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To the admirable Collinson
with the author's best wishes
F.W.

And thence to the

NOTES ON THE RHODE ISLAND
ADMIRALTY, 1727-1790 Admirable Swan
F.W.

BY
FREDERICK BERNAYS WIENER

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NOTES ON THE RHODE ISLAND ADMIRALTY,
1727-1790 *

THE late Charles Merrill Hough was easily the most learned American admiralty judge of his generation, and never did the light of his juristic knowledge shine more brightly than in his *Reports of Cases in the Vice Admiralty and Admiralty Courts of New York*.¹ Into this work he poured his great albeit salty reverence for the law of the sea; the result is an illuminating portrait of an institution. It is a fascinating book, even for the layman, or legal landlubber, who for many purposes is in the same category. For the admiralty lawyer the volume has additional zest, partly because it demonstrates the procedural continuity of American maritime law, more so perhaps because it documents the admiralty tradition expounded by Story in *De Lovio v. Boit*,² a tradition not always accepted, and on occasion branded as "pretension."³

Judge Hough believed that the New York admiralty was unique, both in possessing documents other than minute books and in having decrees which contained more than formal conclusions;⁴ in an appendix decidedly mournful he catalogued the lack of records in other jurisdictions.⁵ In these beliefs, the learned judge was fortunately mistaken, and doubtless none than he would more gladly have confessed error. For in Rhode Island there exists a rich mass of admiralty material, comparable in some measure to that in New York, in which there are file papers and not merely minutes, and many decrees which are verily opinions. Unlike the other admiralty survivals, these documents do not rest on the files of any court,⁶ a circumstance

* In all references to years, New Style is to be understood.

¹ (1925), hereinafter cited as HOUGH. The present writer's indebtedness to this work must of course be readily apparent to anyone familiar with it.

² 2 Gall. 398, Fed. Cas. No. 3,776 (C. C. D. Mass. 1815).

³ *Jackson v. The Magnolia*, 20 How. 296, 335 (U. S. 1858), *per* Campbell, J.

⁴ HOUGH xi.

⁵ *Id.* at 257-58.

⁶ *Id.* at xi.

due largely to historical accident,⁷ and consequently they are not much known. More to the point, when known, their legal aspects have largely been neglected — except by the late Judge Lowell, who drew upon these records to enrich his opinion in *The Underwriter*.⁸ Thus Chief Justice Durfee, writing the state's judicial history, considered the admiralty of no moment;⁹ and the definitive historian of Rhode Island's privateers did not purport to pass on legal questions.¹⁰ It seems proper, therefore, to call attention to the light which the Rhode Island papers shed upon the law and practice of the American admiralty in the eighteenth century, not with any expectation of exhausting the material therein contained, but rather to show what it may be expected to reveal.

THE RHODE ISLAND ADMIRALTY PAPERS

A few words may assist in placing the Rhode Island admiralty in its setting. There was a maritime court in the Colony in the seventeenth century,¹¹ but the real beginnings of admiralty jurisdiction follow the Act of 1696,¹² which, based upon the incorrect assumption that Vice Admiralty Courts existed in all the colonies, made necessary their establishment.¹³ In 1703, Massachusetts,

⁷ The Rhode Island Vice Admiralty generally sat at Newport, which was occupied by the British from December, 1776, to October, 1779. Meanwhile the state court, first set up in March, 1776, was hearing causes elsewhere in the state. The Vice Admiralty records remained in the possession of the last Register, Thomas Vernon, from whose executor they were secured by order of the General Assembly and deposited in the Secretary of State's office. See 10 R. I. COL. REC. 78 (1784); R. I. Acts & Resolves, Feb. 1785, p. 17. The second order was effectual and the executor turned over "One Box of papers which . . . Contain'd all the Records, Files, & papers, belonging to said Office, that had come to his knowledge." Ms., Newport Historical Society. In this equivocal return may be concealed the disappearance of many papers.

⁸ 119 Fed. 713 (D. Mass. 1902). See *id.* at 724, 735-36 for references to the Rhode Island admiralty papers.

⁹ See DURFEE, GLEANINGS FROM THE JUDICIAL HISTORY OF RHODE ISLAND (1883) 34.

¹⁰ See CHAPIN, RHODE ISLAND PRIVATEERS IN KING GEORGE'S WAR, 1739-1748 (1926) 54-55.

¹¹ See Appleton, *Rhode Island's First Court of Admiralty* (1932) 5 NEW ENG. Q. 148.

¹² 7 & 8 WILL. III, c. 22.

¹³ See CRUMP, COLONIAL ADMIRALTY JURISDICTION IN THE SEVENTEENTH CENTURY (1931) 147 *et seq.*

New Hampshire, and Rhode Island were constituted one district,¹⁴ and the Rhode Island court was held by a deputy appointed by the judge in Boston. Only in 1758 was a judge commissary appointed for Rhode Island.¹⁵ Six years later, the exigencies of law enforcement caused the appointment of Dr. William Spry as admiralty judge for all America, but this arrangement was abandoned in 1768 for a system of four courts.¹⁶ Meanwhile, it seems, the Rhode Island judge continued to function, which leads to the conclusion that both plans contemplated merely administrative supervision. And with the approach of the Revolution, the admiralty courts tended more and more to lose their civil business while they enforced the trade and customs laws.¹⁷

The earliest period of the Rhode Island Vice Admiralty, being thus closely bound up with Massachusetts, may be traced by the material in the notes to the Massachusetts Province Laws¹⁸ — a

¹⁴ See WASHBURN, *JUDICIAL HISTORY OF MASSACHUSETTS* (1840) 174-76. The Massachusetts papers are described in Noble, *A Few Notes on Admiralty Jurisdiction in Massachusetts Bay* (1903) 8 *PUB. COL. SOC. MASS.* 150; those of New Hampshire in Aldrich, *Admiralty Jurisdiction and the Admiralty Courts of New Hampshire* (1909-10) *PROC. N. H. BAR ASS'N* 31.

¹⁵ The R. I. General Assembly presented a memorial asking for the appointment of an admiralty judge in the colony to be independent of the one in Massachusetts. See 6 *R. I. COL. REC.* 104 (1757). In May, 1758, the Judge of Admiralty in England was directed to make the appointment. See 2 KIMBALL, ed., *CORRESPONDENCE OF THE COLONIAL GOVERNORS OF RHODE ISLAND* (1903) 275-76. Colonel John Andrews, the appointee, qualified on October 28 of the same year. See *R. I. Acts & Resolves*, Oct. 1758, p. 54.

Whenever possible, citations will be to the *R. I. COLONIAL RECORDS* (10 vols. 1856-65), as these are more generally accessible. But it should not be overlooked that these volumes omit a great mass of material, often for no apparent reason; that they are often grossly incorrect; that they generally do not reproduce the spelling or capitalization of the original documents; and that their indexing is, to speak mildly, woefully inadequate. This is not the place for a bill of particulars. Suffice it to say that any serious research must start with the printed Acts & Resolves (or "Schedules," as they are locally known), and, prior to October, 1747, with the manuscript records. Any reference to the Acts & Resolves in the present paper indicates that the material in question is not in the Colonial Records.

¹⁶ See WASHBURN, *op. cit. supra* note 14, at 175; 2 ANDREWS, *GUIDE TO THE MATERIALS FOR AMERICAN HISTORY, TO 1783, IN THE PUBLIC RECORD OFFICE OF GREAT BRITAIN* (1914) 37, 46-47.

¹⁷ See HOUGH 242n.

¹⁸ 8 *ACTS AND RESOLVES OF MASSACHUSETTS BAY* (1703-07) 386-98, 525-30. The writer wishes to acknowledge his indebtedness to Howard M. Chapin, Esq., the learned librarian of the Rhode Island Historical Society, for calling attention to this source, and for innumerable other suggestions relating to the present paper.

somewhat unlikely location, for all that. But the Vice Admiralty papers herein described are, rather more rationally, in the Rhode Island archives.¹⁹ They start in 1727, run with tantalizing gaps to 1772, and are most complete for 1740-52. This period includes the heavy prize business of King George's War. After 1752, the papers are extremely fragmentary. With the Revolution and the establishment of a state court of admiralty, the records begin again, and for the period 1776-83 they are substantially complete. In a sense, therefore, the Rhode Island papers complement those of New York, since the latter, in the Vice Admiralty period, are most full for 1754-74, and in the state court run from 1784 to 1788.

Four minute books remain, covering the years 1727-28, 1740-43, 1776-79, and 1780-83. In point of fact, the minutes are considerably more complete than this would indicate, as the practice in the Vice Admiralty during the thirty year incumbency of Thomas Vernon as Register²⁰ was to include the minutes of each case in the file papers, on a separate sheet. The files which have survived were evidently indexed with considerable care, and occasionally their labeling adds a distinctive touch. Witness the following, on a pass issued by the Mayor of Philadelphia: "The Dutch Cap^t Acknowledged in C^t to have saild in s^d Germa's Employ formerly who is a rank french man as appears by his own writing."²¹ And during the Revolutionary War: "Copy of the

¹⁹ There they are under the supervision of Miss Grace E. Macdonald, to whom the writer is indebted for many courtesies.

A few scattered papers are to be found in the Newport Historical Society, and, for the revolutionary period, in volume 16 of the *FOSTER PAPERS*, R. I. Historical Society. It is stated in Brigham, *Report on the Archives of Rhode Island* (1903) 1 *REP. AM. HIST. ASS'N* 543, 570, that some admiralty records are preserved in the files of the Superior Court at Newport; but the volume referred to contains merely ships' protests.

HOUGH (p. 257) refers to some papers in the Library of Congress which are said to relate to proceedings in the Rhode Island Vice Admiralty, 1756-58. Professor J. Franklin Jameson, Chief of the Division of Manuscripts in the Library of Congress, writes under date of Sept. 30, 1932, that this is an excusable error (see *HANDBOOK OF MANUSCRIPTS IN THE LIBRARY OF CONGRESS* (1918) 456), but that the papers in fact deal with a trial for piracy in 1756. The writer acknowledges his indebtedness to Professor Jameson for this information.

²⁰ Vernon was Deputy Register and Register from about 1745 until the Revolution.

²¹ 3 *ADMIRALTY PAPERS* 118, R. I. Archives. This reference is to the bound volumes, hereinafter cited as R. I. ADM. PAP.

Commission and Instructions of George the Third, the Tyrant King, to Benedict Byrn Commander of the Privateer Schooner Harlequin, manned by infamous American Loyal Refugees."²²

At the present time, thanks to an annual appropriation by the General Assembly,²³ the Vice Admiralty papers have been arranged and remounted²⁴ with intelligent discrimination; a few more years should see the state admiralty files dealt with in the same way.

PRACTICE IN THE VICE ADMIRALTY

As in New York,²⁵ the Vice Admiralty practice showed hardly any traces of the then High Court terminology. Pleas (with a strong common-law flavor),²⁶ rather than exceptions, were generally used. The libel was almost invariably called a "libel and appeal," and consequently the moving party is more often styled appellant than libellant. Plaintiffs, complainants, and proponents are met with, but rather infrequently. Counsel for the parties appear interchangeably as attorneys, proctors, and advocates. Process *in rem* was known as monition, that *in personam* as precept or simply process. William Mumford, for many years Deputy Marshal, preferred to designate both kinds as "precept" in his returns. The various warrants, to sell, appraise, or survey, require no special mention. Commissions to take depositions in other colonies are not infrequent, and in one case a commission issued to take testimony in a county in Rhode Island other than that in which the court was sitting.²⁷ Fees were divided, upon payment, between the judge and other officers of the court.²⁸

Further comment on the practice must await intensive study of the papers. It may be ventured, however, that the bar was

²² Dimmick v. The Harlequin (1780), ms., R. I. Archives.

²³ R. I. Pub. Laws 1930, c. 1610.

²⁴ This, of course, renders obsolete any references to the former arrangement. See, e.g., JAMESON, PRIVATEERING AND PIRACY IN THE COLONIAL PERIOD (1923) 451, n.2, 510, n.1, 513, n.1; Brigham, *supra* note 19, at 554.

²⁵ See HOUGH xiii-xiv.

