rules as between Flag Officers**

First, That a Captain shall be deemed:

a) to be under the Command of a Flag when he shall actually have received some order directly from, or be acting in the execution of some order issued by a Flag Officer and in the event of his being directed to join a FO on any station he shall be deemed to be under the Command of such FO from the time he arrives within the Limits of the station, and
b) to continue under the command of the FO of such station until such Captain shall have received some Order issued by some other Flag Officer or the Admiralty

Second That a Flag Officer, Commander in Chief, when there is but One Flag Officer upon Service, shall have to his own Use the said One Third Part of the said Two Eighths of the Prizes taken by Ships and Vessels under his Command:

Thirdly That a Flag Officer, sent to command on any station, shall have a Right to Share as CinC ~~of~~ Prizes taken by Ships or Vessels employed there from the time he arrives within the limits of such station, but if a junior FO be sent to relieve a senior , he shall not be entitled to share as CinC in any prizes taken by the squadron until the command shall be resigned to him but shall share only as a junior FO until he assumes the Command.

Fourthly, That a C in C or other Flag Officer, appointed or belonging to any station and passing through or into any other station shall not be entitled to share in any prize taken out of the limits of the station to which he is appointed or belongs, by any ship or vessel under the command of a FO of any other station, or under Adm orders

Fifthly That when an inferior Flag Officer is sent to reinforce a superior Flag Officer on any station, the superior Flag Officer shall have no Right to any Share of Prizes taken by the inferior Flag Officer before the inferior Flag Officer shall arrive within the Limits of the station, or shall actually receive some Order directly from him, or be acting in Execution of some Order issued by him. And such inferior FO shall be entitled to his Proportion of all the Captures made by the Squadron which he is sent to reinforce, from the Time he shall arrive within the limits of the Command of such Superior FO.

Sixthly That a Chief Flag Officer quitting a Station either to return Home, or to assume another command, or otherwise, except upon some particular urgent Service, with the Intention of returning to the Station as soon as such service is performed, shall have no Share of the Prizes taken by the Ships or Vessels left behind, after he shall have passed the limits of the station, or after he shall have surrendered the Command to another FO appointed by the Admiralty to be CinC upon such station or after he shall he shall have passed the Limits of the Station, in the Event of his leaving the Command without being superseded:

Seventhly, That an inferior FO quitting a station, except when detached by Orders from his CinC out of the limits thereof upon a special service, with orders to return to such station as soon as such service is performed, shall have no share in prizes taken by the ships and vessels remaining on the station, after he shall have passed the limits thereof; and in like manner the

FOs remaining on the station shall have no share in prizes taken by such inferior FO, or by any ships and vessels under his immediate command, after he shall have quitted the limits of the station, except when detached as aforesaid

Eighthly; That when vessels under the command of a Flag, which belong to separate Stations shall happen to be joint captors, the Captain of each ship shall pay one third of the share to which he is entitled to the FOs of the station to which he belongs; but the captains of vessels under Adm Orders, being joint captors with other vessels under a Flag shall retain the Whole of their share.

Ninthly That if a Flag Officer is sent to command in the Out-Ports of this Kingdom, he shall have no Share of the Prizes taken by Ships or Vessels which have sailed, or shall sail, from that Port by Order of the Admiralty:

Tenthly, That when more Flag Officers than One serve together, the One Third Part of the Two Eighth Parts of the Prizes taken by any Ships or Vessels of the Fleet or Squadron, shall be divided in the following Proportions, viz. If there be but Two Flag Officers, the Chief shall have Two Third Parts of the said Third of Two-Eighths, and the other shall have the remaining Third Part: but if the Number of Flag Officers be more than Two, the Chief shall have only One Half, and the other Half shall be equally divided amongst the other Flag Officers:

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