²⁶ See the examples pp. 84-86, *infra*. But on occasion exceptions appear. E.g., Belknap v. The Elizabeth, 8 R. I. ADM. PAP. 115 (1752).

²⁷ Arnold v. Jencks, 7 R. I. ADM. PAP. 94 (1749) (commission to take testimony in Warwick, then in Providence County).

²⁸ See p. 88, *infra*.

quick to take advantage of technicalities. Pleas to the jurisdiction will be considered below.²⁹ Other pleas, generally less substantial, were not uncommon, though infrequently sustained. ". . . All w^{ch} Pleas I overruled and Always shall all Manner of Triffling Evasions to throw the Charges on any poor man when I think his Case is Just" — thus Deputy Judge Gidley in a libel for wages;³⁰ forceful, certainly, though it lacks the *elegantia juris*. But sometimes the objection was necessarily substantial. For instance, in *Banister v. The Noble Jane*,³¹ a libel founded on a bottomry bond, the claimant prayed oyer of the instrument sued upon. Judge Wickham granted this "Claim & Motion," conceiving "the prayer therein Contain'd to be highly reason^{ble} & agreeable to Equity"; whereupon the libel was withdrawn. Banister's note to the Deputy Register tells why: "Sir: I would have my Lybell against the Snow Noble Jane with Drawn as I ant yet Recoverd any Papers. . . ."

Appeals on the instance side lay to the High Court of Admiralty, and in prize cases to the "Lords Commissioners Appointed for Hearing &c Appeals in Prize Causes," who were selected members of the Privy Council.³² This seems to have been well understood by the Rhode Island bar. Since very few instance appeals appear to have been prosecuted,³³ it is probably fair to assume that, as in New York, delay was the prime motive. Prize appeals were in a different category, doubtless because of the larger sums involved. The appeal papers, called not apostles but merely "a copy of the case," contained pleadings, depositions, minutes, and decree — the last with the judge's spelling considerably improved.³⁴ After reversal, the successful appellant

²⁹ See pp. 53-55, *infra*.

³⁰ Shilcock v. Banister, 2 R. I. ADM. PAP. 40 (1743). The overruled pleas appear at pp. 85-86, *infra*, the full decree p. 77, *infra*.

³¹ 7 R. I. ADM. PAP. 103 *et seq.* (1750).

³² See HOUGH xvii; CHALMERS, OPINIONS OF EMINENT LAWYERS &C. (1858 ed.) 532; STOKES, A VIEW OF THE CONSTITUTION OF THE BRITISH COLONIES (1783) 275, 277; 2 BROWNE, COMPENDIOUS VIEW OF THE ADMIRALTY (2d ed. 1802) 435, 454.

³³ The case of Whipple v. Wilson was appealed to the High Court of Admiralty between 1728 and 1731. See 2 ANDREWS, *op. cit. supra* note 16, at 311. No papers relating to this cause have been found, nor of any other instance appeals that actually went to England.

³⁴ Apostles in Allen & Wimble v. The Angola, 1 R. I. ADM. PAP. 112 (1743).

filed a new libel;³⁵ where an appeal on the instance side was dropped, the respondent filed a "petition and suggestion."³⁶ But the existing material on these points is too scanty to permit of generalization.

It is possible to say, however, that satisfaction by way of appeal was an expensive as well as a tedious matter; witness the case of *The Angola*. This was a Liverpool ship, captured by the Spaniards and recaptured by two privateers, one commissioned in Rhode Island, the other in England. On the issue, prize or salvage, Judge Gidley decided in favor of the privateers and condemned the *Angola* as prize, June 10, 1743.³⁷ The Liverpool owners appealed to the Lords Commissioners,³⁸ who on July 15, 1745 reversed the decree of condemnation, holding the case to be one of salvage.³⁹

After news of the reversal reached Newport, two of the local

³⁵ Cunliffe *et al.* v. Bours *et al.* (The *Angola*), 6 R. I. ADM. PAP. 134 (1748).

³⁶ Johnson v. Dyre, 5 R. I. ADM. PAP. 10 (1747).

³⁷ 1 R. I. ADM. PAP. 83. The decree appears at p. 75, *infra*.

³⁸ Meanwhile a riot in which the local Collector of Customs was assaulted and imprisoned while surveying the prize cargo produced an interesting interlocutory proceeding in the shape of a criminal information against the rioters. Wanton v. Freebody *et al.*, 1 R. I. ADM. PAP. 105 *et seq.* (1743); see CHAPIN, R. I. PRIVATEERS 10. Two features of this case deserve special mention. The first information was addressed to John Gidley, Judge of Vice Admiralty by Act of the General Assembly. Citations issued to the defendants and witnesses were summoned. Pending trial, Judge Lockman arrived from England, and, his commission being read in court, he "ordered all Proceedings in said Case to be Null and Void." See p. 58, *infra*. Thereupon a new information was filed, and new citations and summonses were issued. After trial, the defendants were found guilty and fined 50s. each; they appealed, but dropped the appeal. The other point in the case relates to one of the pleas filed for the defendants, and overruled, to the effect that the informer, Collector Joseph Wanton, had not taken the proper oaths to qualify him as an Officer of the Customs. See p. 85, *infra*. This was, of course, based on the circumstance that the Wantons were Quakers.

³⁹ 6 R. I. ADM. PAP. 134 (1748). The Commissioners who heard the appeal were Sir John Willes, C. J. C. P., Thomas Winnington, Esq., and George Wade, Esq. Winnington was a Lord of the Admiralty and Recorder of Worcester. An active politician, he was known as a "Second-Rate Minister." Wade was probably Field-Marshal George Wade, a brave though far from brilliant soldier who built excellent roads throughout Scotland. DICT. NAT. BIOG., *s.v.* Wade, Winnington. But since prize appeals turned on policy and politics rather than law, the tribunal as thus constituted was doubtless adequate to the task. Cf. HOUGH 119, n.1, 122, n.1, 289; JAMESON, PRIVATEERING AND PIRACY 567, n.1.

For the English proctor's bill for professional services on this appeal, see JAMESON, PRIVATEERING AND PIRACY 468.

privateer's owners, Peter Bours and John Brown, appear to have made payment according to the tenor of their bonds, but apparently not before June 1, 1747. About a month later, John Banister, factor for the Liverpool merchants, received a copy of the certified decree of the appellate court, and offered to make a settlement. Negotiations undoubtedly continued for some time, because no libel was filed until September 5, 1748. Bours and Brown both pleaded that they had made payment; John Freebody, the other owner, pleaded to the jurisdiction for that the bond was executed *infra corpus comitatus*. This being overruled, an appraisal of the *Angola's* cargo was ordered, September 25, 1749. Freebody, still obdurate, refused to show the appraisers his share, in consequence of which he was cited by the court to assign reasons for his action. Thereupon, he not assigning any, he was ordered in the spring of 1750 to account for his share and pay costs of court; and Banister finally acknowledged receipt of payment from Freebody on June 11, 1750⁴⁰ — seven years after the original decree of condemnation. These proceedings graphically illustrate Mr. Chapin's conclusion, that "the long and costly litigation so often involved in prize cases and their appeals" was one of the principal causes which "undermined the profits of privateering and led to its decline."⁴¹

A lighter touch is furnished by *Yudice v. Sheldon*,⁴² a case which to the modern mind recalls the gall of the highwayman's bill for an accounting.⁴³ The *Providence*, Jonathan Sheldon master, had been captured in King George's War by the Spanish frigate *Galga*. Yudice, the frigate's lieutenant, was put on board as prize master, and as such offered to ransom the brigantine for 500 barrels of flour and a sloop, or the equivalent. Sheldon agreed. Thereupon Yudice ordered the vessel released, and directed his men to assist in sailing her back to Newport, where he demanded the promised ransom. "But the said Jonathan Shel-

⁴⁰ Cunliffe *et al.* v. Bours *et al.*, 6 R. I. ADM. PAP. 134 *et seq.* (1748), 7 *id.* 53 *et seq.* (1749), 7 *id.* 116 *et seq.* (1750). Years later, Banister unsuccessfully sued Brown in assumpsit; a number of items in the account related to this transaction. See MS., R. I. Historical Society; on appeal, 5 ACTS OF THE PRIVY COUNCIL (COLONIAL SERIES) 51-52 (1766, 1768).

⁴¹ CHAPIN, R. I. PRIVATEERS 173.

⁴² 5 R. I. ADM. PAP. 59 (1747).

⁴³ See (1893) 9 L. Q. REV. 197.

don not having any Regard to Justice or to the Rules to be observed among Nations in Time of Warr for their Mutual Advantage denies & refuseth to make to your Appellant any Satisfaction". Yudice consequently filed his libel, the war still raging, and was able to retain Attorney-General Updike to appear for him. Sheldon, *per* Advocate-General Honyman, pleaded in bar that the libelant was an alien enemy, and this plea was sustained by the court; but Honyman seems to have entertained some doubts in the matter, as he reserved the right of pleading over.⁴⁴

The court's functions were not specialized, and on occasion the judge acted in what we should now call an administrative capacity. In 1746, Deputy Judge Strengthfeild conducted an investigation which today would certainly be left to other channels. Captain Simeon Potter, in his memorable raid on the French settlement of Oyapoc in 1744,⁴⁵ had struck such fear into the nearby Dutch at Curaçao, that the Dutch minister protested to the English authorities. The Lords of the Admiralty ordered an inquiry by the Rhode Island admiralty judge, that being the colony where Potter had obtained his commission; Strengthfeild, after issuing warrants for the apprehension of Potter and his associates, and examining the men, finally exonerated them in his report. The only doubt raised in anyone's mind as to the validity of the proceeding was whether the commission running to Judge Lockman could be executed by his deputy, and this doubt was affirmatively resolved by the opinions of the Attorney-General and Advocate-General, "who were both in Court." "Both replyd that it was the only court that could proceed in it".⁴⁶

⁴⁴ A generation later, however, Lord Mansfield would probably have allowed the suit. *Cornu v. Blackburne*, 2 Doug. 640 (1781); *Anthon v. Fisher*, 2 Doug. 649n., 3 Doug. 166 (1782); see Senior, *Ransom Bills* (1918) 34 L. Q. REV. 49. But Lord Stowell stated the law to be otherwise. ". . . Even in the case of ransoms which were contracts, but contracts arising *ex jure belli*, and tolerated as such, the enemy was not permitted to sue in his own proper person for the payment of the ransom bill; but the payment was enforced by an action brought by the imprisoned hostage in the courts of his own country, for the recovery of his freedom." *The Hoop*, 1 C. Rob. 196, 201 (1799). See also 2 HYDE, INTERNATIONAL LAW (1922) 509-10.

⁴⁵ See CHAPIN, R. I. PRIVATEERS 132-48; JAMESON, PRIVATEERING AND PIRACY 510-14, and sources cited.

⁴⁶ 4 R. I. ADM. PAP. 18 *et seq.*, 22 (1746) Updike and Honyman respectively).

During the next war, the Deputy Register of the court, at the request of the General Assembly, kept lists of the prisoners of war detained in the colony, and made reports thereon to the governor.⁴⁷ Another instance of administrative action, in 1772, recalls the first. Robert Auchmuty (the younger), Judge of Vice Admiralty in Massachusetts, was one of the commissioners appointed to investigate the burning of the *Gaspee*.⁴⁸ Auchmuty may have had admiralty jurisdiction in Rhode Island, a matter admitting of some doubt,⁴⁹ but even if he had, he acted on this occasion as an individual appointed to the commission, and not as judge of admiralty *ex officio*.⁵⁰

CONFLICTS OVER THE VICE ADMIRALTY'S JURISDICTION

The absence of any substantial conflict between the courts of law and admiralty which Judge Hough observed in New York⁵¹ was a condition not duplicated in Rhode Island. For one thing, the bar in the latter colony were not unaware of the struggle between the two jurisdictions, as their surviving pleadings amply demonstrate. Pleas to the jurisdiction of the admiralty court were interposed, *inter alia*, to libels for wages⁵² and for necessities,⁵³ to a libel by a part owner for sale or security,⁵⁴ to a petition by a part owner to sell or buy,⁵⁵ to a libel founded on an appeal bond,⁵⁶ and to a criminal information.⁵⁷ As a consequence, prohibitions were not uncommon. An act of the General Assembly in 1735 had authorized the Superior Court to issue such

⁴⁷ 8 R. I. ADM. PAP. 136-40 (1759).

⁴⁸ 7 R. I. COL. REC. 108 (1772).

⁴⁹ As above stated, four courts were set up in 1768, and that in Boston had jurisdiction over all the New England colonies. See p. 46, *supra*. This is the extent of Auchmuty's powers as recited in the *Gaspee* commission. 7 R. I. COL. REC. 108 (1772). But it is clear that Judge Andrews was recognized by the Commissioners as judge of admiralty in Rhode Island (7 *id.* 179 (1773)) and that he was in fact acting as such. See 2 ANDREWS, *op. cit. supra* note 16, at 26.

⁵⁰ 7 R. I. COL. REC. 107-82 (1772-73).

⁵¹ See HOUGH xix-xx. But see *The Conception*, *id.* at 148, 151 (1758).

⁵² *Shilcock v. Banister*, 2 R. I. ADM. PAP. 34 (1743); see p. 85, *infra*.

⁵³ *Potter v. The Greyhound*, 5 R. I. ADM. PAP. 83 (1747).

⁵⁴ *Averell v. Blackstock*, 7 R. I. ADM. PAP. 148 (1750).

⁵⁵ *Belknap v. The Elizabeth*, 8 R. I. ADM. PAP. 115 (1752).

⁵⁶ *Cunliffe et al. v. Bours et al.*, 6 R. I. ADM. PAP. 136 (1748).

⁵⁷ *Wanton v. Freebody*, 1 R. I. ADM. PAP. 108 (1743); see p. 84, *infra*.

writs,⁵⁸ and this power, as the case of *Potter v. The Greyhound*⁵⁹ well illustrates, was exercised with alacrity and even enthusiasm.

Simeon Potter of Bristol (doubtless the doughty privateersman already mentioned) supplied necessaries to the ship at the instance of her owners — beef, pork, rum, sugar, “Tarr,” “Buntin,” wheel rope, nails, spikes, cable, powder and labor — and, payment being refused or delayed, libeled her. The owners pleaded to the jurisdiction. Deputy Judge Strengthfeild, before whom the “plea” was argued, may have been familiar with the civilians’ argument in favor of the jurisdiction in such a case;⁶⁰ more likely, however (with an eye to fees of court), he was moved by the maxim *boni judicis est ampliare jurisdictionem*.⁶¹ At any rate he sustained the jurisdiction. A prohibition immediately followed, *per* Gideon Cornell, Rhode Island’s first Chief Justice,⁶² and “accordingly the Court was adjourned until further notice.” A month and a half elapsed, and then the parties entered into an agreement to submit to the judgment of three named arbitrators. The owners thereafter filed a “plea in Barr,” setting forth this agreement. This plea was also overruled, for, no arbitration having been had within the time specified, the agreement was no longer in force. Judge Strengthfeild admitted

⁵⁸ Act of August, 1735; LAWS OF R. I. (1745) 188. This compilation is generally referred to as the Digest of 1744, but in fact only the charter and index appended thereto bear that date. The main body of laws has a separate title-page dated 1745.

⁵⁹ 5 R. I. ADM. PAP. 83 *et seq.* (1747).

⁶⁰ 2 BROWNE, *op. cit. supra* note 32, at 80-81.

⁶¹ “It is the foible of all judicatures to value their own justice and pretend that there is none so exquisite as theirs; while, at the bottom, it is the profits accruing that sanctify any court’s authority.” Roger North, quoted in 1 HOLDSWORTH, HISTORY OF ENGLISH LAW (3d ed. 1927) 558, n.2.

⁶² The Superior Court of Judicature, Court of Assize, and General Gaol Delivery, was first established in June, 1729, and until 1747 consisted of the governor, deputy governor, and assistants. LAWS OF R. I. (1730) 191. (Distinguish the present Superior Court, created in 1905.) In February, 1747, an act was passed providing for the annual election of a chief judge and four associates. LAWS OF R. I. (1745-52) 27. Of Cornell himself (the name is often spelled Cornel by his contemporaries) little is known beyond the fact that he was the first Chief Justice. See DURFEE, *op. cit. supra* note 9, at 92. He was formerly commemorated in a fashion by Cornell Place, a passageway to the west of the old Providence County Court House; but this has now been obliterated by the erection of the new building (1931-32).

The prohibition in question is given at p. 87, *infra*.

that if it had been, “it would have been sufficient to have discharged them [the owners] from this Court.” On the heels of this decision there followed another prohibition from the Superior Court,⁶³ and once more the Court of Vice Admiralty adjourned. Before it met again, the parties reached an agreement. They submitted the entire controversy to arbitration, and asked an account of the charges — which, when made up, included 5s. for duly entering each prohibition.⁶⁴

It must not be supposed, however, that the common-law courts were concerned simply with keeping the admiralty within what they conceived to be its proper sphere. On occasion they enlarged their own jurisdiction to take cognizance of purely maritime causes, a tendency illustrated by *Hopkins v. Moss*.⁶⁵ Esek Hopkins, later to be the first and last Commander-in-Chief of the American Navy,⁶⁶ had cruised to the West Indies in 1757 in command of the privateer *Providence*. Pickings were slim until he captured, on the ground of a violation of the navigation acts, the brigantine *Sally*, Boyle Moss master, bound from Dublin to St. Eustatia. “Could I gitt him to S^t Kits or antigua She would be Condemd as prize,”⁶⁷ but the law in the Rhode Island Vice Admiralty was distinctly more doubtful. Deputy Judge Robert Lightfoot had refused to condemn under substantially the same facts in *Luther v. Hulmes*, decided in June, 1757. The informers in that case had thereupon resorted to the Court of General Sessions for Providence County, where they found a warm welcome, even though eventually they were unsuccessful.⁶⁸ Doubtless the

⁶³ *Per* Josiah Arnold, J.

⁶⁴ These details are from the minutes and file papers. Compare Judge Lowell’s account in *The Underwriter*, 119 Fed. 713, 736 (D. Mass. 1902).

⁶⁵ 1 RECORD BOOK R. I. SUPER. CT. PROV. CTY. (Sept. T. 1757) 203. The writer is indebted to William Sandager, Esq., Assistant Clerk of the Rhode Island Supreme Court, for calling his attention to this case and the one following.

⁶⁶ See BECK, ed., THE LETTER BOOK OF ESEK HOPKINS (1932) 35. See also FIELD, ESEK HOPKINS (1898).

⁶⁷ Esek Hopkins to Capt. Allen Brown and Co., July 22, 1757; MS., R. I. Supreme Court files.

⁶⁸ MS., R. I. Supreme Court Files. Luther and Childs, agents of the privateer sloop *Robie*, filed an information against the *Molly*, Hulmes master, for violation of the St. 7 & 8 WILL. III, c. 22 (1696). Judge Lightfoot dismissed the information as insufficient. The informers thereupon, reciting this, filed an identical information in the Court of General Sessions, which ordered the sheriff to seize the offending ship. Hulmes’ plea to the jurisdiction being overruled, the trial

owners of the *Providence* had heard of this case. At any rate, when the captured ship reached Providence, Hopkins filed an information against her in the Superior Court. Moss pleaded to the jurisdiction, and, this plea being overruled, he refused to plead further and was defaulted. The vessel and cargo were declared forfeit to Hopkins and his owners, and judgment for costs was rendered against the defendant. The latter appealed to the Privy Council, but the appeal seems to have been dropped.⁶⁹ A suspicion that collusion was not entirely absent is fortified by a reading of the postscript to Hopkins' letter home immediately after the capture.

"P S the Old Gentlman that is master of the Brige Semes to be a prety good Sort of a man and if the Brige is Condemd Should be Glad he mite be treated well and not prosecuted in Regard to the penelty to the Crown but helpe Him to a pasige home as Son as you Can and I bleve he will be Satisfied with that without giving you much Truble a bout the property of the vesel and Cargoe."⁷⁰

But the case that more than any other demonstrates the possibilities for conflict between the courts of law and admiralty is undoubtedly *Metcalfe & Wanton v. Weston*,⁷¹ an information for violation of the Molasses Act⁷² filed in 1761. Originally, Governor Hopkins was to have been joint informer with Collector Wanton, but Metcalfe was substituted at the request of his counsel, John Aplin. Judge Andrews condemned the cargo, and awarded one third to the Crown, another third to the Governor, and, after five months of consideration, the other third to Wanton. Metcalfe received nothing. Shortly after the final decree, the Superior Court issued a prohibition, and Judge Andrews obeyed. None the less, Governor Hopkins sued the Judge for his third in the

proceeded upon interrogatories indistinguishable from those used in admiralty. The jury found a special verdict, that the defendant's guilt depended on his legal right to a ship's register. This point of law being resolved against the informers, they appealed to the Superior Court; but their appeal was dismissed. 1 RECORD BOOK R. I. SUPER. CT. PROV. CTY. (Sept. T. 1757) 202.

⁶⁹ 4 ACTS OF THE PRIVY COUNCIL (COLONIAL SERIES) 420 (1759). An appearance was entered for Hopkins and a day was set for hearing Moss's appeal; nothing further appears.

⁷⁰ *Supra* note 67.

⁷¹ 8 R. I. ADM. PAP. 146 (1761).

⁷² 6 GEO. II, c. 13 (1733).

Inferior Court of Common Pleas, which overruled the prohibition pleaded in bar, and granted judgment and execution. From this dilemma Judge Andrews had to be rescued by an Act of the General Assembly nullifying the lower court's judgment.⁷³ Meanwhile, Aplin (whose client had received nothing) accused Hopkins of converting to his personal use the third adjudged to him as Governor.⁷⁴ A war of pamphlets followed and party spirit ran high enough to defeat Hopkins for re-election in May, 1762.⁷⁵

So much for the Vice Admiralty's relations with the common-law courts; there remain for consideration its contacts with the General Assembly. That body, as already noted, had authorized the issuance of prohibitions.⁷⁶ In 1743, it prescribed the fees which the Vice Admiralty was entitled to demand.⁷⁷ A year later, it appointed a committee to inquire of Samuel Pemberton, late Deputy Judge, why he had condemned a certain Dutch ship, concerning which complaint had been made abroad.⁷⁸ Pemberton (*pro hac vice* in jail for debt) explained that his reasons were fully set forth in the decree. Another committee was then appointed to draft a letter for Governor Greene to send home; in this it was explained that the court was entirely independent of the local government, and hope was expressed that the Colony would not be censured for the "mistakes or passions of an ignorant or indigent person."⁷⁹ It should not be thought from these instances, however, that the Assembly was unaware of the necessity for an admiralty court. On three occasions, pending the ap-

⁷³ 6 R. I. COL. REC. 372-73 (Oct. 1763). The facts are given in Judge Andrews' memorial to the Assembly, 6 *id.* at 370-72. See also 6 *id.* at 342, 350; R. I. Acts & Resolves, Feb., 1764, p. 118.

⁷⁴ See A DIALOGUE BETWEEN THE GOVERNOR AND A FREEMAN (1762). This pamphlet was published anonymously.

⁷⁵ "A FREEMAN," MR. FRANKLIN, I HAVE LATELY BEEN FAVOR'D &C. (1762); REMARKS ON A LATE PERFORMANCE, SIGN'D, A FREEMAN, &C. (1762); GOVERNOR HOPKINS'S VINDICATION OF HIS CONDUCT, IN RELATION TO THE SUGARS (1762). All the above are broadsides in the R. I. Historical Society. See also 2 ARNOLD, HISTORY OF RHODE ISLAND (1859-60) 234-35.

⁷⁶ *Supra* note 58.

⁷⁷ Act of October, 1743; LAWS OF R. I. (1745) 268-70.

⁷⁸ The *Gertrude*, actually the *Geertruyda* (formerly the *De La Clara*). Flower *et al.* v. Sloop De la Clara, 1 R. I. ADM. PAP. 51-56 (1742). Unfortunately the decree in the case has not been preserved. The communication from England appears in 1 KIMBALL, *op. cit.* *supra* note 15, at 230.

⁷⁹ See 5 R. I. COL. REC. 79-80 (1744).

pointment of a new judge from abroad, it designated individuals to fill the vacancy; two had been Deputy Judges prior to the General Assembly's action, and one was later to serve as such.⁸⁰ And in 1757, it memorialized the Lords of the Admiralty to appoint a judge who should hold court regularly, in place of the deputy appointed from Massachusetts.⁸¹

This interference by the Colony naturally did not escape notice from abroad, but issue was never very sharply joined. While the preamble to the act establishing fees recited that "it is the undoubted Right of the General Assembly of this Colony to establish and state the Fees of all the Courts within the same,"⁸² the principal objection thereto was that the scale was fixed too low to allow the judge a decent living.⁸³ Again, though Judge Lockman declared "Null and Void" proceedings held before Judge Gidley, the latter having only an interim appointment from the General Assembly and no commission from abroad,⁸⁴ the colonists' real grievance arose from the fact that Lockman held a Crown commission as clerk of the navy office.⁸⁵ This was an administrative position under the navigation laws, to which the Colony claimed the right of appointment. The General Assembly voted money for "the just defense of the charter privileges of the colonies," the Colony's agent presented a petition to the Lords of Trade, and for a time there was a lively stir.⁸⁶ But when Lockman first appointed a deputy, he selected Gidley.⁸⁷

⁸⁰ Act of October, 1728, 4 R. I. COL. REC. 413, appointing William Whiting; Act of June, 1733, 4 *id.* at 483, appointing George Dunbar, "who was surrogated and deputed by the late Nathaniel Byfield, deceased"; Act of March, 1743, 5 *id.* at 60, appointing John Gidley, "the judge of admiralty, for this colony [Lockman], being gone home for Great Britain, and his deputy appointed here [Pemberton], declining to serve any longer." See also pp. 66-67, *infra*.

⁸¹ 6 R. I. COL. REC. 104 (1757); see also note 15, *supra*.

⁸² *Supra* note 77.

⁸³ *Per* Dr. Strahan, Advocate to the Admiralty, Feb. 1, 1744; 1 KIMBALL, *op. cit. supra* note 15, at 243.

⁸⁴ See notes 38, 80, *supra*. ⁸⁵ 5 R. I. COL. REC. 70-71 (1743).

⁸⁶ 5 R. I. COL. REC. 97 (1743); see 1 KIMBALL, *op. cit. supra* note 15, at 226. See also 1 *id.* at 233, 242-46, 252, 255, 311, 344; 2 *id.* at 30, 92; 2 ARNOLD, *op. cit. supra* note 75, at 141, 142, 145; *cf.* Appleton, *Richard Partridge: Colonial Agent* (1932) 5 NEW ENG. Q. 293, 307. The summary of the affair in 2 BROWNE, *op. cit. supra* note 32, at 521, seems to be a confused rendering of Dr. Strahan's opinion, *supra* note 83.

⁸⁷ Gidley's proceedings as Judge were declared void August 23, 1743; by November of that year he was acting as Deputy Judge.

The key to the conflict in Rhode Island is not to be found in any outworn generalizations as to hatred of admiralty or love of trial by jury. (All the illustrations given above, it should be noted, precede the period of intensive enforcement of the navigation laws which followed the Peace of Paris in 1763.) The real causes were more practical. The admiralty judges were appointed from without, whereas the common-law judges were annually elected by the General Assembly. If the Superior Court, for instance, enforced a decree of the Privy Council in a private lawsuit, contrary to the sentiments of the Assembly, a new Court could be elected which would refuse enforcement.⁸⁸ Admiralty judges could not be superseded. Truly, as Mr. Justice Curtis so sagely observed, questions of jurisdiction are questions of power.⁸⁹ And the Rhode Islanders were never in any danger of forgetting it.

THE STATE COURT OF ADMIRALTY; ITS PRACTICE

Rhode Island's state court of admiralty was created in the spring of 1776, in the twilight period between loyalty and independence. The "Act for encouraging the fixing out and authorizing armed Vessels to defend the Sea-Coast of America, and for erecting a Court to try and condemn all Vessels that shall be found infesting the same"⁹⁰ was directed only at the "present administration of Great Britain," at the "ministerial navy." The Acts and Resolves for the same session still bore the royal arms and concluded with a pious "God Save the King"; the ties of allegiance were not loosed until May 4, 1776.⁹¹ By that date, however, a judge and an advocate had been elected,⁹² and apparently the first condemnations were had on May 21.⁹³

⁸⁸ See 6 ACTS OF THE PRIVY COUNCIL (COLONIAL SERIES) 505-06 (1770-72).

⁸⁹ B. R. CURTIS, PROCEEDINGS ON THE DEATH OF CHIEF JUSTICE TANEY (1864) 9; 2 Cliff. 611, 614, 30 Fed. Cas. 1341, 1342.

⁹⁰ Act of March 24, 1776, 7 R. I. COL. REC. 481. The exact date has been ascertained from the ms. Journals of the Upper House. See also 7 *id.* at 441-42 (Jan. 1776) (committee to draft act establishing the court).

The title of the act was not mere verbiage; Bristol had been bombarded by a British squadron in October, 1775. See 2 ARNOLD, *op. cit. supra* note 75, at 358.

⁹¹ 7 R. I. COL. REC. 522.

⁹² John Foster was elected Judge, John Cole Advocate. R. I. Acts & Resolves, May, 1776, pp. 9, 44. That portion of the original act which made the Attorney-General *ex officio* advocate of the court was repealed at this session. 7 R. I. COL. REC. 537. ⁹³ The Speedwell; The Georgia Packet; both mss., R. I. Archives.

The "Maritime Court for the Trial of Prize Causes" existed as such until July, 1780.⁹⁴ It was a prize court pure and simple, and would seem to have functioned satisfactorily, for Judge John Foster was annually re-elected.⁹⁵ Doubtless, too, the General Assembly was pleased with his admitted dependency, so different from the attitude of the Vice Admiralty judges. In 1778, Foster had written that "he considers himself only as the servant of the General Assembly, and cannot pretend to any authority but what he receives from them."⁹⁶ Whether this had any causal relation with the next step may be questioned, but the fact is that the Court of Admiralty established in 1780 received a wider jurisdiction, which included not only prize, but also "Causes concerning Seamens Wages, Salvage, and all other Matters and Things of a maritime Nature, properly cognizable before, and to be heard and determined by a Court of Admiralty."⁹⁷

The practice of the state court—it was really one tribunal with a continuous history—was largely regulated by statute, the most striking feature being the presence of a jury to determine issues of fact.⁹⁸ After a ship had been libeled and a date

⁹⁴ The following are acts relating to the court, not otherwise noted: 7 R. I. COL. REC. 535 (May, 1776) (amendments); 7 *id.* 602 (Aug. 1776) (sheriffs to sell prize goods); 7 *id.* 613 (Sept. 1776) (town clerks' fees); 8 *id.* 14 (Oct. 1776) (action taken against notary who protested condemnations); 8 *id.* 18 (Oct. 1776) (committee to revise law establishing court); 8 *id.* 22 (Oct. 1776) (regulating judge's fees); 8 *id.* 98 (Dec. 1776) (judge to appoint special sheriff); 8 *id.* 302 (Sept. 1777) (town sergeants to serve warrants when sheriffs interested); R. I. Acts & Resolves, Oct. 1779, p. 8 (bulk on prizes not to be broken until condemnation); 9 R. I. COL. REC. 89 (June, 1780) (committee to revise law establishing court); R. I. Acts & Resolves, June 1780, pp. 26-27 (fees regulated). Prior to the last act cited, the old vice-admiralty fees had been in effect. See 7 R. I. COL. REC. 481, 488.

⁹⁵ 8 R. I. COL. REC. 221 (1777); 8 *id.* 389 (1778); 8 *id.* 531 (1779); 9 *id.* 6, 55 (1780). After the tribunal was reconstituted as a Court of Admiralty, Judge Foster continued to be re-elected until 1787. 9 *id.* 385 (1781); 9 *id.* 542 (1782); R. I. Acts & Resolves, May, 1783, p. 4; 10 R. I. COL. REC. 23 (1784); 10 *id.* 95 (1785); 10 *id.* 193 (1786).

⁹⁶ 8 R. I. COL. REC. 373 (March, 1778). Judge Foster's memorial raised a question as to his right to tax fees in a pending case. The Assembly's action on this matter is recorded in 8 *id.* at 400-02 (May, 1778). See also 8 *id.* at 455 (Sept. 1778).

⁹⁷ Act of July 20, 1780, R. I. Acts & Resolves, July, 1780 (2d Sess.) p. 9. The exact date has been ascertained from the ms. Journals of the Upper House.

⁹⁸ 7 R. I. COL. REC. (1776) 481, 484; R. I. Acts & Resolves, July, 1780 (2d Sess.) p. 9.

set for trial in the county wherein lay the port to which she had been brought, the judge issued warrants to the town sergeants or constables of all the towns in that county, commanding them to warn town meetings to draw jurors.⁹⁹ The juries consequently included men from such rustic communities as West Greenwich, Glocester, and Cumberland. If any jurors failed to appear or were disqualified, a *venire facias* issued to the sheriff to summon enough freemen to complete the twelve. Whether the jury thus assembled ever heard a charge delivered may well be doubted, as Rhode Island juries were not charged until well into the nineteenth century,¹⁰⁰ but there is reason to believe that Judge Foster largely dominated the proceedings. Some of the verdicts, signed by the jurors, are in his hand.¹⁰¹ On occasion, too, he would draw a libel when supplied with a memorandum containing the facts to be alleged;¹⁰² and indeed, considering that most of the indorsements on file papers and the greater portion of the minute books were likewise written by him, it would not be far from the truth to say that the state court was essentially a one-man institution.

Unlike a Court of Vice Admiralty, this tribunal had no marshal, and consequently warrants to sell were directed to the sheriff of the county or to the vendue masters of the towns. And unlike the Rhode Island Vice Admiralty, the decrees embodied only formal conclusions. Only one "opinion" survives, a long-winded and rather dreary performance replete with rhetorical questions, covering ten closely written folio pages.¹⁰³ Judge Foster cited

⁹⁹ See pp. 89-90, *infra*. Many of these warrants bear the notation, "N. B. Seven Freemen are a Sufficient Number to draw Jurors."

¹⁰⁰ See DURFEE, *op. cit. supra* note 9, at 83-86, 120-21.

¹⁰¹ *E.g.*, Hopkins & Hinman v. The True Blue (1776), MS., R. I. Archives; see p. 90, *infra*.

¹⁰² Martindale *et al.* v. The Dolphin (1779), MS., R. I. Archives.

¹⁰³ "Observations Concerning the Minerva" (1779), MS., R. I. Archives. No other papers relating to this case have been found, nor is there any entry concerning it in the minute books. But see 8 R. I. COL. REC. 482, 483 (Dec. 1778); Providence Gazette, Dec. 19, 1778, Feb. 6, March 6, 13, 20, 27, 1779. Apparently the opinion was written at or shortly after the trial, which was set for February 15, 1779.

The *Minerva*, a British transport, was grounded with about thirty soldiers on board on December 13, 1778, below the low water mark near Westerly, and there captured. She was claimed by the captors as prize, by the state as wreck, and by the upland owner as wreck. Besides the authorities mentioned, Judge Foster

some authorities — Blackstone¹⁰⁴ and Bacon's *Abridgement*¹⁰⁵ — but his reliance on the statute of 15 Richard II¹⁰⁶ and his reiteration of the high-water mark limitation indicate that he probably took a restricted view of the admiralty jurisdiction.

Appeals from the state court lay to the Continental Congress; the details of the exercise of this appellate jurisdiction have been elsewhere described.¹⁰⁷ Slightly more than half of the Rhode Island cases appealed were reversed,¹⁰⁸ but the papers disclose no trace of any conflict with the reversing authority. Certainly Rhode Island produced no *causes célèbres* such as *United States v. Peters*¹⁰⁹ or the case of the McClary owners.¹¹⁰ As in Vice Admiralty times, many of the appeals were not prosecuted. Under the Act of 1780, an alternative appeal to the Superior Court was provided for,¹¹¹ but the record books of that court, for Providence and Newport Counties at least, do not disclose that any such were ever taken. Later, appeals to Congress were disallowed in cases where the appellant's own state forbade prize appeals to that body;¹¹² but this was merely a temporary retaliatory measure.

CASES IN THE STATE COURT

It would be interesting to discuss some of the cases tried in the state court, but such discussion would appeal only to the local

relied on the Act of 1776 establishing the court, and on the resolve of the Continental Congress, July 24, 1776. 5 JOURNALS OF THE CONTINENTAL CONGRESS 605, 606. *Semble*, decision for the captors upon the special verdict of the jury. It is difficult to extract a holding. ¹⁰⁴ 1 BL. COMM. 290-94.

¹⁰⁵ 1 BACON, ABRIDGMENT (3d ed. 1768) 623-24; 4 *id.* 159.

¹⁰⁶ C. 3 (1391).

¹⁰⁷ See Davis, *Federal Courts Prior to the Adoption of the Constitution*, 131 U. S. Appendix xix *et seq.* The information concerning the Rhode Island court, *id.* at xxi, is inaccurate.

¹⁰⁸ Six out of ten. Papers relating to most of the Rhode Island cases reported, 131 U. S. Appendix xxxv *et seq.*, are preserved in the state archives.

¹⁰⁹ 5 Cranch 115 (U. S. 1809); see 131 U. S. Appendix xxix-xxxiv.

¹¹⁰ *Doane's Adm'rs v. Penhallow*, 1 Dall. 218 (Pa. 1787); *Penhallow v. Doane's Adm'rs*, 3 Dall. 54 (U. S. 1795); see Aldrich, *supra* note 14, at 45-46; 131 U. S. Appendix xxix.

¹¹¹ R. I. Acts & Resolves, July, 1780 (2d Sess.) p. 13. It was provided that upon such an appeal, the Superior Court should be governed by maritime law. Perhaps the idea of an appeal to the highest state court derived from New Hampshire. See Aldrich, *supra* note 14, at 53. ¹¹² 9 R. I. COL. REC. 278 (Nov. 1780).

historian and not to the lawyer. The light which some of the papers throw on the almost unknown history of Block Island during the Revolution, when that unhappy place was at the mercy of friend and foe alike,¹¹³ is not for these pages. Sufficient to consider two cases: one illustrates the vagaries of appeals to the Continental Congress, the other the too human tendencies of juries and the General Assembly's control over the court's decisions.

On October 29, 1776, the privateer *Montgomery*, Thomas Rutenburgh commander, captured the schooner *Frank*, apparently a British vessel. A libel was duly filed, but the jury found by their verdict, December 31, 1776, that the schooner was the property of the claimants, Mary Alsop, administratrix of Richard, deceased, and Sylvanus Waterman, both of Connecticut. The ship being thereupon released, Rutenburgh filed a second libel four days later, alleging that the *Frank* had been trading with the British. This was denied by the claimants, and in his deposition Waterman unfolded a wondrous tale. He was master of the vessel, originally named the *Dolphin*, and while at Jamaica in the summer of 1775, had received news of Lexington and Concord. Being apprehensive of a possible condemnation, he executed a bill of sale without consideration to one Mairez, a friendly Frenchman, and renamed the schooner, taking a new register with clearance to Newfoundland, but intending to return to New London. On the way he met a British warship in Long Island Sound, and to avoid it he continued to Newfoundland. From there he cleared for Jamaica, still intending to return to New London, but on this voyage he was chased by British frigates, so that he once more landed in Jamaica. For a second time he cleared for Newfoundland, but had to give bond; and in order to save the bond he continued to his destination. Once more he

¹¹³ "All intercourse with the Island was forbidden. . . . The records of the town were sent to . . . Charlestown, for safe keeping, at the breaking out of the war, and for eight years there is no entry extant to tell what they did or suffered. For eight years they were left to be preyed upon or petted alike by friend and foe, with no food to eat but such as they raised upon the Island or caught from the sea, with no clothes to wear but such as they had at the breaking out of the war, or as they could manufacture with their own hands, without a physician to heal their bodies, or a clergyman to cure their souls." SHEFFIELD, HISTORICAL SKETCH OF BLOCK ISLAND (1876) 50. See also LIVERMORE, A HISTORY OF BLOCK ISLAND (1877) 88-106.

sailed for Jamaica, intending this time to proceed to St. Nicholas Mole in Hispaniola, and from thence to New London. This time his luck failed and the schooner was captured by Rutenburgh. Not unnaturally, the jury disbelieved Waterman's involved account, and found that the *Frank* had been trading with the enemy. She was therefore condemned;¹¹⁴ but the Committee of Congress, in the face of the captain's highly improbable tale, and with a complete disregard of the specific findings of the jury, reversed the decree.¹¹⁵ As in the case of colonial prize appeals,¹¹⁶ judicial considerations were evidently not the only ones producing the result.

The other case was probably one of the last prize causes heard by the court. The sloop *Fair American*, William Havens master, left North Carolina for Rhode Island in November, 1782. She was captured by the enemy in the following month, and while off Edgartown on Nantucket, the captors signaled for a pilot. Benjamin Pease, Henry Fish, and others, not suspecting the vessel's character, went aboard. Other armed British ships then came up, and ordered the *Fair American* to sail to sea. Once headed outward, the sloop ran aground, but the British vessels sailed over the bar. The following morning, Pease spoke to Fish " & said the Coast is now Clear, now is the time for to take Her, & came on Deck with a Pistol & said the Vessel is ours & disarm'd the Britoners with the Assistance of our Said Boats Crew." But, the prisoners once put ashore, stormy weather prevented the intended cruise to an American port, and while the Nantucket Islanders were awaiting fair weather, the privateer *General Rochambeau*, Captain Oliver Read, captured the *Fair American* and sailed her into Newport as prize. Pease and his colleagues filed one libel; Read filed another. The master of the vessel, Havens, entered a claim, relying on the ordinance of Congress which allowed only reasonable salvage to recaptors of American ships within cannon shot of land,¹¹⁷ as seems to have been the case here. Havens not being present at the trial, his proctor, General Varnum, waived the claim; the jury found for Read, and the ship was condemned as prize to him and his owners.¹¹⁸

¹¹⁴ Mss., R. I. Archives.

¹¹⁵ 131 U. S. Appendix xxxvii, No. 11 (1777).

¹¹⁶ Cf. note 39, *supra*.

¹¹⁷ 22 JOURNALS OF THE CONTINENTAL CONGRESS (Feb. 26, 1782) 99, 100.

¹¹⁸ Mss., R. I. Archives.

This was on January 30, 1783. Havens' absence, it seemed, was due partly to illness and partly to the suspension of ferry service from North Kingstown to Newport by reason of stormy weather. In fact, he arrived only half an hour after Varnum's waiver, and, not being then permitted to assert his rights, petitioned the General Assembly for a new trial as to his claim only.¹¹⁹ This was granted,¹²⁰ and a second trial was had on July 18, 1783; the jury again found for Read. Havens prayed an appeal, but seems not to have prosecuted it;¹²¹ and he was subsequently sued for costs of court.¹²²

After the cessation of hostilities in 1783, the court had but little to do; and despite the grant of instance jurisdiction made in 1780,¹²³ the only cases of a civil character involved surveys of damage to one vessel and two cargoes.¹²⁴ Though a judge was annually elected through May, 1790,¹²⁵ the tribunal was dormant for all practical purposes, and it is therefore not surprising that when Rhode Island entered the Union and became subject to the Judiciary Act,¹²⁶ there were no causes to be transferred to the newly constituted district court. Indeed, that court, which under the then federal system alone had original jurisdiction in admiralty,¹²⁷ had no business at all until its third term.¹²⁸

¹¹⁹ 20 PETITIONS TO THE GENERAL ASSEMBLY 73 (1783), R. I. Archives.

¹²⁰ June 26, 1783. The act granting the petition does not appear, however, either in the R. I. COL. REC. or in the printed Acts & Resolves.

The leading case on the power of General Assembly to grant new trials in actions at law is *Taylor & Co. v. Place*, 4 R. I. 324 (1856). Cf. *In re Dorr*, 3 R. I. 299 (1855). See also DURFEE, *op. cit. supra* note 9, at 58-65; Eaton, *The Development of the Judicial System in Rhode Island* (1905) 14 YALE L. J. 148, 164-65.

¹²¹ MINUTE BOOK 1780-83. No record of any such appeal is to be found in the list in 131 U. S. Appendix xxxv *et seq.*

¹²² Indorsement on the Bill of Costs; see p. 89, *infra*.

¹²³ See p. 60, *supra*.

¹²⁴ Damaged Goods on Brig Little William (1784); Damage to Sugar on Brig Luisa (1785); Damage to Brigantine Happy Return (1786); all mss., R. I. Archives.

¹²⁵ From 1787 onward, Ambrose Page was chosen each year. 10 R. I. COL. REC. 242 (1787); 10 *id.* 284 (1788); 10 *id.* 327 (1789); 10 *id.* 378 (1790). Rhode Island did not ratify the Federal Constitution until May 29, 1790. See STAPLES, *RHODE ISLAND IN THE CONTINENTAL CONGRESS* (1870) 672-77.

¹²⁶ By the Act of June 23, 1790, 1 STAT. 128.

¹²⁷ Act of Sept. 24, 1789, § 9, 1 STAT. 73, 76.

¹²⁸ MINUTE BOOK No. 1, D. C. D. R. I. (1790-1800). There was no business at the August or November Terms, 1790; the first case was a customs forfeiture at the February Term, 1791. *Per contra*, the Circuit Court heard a considerable

BENCH AND BAR

The judges who held the Court of Vice Admiralty in Massachusetts are tolerably well known;¹²⁹ but the absence of any list of even approximate correctness of their deputies in Rhode Island suggests that the same cannot be said of the latter.¹³⁰ It has therefore seemed desirable to supply this omission, adding to the dry bones of chronological recording such biographical flesh and blood as the surviving records have yielded up.

In 1727, John Menzies was judge in Boston, and Colonel William Whiting was his deputy at Newport. When Menzies died in September of the following year, his successor was Nathaniel Byfield, who had held the office from 1703 to 1715. In the interim, Whiting was appointed judge by the General Assembly, but doubtless was superseded by the deputy of Byfield's appointment, Nathaniel Hubbard, who took the oaths on May 8, 1729.¹³¹

Byfield died in 1733, probably not much mourned by any in Rhode Island,¹³² and again the General Assembly made an *ad hoc* appointment. George Dunbar, the appointee, had been deputy under Byfield, though just when is not known. Probably he was continued in office by Robert Auchmuty (the elder), judge of admiralty in Massachusetts from 1733 to 1747; at any rate, the files of the Rhode Island court show that he served there from at least July 4, 1740 to July 27, 1741.¹³³

In January, 1742, Leonard Lockman first appears on the scene. He seems to have been a native Englishman. Two months in Newport evidently convinced him that service as a mere deputy was not to his liking, for in July, 1742, he was back in London,

number of causes at its first sitting in December, 1790. MINUTE BOOK No. 1, C. C. D. R. I. (1790-1804).

¹²⁹ See WASHBURN, *op. cit. supra* note 14, at 175-85; Noble, *supra* note 14, at 157-60; *The Courts of Admiralty in New England Prior to the Revolution* (Feb. 1932) 17 MASS. L. Q. 97, 100.

¹³⁰ The only list is in SHEFFIELD, *THE PRIVATEERSMEN OF NEWPORT* (1883) 37-38. The names and dates therein given differ in a number of respects from those in the present paper; but it may be said that all of the latter have been taken directly from the minute books and file papers of the court.

¹³¹ See WASHBURN, *op. cit. supra* note 14, at 176-78; note 80, *supra*.

¹³² See CHAPIN, *PRIVATEER SHIPS AND SAILORS, 1625-1725* (1926) 178-81.

¹³³ See WASHBURN, *op. cit. supra* note 14, at 180, 183; note 80, *supra*.

endeavoring to persuade the Admiralty to grant him a commission as judge. He must have had some success, for after his return to Newport, in August, 1743, he is designated in the papers as judge and not as deputy. Apparently he continued in office until late in 1745. Lockman's difficulties with the Colony have been adverted to above.¹³⁴ If his character was as gnarled as his orthography — a creation fearful and wondersome even in that century of wretched spelling — he must have been rather difficult. It may be observed in passing that the colonists' taunts followed him home.¹³⁵

While Lockman was in England angling for a commission, Samuel Pemberton, a Boston minister's son, held court at Newport from March 25, 1742 to January 18, 1743. Thereafter, according to the General Assembly, he declined to serve any longer. This may well have been a decision dictated by necessity, for the fact of the matter is, Pemberton was incarcerated for debt.¹³⁶

Once more the General Assembly appointed a judge of its own choosing, John Gidley, who served as such from April to August, 1743, and later as deputy under Lockman in November of the same year. This was the period of the war with Spain. Gidley's principal qualification was probably wholly pragmatic: he owned a number of privateers. He was killed in a gunpowder explosion in 1744.¹³⁷

Upon Lockman's second return to England, William Strengthfeild presided over the court as deputy from December 7, 1745 until August 27, 1748. He died about that time. Strengthfeild had come to Newport from England, via Jamaica, and was Deputy Register of the court prior to his appointment to the bench.¹³⁸

He was succeeded by Peter Bours, a somewhat more substantial personage. Bours served as deputy judge of Vice Admiralty only

¹³⁴ P. 58.

¹³⁵ See ANDREWS, *op. cit. supra* note 16, at 23, 24, 25, 36; references cited in notes 83-87, *supra*.

¹³⁶ See JAMESON, *PRIVATEERING AND PIRACY* 451, n.2; references cited in notes 78-80, *supra*.

¹³⁷ See CHAPIN, *R. I. PRIVATEERS* 13-14, 17, 26, 73, 81; references cited in notes 38, 80, 87, *supra*.

¹³⁸ See Pitman, *The Family of Strengthfeild* (March, 1924) 5 MISCELLANEA GENEALOGICA ET HERALDICA AND THE BRITISH ARCHIVIST 136.

from December, 1748, to February, 1749, but he was a member of both houses of the Assembly over a space of twenty years, and judge of the Newport County Common Pleas for seven or eight. He served on several legislative committees, on one occasion to interview the imprisoned Pemberton, and for the last few years of his life was a member of the Council of War. He died in 1761.¹³⁹

Samuel Wickham, the next deputy judge, first sat in the Court of Vice Admiralty in September, 1749, and continued in that position until his death, which seems to have occurred in the early part of 1753. He was justice and chief justice of the Inferior Court of Common Pleas and General Sessions of the Peace for Newport County—to give this tribunal the full title of its civil and criminal sides—for the fifteen years preceding his death. Like Bours, he was also on the Pemberton investigating committee.¹⁴⁰

Wickham's successor at the Vice Admiralty was Robert Lightfoot, an Oxford graduate and a man of considerable culture, who had previously been admiralty judge in the southern colonies. A number of interesting anecdotes concerning him have survived, but only little is known of his judicial labors, as the Rhode Island records during his term of office—April, 1753, until October, 1758, most probably—have not reappeared. Lightfoot died in Connecticut in 1778.¹⁴¹

Auchmuty had been superseded in 1747 by Chambers Russell, who was to be Vice Admiralty judge in Massachusetts until 1767.¹⁴² The latter's jurisdiction over Rhode Island continued until Colonel John Andrews took office as Judge Commissary of Vice Admiralty for that Colony on October 24, 1758. Andrews, who probably served until the Revolution, had been a military man of some note during the French and Indian War. At the outbreak of the War of Independence, he either died or showed

¹³⁹ See 1 MASON, ANNALS OF TRINITY CHURCH, NEWPORT (1890) 121n.; R. I. COL. REC.; SMITH, CIVIL AND MILITARY LIST OF RHODE ISLAND (1900), hereinafter cited as CIV. & MIL. LIST. The latter work is invaluable, but must be checked against the Acts & Resolves or the Colonial Records.

¹⁴⁰ See R. I. COL. REC.; CIV. & MIL. LIST.

¹⁴¹ See UPDIKE, MEMOIRS OF THE RHODE ISLAND BAR (1842) 246-52; SHEFFIELD, *op. cit. supra* note 130, at 37.

¹⁴² WASHBURN, *op. cit. supra* note 14, at 184, 299.

his tact in other ways, for he seems to have avoided conflict with the authorities. Little is known of him.¹⁴³

In the state admiralty, of course, the great figure is John Foster, judge from 1776 to 1787. He started his career as clerk of the Superior Court for Providence County, and apparently clerical duties were to his liking, for he kept the papers of his court practically single-handed, and did not require—or permit—the Register, Theodore Foster,¹⁴⁴ to do much with them. Judge Foster died in September, 1791.¹⁴⁵

Ambrose Page, judge of the court from 1787 to 1790, had been judge of the Superior Court and of the Common Pleas, and member of the Council of War. "He was for many Years a respectable nautical Commander from [Providence], and had sustained several Offices of public Trust, the Duties of which he discharged with Ability and Integrity."¹⁴⁶

When Rhode Island ratified the Constitution, Washington appointed Henry Marchant to be first District Judge. Marchant had acted as the Colony's agent abroad, had served with distinction as Attorney-General, and had been a member of the Continental Congress. After 1787, he had worked untiringly for the acceptance of the Constitution, doubtless the immediate cause for his appointment. Marchant's memory is thus secure; and were it not, it would long be kept alive by his criticism of a Privy Council decision, a denunciation unequalled in comprehensiveness by any other bit of licked-lawyers'-language: "The King and Council . . . made up said judgments contrary to law, reason, equity and justice."¹⁴⁷

"It must be observed," wrote the chronicler of Rhode Island's

¹⁴³ See note 15, *supra*; R. I. COL. REC.; CIV. & MIL. LIST; JAMESON, PRIVATEERING AND PIRACY 575, n.2; CHAPIN, R. I. PRIVATEERS 182. It should be noted, however, that the Judge was not the only John Andrews in the Colony.

¹⁴⁴ Apparently no relation to John Foster, he eventually became a man of some prominence, though never judge of the admiralty court, as stated in 6 DICT. AM. BIOG. 559.

¹⁴⁵ See R. I. COL. REC.; CIV. & MIL. LIST; Providence Gazette, Oct. 1, 1791; references cited in note 95, *supra*. See also 7 RIDER'S BOOK NOTES (1890) 134 *et seq.*

¹⁴⁶ See Providence Gazette, Dec. 31, 1791; R. I. COL. REC.; CIV. & MIL. LIST.

¹⁴⁷ 6 ACTS OF THE PRIVY COUNCIL (COLONIAL SERIES) 505-06 (1770); see UPDIKE, *op. cit. supra* note 141, at 82-89; 7 R. I. COL. REC. 29-31 (1771); 7 *id.* 197-98 (1772).

earliest legal figures, "that in the life of a lawyer, there are scarcely any events that are very impressive or imposing."¹⁴⁸ This theme needs no embroidering. But since the men who practiced in the Rhode Island admiralty were, like their brethren in New York, leaders of the bar, they deserve at least some mention.

There was, for instance, Henry Bull, the immortal who prepared himself for the law, quite adequately to all intents, by haranguing the cabbages in his father's garden.¹⁴⁹ Contemporary with him was Thomas Ward, Secretary of the Colony for sixteen years or more, son of one governor of Rhode Island and brother of another.¹⁵⁰ Daniel Updike, Attorney-General for twenty-four years between 1722 and 1757, was an active admiralty practitioner.¹⁵¹ James Honyman, his great contemporary, was ten years Attorney-General, and Advocate-General of the Admiralty Court for thirty years at least. When the Revolution came, he delivered up his royal commission, not desiring to offend the General Assembly; and died not long thereafter, during the British occupation of Newport.¹⁵² All the above — Bull, Ward, Updike, and Honyman — were, together with Bours and Stephen Hopkins, counsel for Rhode Island in the boundary dispute with Massachusetts.

Their generation of lawyers included also John Aplin of Providence, learned, technical, and a controversialist, but evidently not sufficiently scrupulous even for that day. He was found guilty of malpractice, and removed to Connecticut.¹⁵³ Augustus Johnston, Attorney-General after Updike's death, was popular enough in his day to have a new town named for him, before he accepted office under the Stamp Act. After that, he was run out of Newport, and found more salubrious employment in the South as judge of admiralty.¹⁵⁴ Martin Howard, another proctor, who on

¹⁴⁸ See UPDIKE, *op. cit. supra* note 141, at ix-x.

¹⁴⁹ See *id.* at 23-26; quoted in WARREN, HISTORY OF THE AMERICAN BAR (1911) 142.

¹⁵⁰ See R. I. COL. REC.; CIV. & MIL. LIST.

¹⁵¹ See UPDIKE, *op. cit. supra* note 141, at 34-64.

¹⁵² See *id.* at 27-33; 7 R. I. COL. REC. 563-64 (June, 1776). Many works spell the name Honeyman. But the admiralty papers show that he signed himself as given here.

¹⁵³ See pp. 56-57, *supra*; UPDIKE, *op. cit. supra* note 141, at 73-74; STAPLES, ANNALS OF PROVIDENCE (1843) 603; 7 RIDER'S BOOK NOTES (1890) 134 *et seq.* According to the last cited account, Aplin's final quarrel was with John Foster, then a clerk of court.

¹⁵⁴ See UPDIKE, *op. cit. supra* note 141, at 65-69.

occasion acted as register of the Rhode Island court, likewise made the mistake of supporting the Stamp Act. Thereafter he was Chief Justice of North Carolina. Howard's disposition was no more pleasing than his politics, and he has the doubtful distinction of having been mobbed in two colonies.¹⁵⁵ Matthew Robinson, on the other hand, though a Loyalist at heart, was generally liked, and greatly respected by the bar for his learning. He survived the war, and lived to inflict what must have been a very wearisome and garrulous argument on Chief Justice Jay in the federal Circuit Court at Newport.¹⁵⁶

In the revolutionary period, John Cole was first advocate of the Maritime Court. He had been Chief Justice of the Superior Court, and deputy from Providence during the stormy 1770's.¹⁵⁷ Later he was President of the Providence Town Council. Most of the privateers' libels filed in the early years of the state admiralty are in his hand. Contemporary with him was William Channing, father of William Ellery Channing, Attorney-General from 1777 to 1787, and first United States attorney for the Rhode Island district.¹⁵⁸

On the death of Cole, in 1779, he was succeeded as advocate by General James Mitchell Varnum, a member of the first graduating class of Rhode Island College (now Brown University), and perhaps the only one of this entire list of men of law who achieved national fame. Varnum made a brilliant military record in the Revolution, represented his state with distinction in the Continental Congress, and thereafter reached the summit of his career in the celebrated paper money case, *Trevett v. Weeden*,¹⁵⁹ of which he was the hero. There he sowed the dragon's teeth of unconstitutionality, a performance somewhat ironical in a jurisdiction which had to wait half a century more for a formal constitution. Soon after his great forensic triumph, however, Varnum forsook his home, attracted by a judgeship in the Northwest Territory; he died there in the wilderness, alone, and only forty years old.¹⁶⁰

¹⁵⁵ See I SABINE, BIOGRAPHICAL SKETCHES OF LOYALISTS OF THE AMERICAN REVOLUTION (1864 ed.) 546.

¹⁵⁶ See UPDIKE, *op. cit. supra* note 141, at 234-46.

¹⁵⁷ See *id.* at 122-30.

¹⁵⁸ See *id.* at 90-93.

¹⁵⁹ (1786), I THAYER, CASES ON CONSTITUTIONAL LAW (1895) 73. See DURFEE, *op. cit. supra* note 9, at 51-58.

¹⁶⁰ See UPDIKE, *op. cit. supra* note 141, at 145-53.

CONCLUSION

This paper does not purport to be more than a sketch, and the "opinions" and forms appended below are simply representative examples. A definitive volume on the Rhode Island Admiralty, comparable to what Judge Hough did for that of New York, will require time, patient grubbing, and above all, familiarity with the admiralty tradition. The lay historians are not adequate to the task. Even Channing, the great Channing, seemed "unacquainted with the difference between an Admiralty Court and a Commission for the Trial of Piracies, etc."¹⁶¹ And the admiralty beacon in the District of Rhode Island flickers dimly perforce; only nineteen libels were filed in 1931, and fifteen of these were by the Government, seeking forfeitures.¹⁶² Here, then, is a remarkable opportunity for the legal historian interested in the all but uncharted sea of early American law.

Frederick Bernays Wiener.

PROVIDENCE, RHODE ISLAND.

¹⁶¹ See HOUGH xx, citing 2 CHANNING, HISTORY OF THE UNITED STATES (1908) 276 *et seq.*

¹⁶² This information has been obtained from the dockets of the court. Within comparatively recent times there was considerably more admiralty business; but this is hardly the place to discuss the reasons for the decline.

APPENDIX *

A. CASES

UPON AN INFORMATION IN BEHALF OF HIS MAJESTY V^s A SMALL SLOOP
TAKEN UP SUPER ALTUM MARE¹

Whereas there was an Information fil'd agst the Said Sloop and M^r Abraham Wincoop appearing in Court & laying Claim to s^d Vessel & producing his Bill of Sale for her & also informing that She was at an Anchor in Stratford harbour not long Since And by a Great Body of Ice was forced out of s^d harbour and So was Drove away and M^r George Johnson allso appearing in Court gave oath that he knew her to belong to the s^d Wincoop Therefore I decern & decree the s^d Sloop to be redelivered to the s^d Abraham Wincoop with all her Appurtenances as per Inventory he paying the Costs of this Court taxed to Five pounds Seven Shillings and ten pence and also the Costs & Charges M^r Flower has been at in Securing s^d Sloop being three pounds in all eight pounds Seven Shillings and ten pence.

Will^m Whiting D. Jud Adm:

JAMES COLLINGWOOD COMMAND^r OF THE SLOOP CHARMING BETTY VS SHIP
ORATAVA & HER CARGO²

This case, If only Considered as to the Value of the Ship and Goods Libelled against is of Consequence: But when Strictly viewed in all It's Appearances attended with such Variety of Circumstances It will Appear in its Determination to be of as high Importance as can Come in Judgment and therefore not to be wondered the Auditory was so great, and the Tryal [long] tho' the Question before me on this Libel appears very Short: namely whether the Capture thereinmentioned is a Lawful Prize or not: And in Order to form a Right Judgment herein, I have maturely considered, the preparatory Examinations produced on Tryal, and also the Writings taken in and with the said Capture, as well as the Evidences given in Open Court, and Arguments of the Advocates on the Part of the Captor as on the part of the Claimants, and am of Oppinion: the Captor has fully Supported all the material and Necessary parts of his Libel: that the Ship Oratava was at first the property of One or More of his Majesty's Liege Subjects, that She was Chartered in April last at Tenerief, there Loaded with Wines of the Island but who had the Property of her then does not fully appear, that She and

* The Editor has been more than generous in making available space for this appendix, but the choice of documents was nevertheless necessarily limited. The basis of selection, among the cases, has been some point of interest in each one, either legal, or human, or both; as to the forms, the object has been to supplement those printed by Judge Hough without merely adding cumulative material.

Wherever possible, the spelling and capitalization of the original papers, often not too legible, is preserved here. But periods or colons under superior letters are uniformly omitted.

¹ 1 R. I. ADM. PAP. 2 (March 8, 1727).

² 1 R. I. ADM. PAP. 19; see CHAPIN, R. I. PRIVATEERS 68-70.

her Cargo came first into Cape Codd putting Hubbard a Shore & Secretly Some Wine and some fruit and after hovering on the Coast were taken as in the Libel set forth: the Cargo was to be Sold or Runned [?] here or [in] some other part of his Majesty's Plantations Returns to be made back to Tenerief in provisions to be purchased in said Plantations, with the Produce of said Cargo, pursuant to Instructions Signed by the said Lockhart one of the Claimants, and on Tryal owned to be his Instructions given M^c Carrick the Super Cargo: Instructions that open a most Shocking Scene of Disloyalty, Treachery, and Corruption: therein I behold Persons Shaking of their Natural and Just Allegiance to our Sovereign Lord the King, weakening, if not Sapping, our Constitution deeply laying a Scheme for Supplying his Majesty's Enemies and from his own Plantations with all Sorts of Provisions, for many Voyages, chartering Vessels projecting false Clearances, and for hiring his Majesty's Subjects to Navigate such Vessels first decoying them from his Majesty's Dominions, the Consequence of which is that Such unhappy Subjects So Imposed upon Must on their Arrival at Tenerief Either be Imprisoned So Long as their Loyalty or Integrity Continues or on the Forfeiture of Both Enter into the Service of Our Enimies: and what Still more Shocks me is that in this Treasonable Commerce A Gentleman that once had the Honour and Trust of being his Majesty's Consul in Tenerief,³ Shou'd be Engaged a Partner with this Lockhart that he should make a State [?] of that Power to Certify as in the Case writing to his Majesty's Subjects in these parts to favour these pernicious proceedings and to Corrupt and Bribe them from their Duty and finally to Engage and Tempt them in the like Practices; Assuring them he *will retaliate upon the like or any other Occasion*: and that this is not a Hasty and Suddin transaction of the said Lockhart and his *Concerned* but herein he is acting a part w^{ch} by the papers appears he Acted before and that Since the Declaration of Warr tho' in this he Seems to Spread more Canvas: And Notwithstanding all these things in open Court appears most flagrant and Glaring to the Just abhorrence & Detestation of the whole Auditory the Claimants by their Advocates⁴ Either Justify or Excuse themselves by Insinuating that the said Lockhart & Company are good Loyal Subjects were only Endeavouring to get off their Effects from an Enemies Country or that if the projection was Illegal the same was not carryed into Action and therefore the capture ought to be discharged or acquitted The falsity of the first will fully appear from the Instructions and other Evidences in the Case And as to the Second in part they carried their Evil Concerted Measures into Action is plain: for to purchase provisions for the Kings Enemies they fitted out and Loaded [s^d] Ship sent her to New England where some of her Cargo Such as Wine & Fruits was Conveyed aShore that they were hovering on the Coast waiting a favourable opportunity to put the rest of the Instructions into Ex^{on} when happily they were taken happily Indeed as thereby preventing Succour and Comfort to our Enemies Happily as preventing Sundry of his Majesty's good Subjects from being decoyed from their Loyalty or tricked out of their Lives and Liberties Surely if a projection should by Hellish Minded Subjects be carried

³ John Crosse, Jr.

⁴ According to the pleadings, the claimants were represented by John Overing, at that time Attorney-General of Massachusetts. See JAMESON, PRIVATEERING AND PIRACY 442, n.2. Two other Massachusetts men, Advocate-General William Shirley and William Bollan, appeared for the libellant.

on against his Majesty's most Sacred Person to take away his Royal Life (which God long preserve) would any lawyer say the fitting out a Vessel manning of her giving the Master Instructions how to Commit this High Treason are not So many Overt Acts which render the Concerned Traytors or that on Tryal because their Hellish projection was most happily prevented from being Executed therefore the Contrivers were not to be hanged such Doctrine would appear very Odd and Strange in Westminster Hall And tho' this Case appears Short of that yet upon a Close observation it will not appear Vastly So Therefore as this Colony has distinguished it self Shewed how Much they have at Heart the Good Success of his Majestys Arms Engaged in So just a Warr by fitting out a Vessel of Warr at their own Expence⁵ and Several Merchants belonging to it have With like Spirit fitted out at their Particular Charge Vessels of force to Annoy and destroy the Enemy Providence also Seems to distinguish their Loyalty with Success and the present Capture is an Instance thereof, tho not so beneficial to the Captors as other Seizures yet much more to the Publick in its Consequences then all of them put together and I hope none that Loves their Prince their Country, Constitution and themselves will discourage this Laudable Undertaking I never shall, and upon the whole I adjudge & Condemn the Vessel & Cargo Libelled against as a Lawfull Prize and Entirely to belong to and be divided between and among the Owner of the said Sloop that Seized and took the same and the Several Persons which were on Board the Same in such Shares and proportions as were Agreed on with the Owner afores^d and the Persons thus Entituled thereto by Virtue of such Agreement among themselves, & Decree the Def^t to pay double the Costs of this Court. and as to the Persons taken in this Capture I leave them to be treated by this Government according to Justice Appertains.⁶

Rob^t Auchmuty Judge Ad^y
July 12th 1740

JAMES ALLEN & AL^s VS SHIP ANGOLA & CARGO &C.⁷

Whereas a Libel has been presented before me May 19th 1743 by James Allin Commander of the Sloop Revenge a Private Man of War belonging to Newport Commissioned by Richard Ward Esq^r late Governour of Rhodeisland for himself Owners & Company in Conjunction with James Wimble in the Sloop Revenge another Private Man of War belonging to London Great Britain Commissioned by the Honorable Commissioners for Executing the Office of Lord High Admiral of Great Britain Ireland &c for himself owners & Company by Virtue of w^{ch} Commissions they did take the Ship Angola who was taken by the Spaniards on the 20th day of April last N. S. oft the

⁵ The Colony Sloop *Tartar*. See CHAPIN, R. I. PRIVATEERS 186-98.

⁶ On the same day, Shirley moved that McCarrick be arrested and delivered "to the Governour of this Colony together with a Copy of the Decree or some other due Notice of his afores^d Crime that he may be proceeded with according to due Course of Law." See MINUTE BOOK 1740-43. Thereafter McCarrick and two others were brought before the Governor and Council, but the records of the July, 1740 session do not show any action taken in the matter. Mss., R. I. Archives. The prisoners were subsequently released. See CHAPIN, R. I. PRIVATEERS 69.

Judge Auchmuty was an interesting and original figure in other respects also. See Chapin, *When Judges Advertised* (1930) 3 NEW ENG. Q. 332.

⁷ 1 R. I. ADM. PAP. 83, reversed on appeal. See pp. 50-51, *supra*.

Hineango one of the first Islands in the Wind Ward Passage of the Burden of Two Hundred and Forty Tons or thereabouts Mounted with twelve Carraige and four Swival Guns together with Her Cargoe Consisting of One Hundred and Fifty Seven Hog^{es} of Sugar Eighty Planks of Mohogony three Hundred and Seventy Bags of ginger Eighty Seven Bags of Cotten and three tons of Elephants teeth Sundry Musquets Warlike Stores &c and did bring Her into Newport for Tryal & Adjudication and there being A Claime Entred by George Smithson Commander of the s^d Ship Angolo when she was first taken in behalf of Foster Cunliffe Esq^r Jn^o Hardman and Sam Augden all of Liverpool in Lancashire Great Britain as owners of the s^d Ship & Cargoe before she was taken by Don Francisco Lorenzo and Don Francisco Camejo Commanders of two Sloops of War fitted out and belonging to the King of Spain and I have attentively heard the Pleas of the Counsels both for Captors & Claimers^s the Argument of the Council for the Captors was this that when A Ship or Vessel belonging to the Subjects of the King of Great Britain was taken by Ships or Vessels of War fitted out and belonging to the King of Spain and was Carried by any of them into their Ports or Harbours that she was then A Lawfull Prize Nay more Indisputably so after the Cerimony of Condemnation had past upon Her that then the Propperty was Actually altred: the Plea of the Council Runs thus for the Claimers that the Passages in His Majestys Act for Salvage was Express without any Manner of Exception and Although A Vessel after taken was Carried into Port by the Enimy and there Condemnd that there was Nothing but Salvage due and that the Propperty was not altred Untill she was Sold by them to Some other Nation now I having Delebaratly looked over His Majestys Act of Parliment begun and Holden at Westminster the 14th of January 1734⁹ and other Authoritys and have Maturely Weigh^d the Preparatory Examination of the Evidences on Oath and likewise again in open Court Peticularly the Capt of the Ship when she was taken by Capt James Allin, Philippi De Arrieta and two Other Spaniards All Disinterested to Appearance (and no Contradiction of what they Swore and Said being made by George Smithson who was not Sworn in the Case nor Requested it and likewise by the English Mens Oaths belonging to the Ship w^{ch} Rather Strengthen^d then Deminishd the Spannish Evidences (the Substance of w^{ch} was that she was Carried into Tannamo a Port or Harbour in Cuba where the Papers belonging to the Ship was Sent to Barricoe and Her Condemnation Came back before She Sail^d from Tannamo Laying in that Harbour four days & half and as for the time of Laying there being so short they have no formal Court of Admiralty for Prizes taken by the Ships or Vessels belonging to the King of Spain and the s^d Ship was taken again by Capt James Allin on the 29th of April NS About ten Leagues to the Eastward of the Havannah and about half A League from the Island of Cuba the Reason of the Cobby of the Condemnation of the Ship being wanting in this Case Phelippi De Arrieta gives is this that he had orders from Don Francisco Lorenzo whose Leautinant he then was to throw the s^d Papers Overboard if he should be in Danger of being taken by an Englishman w^{ch} he said he did in the Engagement he had with Capt Allin wth Sundry Letters

⁸ This term was current in Massachusetts also. See *Dumaresq v. The Amsterdam Post* (Mass. Vice Adm. 1740) JAMESON, PRIVATEERING AND PIRACY 356, 359.

⁹ 13 GEO. II, c. 4, § 18 (1740). Gidley's date refers to the beginning of the Parliament that passed the act.

that ware Sent with it from Barricoe in a Packet to the Governour of the Havanah w^{ch} Papers and Cobby of Condemnation he Reinclosed and Seal^d up in Said Packet for All w^{ch} he gave a Receipt I have been more Peticular in this my Order then there is Real Occasion for but was Willing to Set forth the Reasons Alleig^d and Sworn aganst the Ship &c w^{ch} will more at Large Appear by the Preparatory Examinations of the Evidences and other Questions Answered by them in Open Court and on the whole I am of Opinion of the Council for the Captors and therefore do adjudge and Condemn the aforside Ship Angolo her Tackle Apparell &c and her Cargoe w^{ch} I have already Mentioned the Peticulars of to be A Lawfull and Just Prize to the Captors Capt James Allin Owners & Company in Conjunction wth Capt James Wimble Owners and Company to be Devided betwixt them According to their Articles and Agreements &c dated in Newport this 10th day of June Annoy Domini 1743 and in the Sixteenth Year of the Reign of His Majesty George the Second by the Grace of God King of Great Britain France & Ireland &c Sign^d and Decree^d by me

Jn^o Gidley Judge

SHILCOCK V. BANISTER.¹⁰

I shall first Mention Some Pleas made by the Respondent the first to the Jurisdiction of the Court on Account of A Contract the Appellant Rec^d w^{ch} was A Memorandum to Continue him in Wages if the Ship was Sold Untill his Arrival at Newport the Second was that James Vaughan of the City of London was an Owner and not mentioned in the Lible although the Respondent Ship^d the Appellant and Gave him the Memorandum or Contract for his Wages if the Ship was Sold Untill his Return to Newport the Next was the place from whence he Sail^d was left out in the Lible all w^{ch} Pleas I overrule^d and Always shall all Manner of Triffling Evasions to throw the Charges on any poor man when I think his Case is Just as to the Merits of the Cause the Respondent Pleaded that what he Rec^d here Advance Wages and what he had Receiv^d in London was the Ballance Due to him and he Should have Sued for the Memorand^{um} or Contract by it Self but I find what Advance^d Wages he had Rec^d and what he Rec^d in London was not the full of the Wages Due to him Even when the Ship was Sold So I Order the Respondent Jn^o Banister Merch^t to pay to Tho Shillecock Marriner his Wages from the time he was Ship^d being the 26 of March as Appears by the Portage Bill Untill he was Discharged at Newport being Oct 18th the Amount of w^{ch} is twenty three Pounds 11 Sh and four pence Sterling but to be Subducted out of it what his Advance Wages was before he Sail^d being Sixteen pounds this Currency and Seven pounds Sterling he Rec^d in England and likewise twelve pounds this Currency part paid in his Absence and part he Rec^d After he Came home the Whole three Sums Amounting to twelve pounds one Shilling and Six pence Sterling So Remains Due to Tho: Shillecock Marriner Eleven pounds Nine Shilling and 10 pence Sterling w^{ch} I Order the S^d Jn^o Banister to pay him and likewise to pay the Cost of this Court.

Jn^o Gidley Dep^t Judge

¹⁰ 2 R. I. ADM. PAP. 40 (1743); see pp. 85-86, *infra*.

ALLEN & MARSHALL V. THE WILLEM GALLEY.¹¹

I have carfully perused the evidences in Præparatorio concerning the Ship now in question as also have given due attantion to the Pleas of the advocates on both sides it thereby appairs that the ship now libeld aginst by James Allen commender of the Sloop Revenge a private man of war & Peter Marshal Commander of the Sloop Succes a nother private Man of war was commended by Cosme Zaggaryn a Spaniard at the time when thy conquerd her, it also appairs that the sy'd ship did formerly belong part to Peter Couvenhoven & the rest to several other Persons residing at Amsterdam all subjects to their Heigh & Mighty Lords the States of the United Netherlands & that Peter Couvenhoven was Capt or Skipper thereof who now in court appairs as Claimant for the syd ship & her Cargo for him self & others & says that the sy'd ship was called the willem Gally when he commended her & that the whole ship & cargo did belong to the subjects of the before mentioned States it also very plain appairs that the ship Willem Gally was on the eighteend day of March last N. S. & seized & taken by a Spanish Man of war between the Islands of Mona & st: dominge caled the nostra senora de carmen of theerty Guns & three Hundred & fifty men Commanded by Don Pedro de Garacochea becas the aforesy'd ship was loaden with Spanish effects for which reason the aforesy'd ship & all her cargo & monnys was by the Laws of Spain liabel to confiscation & accordingly the aforesy'd Don Pedro de Garacochea & Cosme Zaggaryn who was second Capt: of the before mentioned Spanish man of war Condemned & pronounced the beforementioned ship Willem Gally a lawfull Prize to the use of the King of Spain his subjects & Vassals as by virtue of their Commissions thy had a right to do, & there uppon took out of the sy'd ship all the monny to be found & carried the same on board the spanish man of war the sy'd D. P. d. G. & gave to the beforementioned Cosme Zaggaryn a Commission & put theerty six Spanish Sailers on board the ship willem Gally with orders to conduct the syd ship to the Havanna accordingly the sy'd Cosme Zaggaryn Made sail for the Havanna & in nine days after Namely the twenty seven day of the same month in the streight of bohema he was met with by the before mentioned James Allen & Peter Marshall when the sy'd Cosme Zaggaryn Hoisted spanish Collours on board the aforesy'd ship willem Gally & gave the sy'd James Allen & Peter Marshal a broad side & when he found that thy where tow hard for him he Struk to them as being conquerd consequently a lawfull Prize by the rights of war I therefore adjudge & condem the beforementioned ship with all her Guns tackels & appurtinances as also al her cargo & monnys & slaves as in the libel sett forth as a lawfull prize to the aforesy'd James Allen & Peter Marshall their owners & company as thy amongst themselves have or shal hereafter agree I further decree that all such goods on board sy'd ship as are liabel to pay duty that the same be punctually pay'd to his Majesty's Collector of the Custums here

Leonard Lockman¹²

¹¹ 3 R. I. ADM. PAP. 42 (1745); see CHAPIN, R. I. PRIVATEERS 62-64, 162; JAMESON, PRIVATEERING AND PIRACY 465-68. The agreement of consortship between the captors is given in *id.* at 463-65.

¹² Reversed on appeal in 1752. See Ford, *List of Some Briefs in Appeal Causes &c.* (1889) 25 PROC. MASS. HIST. SOC. 85, 99. A photostat of the brief in the R. I. Historical Society shows that the original has been endorsed, very likely by

LANGDON V. THE FRIENDSHIP.¹³

Collony Rhode Island 9 br6. 1745.

I have carfully perused the preparatory Examinations & all other papers which were produced in court concerning the sloop frindship whereof Philip de Jonge was Master when surprized & taken by Cap^t: Richard Langdon Commander of the Brigantine Dolphin a private man of war as by a Coppy of his commission does appare on or about the tweentieth day of August last about three leagues to the South of the Island of Banco in the westindies surprize & took the above say'd sloop and sent her to this port for adjudication as the property of the french Kings subjects or Vassalls, I have also given due attantion of the pleas of the advocates on both sides whereby it does not in the least appare that any of the subjects or Vassalls of the french King hade any right to any part or share in the aforesay'd sloop or cargo but on the contrary it appares very plain that the sloop frindship now libeled against holy & soly belongs to Mordicai Alvares & the holy cargo to Cornalius Plier both Merchants att Curacoa & subjects of there High & Mighty Lords the states of the united Netherlands in amity & alliance with our sovereign Lord the King & of consequence no Prize I therefore order & decree that the abovesay'd sloop with all her apparel & appurtinences & all her cargo be immidiatly restored to the Claimand Philip de Jonge without any embesement as also all the monneys Gold & silver & wrought gold Buckels & buttons silver watch & linnens as the claimand has set forth in his claime it being the property of the say'd Philip who is also a subject of there High & mighty Lords aforesay'd I further decree that the captors pay cost & charges as the act of Parliament directs

Leonard Lockman

SWEET V. THE CATHARINA.¹⁴

I have Considered the Libel of John Sweet against the Sloop the Catharina whereof John Paas was Late master, And have thoroughly examined the persons brought home in the said Vessel w^h were one English and One French Sailor who both on Oath say that the s^d Sloop belonged at the time of Capture to One Ambrosius Duan a reputed Subject of the States General but upon strict perusal of the same it plainly appears there can be no Credit given to either of them therefore the only guide in this case must be the Papers which were found on Board at the time of Capture by which it is plain that the said Sloop was Built in Bermuda, and owned by One John Harvey Esq^r and Nathaniel Bascome Attorney to s^d Harvey who sold the s^d Sloop at Curacao unto the afores^d Ambrosius Duan as appears by a Bill of Sale and the Sea Breif, Muster Role, and other Dutch papers obtained at Curacao seems to confirm the said Duan to be owner of the same From which Port of Curacao she Sailed to the Spanish Coast there Laded with Mules, w^h she carried to the Grenades a French Island and there purchased Sugars, and returning to Curacao about the Eighteenth day of August last

Sir George Lee "I think the decree of Reversal was clearly right." The court: Earl of Granville, Earl Cholmondely, Lord Berkeley, Mr. Dodington, Sir T. Robinson, Clive, B.

¹³ 3 R. I. ADM. PAP. 84.

¹⁴ 4 R. I. ADM. PAP. 97; see CHAPIN, R. I. PRIVATEERS 154-55.

past was taken by S^d Sweet, And Although the S^d John Paas and Jan Ambrosius Duan were both on board at the time of Capture yet the S^d Sweet hath sent neither of them, nor any other officer Of said Sloop into Port contrary to his Instructions from this Government & thereby rendered it impracticable for any of the S^d persons to put in their Claims within the limited time required by Act of Parliament although there be great suspicion of fraud from the willingness of the S^d reputed Owner & Captain to quit the S^d Vessel as there doth likewise from a number of papers said to be thrown over board and also from the prevaricating Evidence of the two Sea Men brought home in the S^d Vessel this misterious conduct on all sides has rendered this matter exceeding doubtfull and as I have received Positive instructions from the R^t Honor^{ble} Commissioners appointed for executing the office of High Admiral of Great Britain &c to be exceeding cautious in all cases wherein the Property of the subjects of the States General are concerned and to transmitt Copy's to them of the same. I therefore Order that the said Sloop be immediately Unloaded and the Goods Inventored by the Mashall. And appraised by Persons appointed by this Court. And that the same be put into a Proper Whare house with Three Separate Locks, One Key to be delivered to the Collector One to the Naval Officer, And the Other to the Captors, and as the Vessel may suffer Damage by lying I order the same together with her appurtenances to be Sold at a Publick Vandue by the Marshall of this Court and the money to be Paid into this Court, And the whole to remain untill sentence of this Court be past on the same, I therefore Order the Register Immediately to make out Monitions, And I likewise order the Marshall to use all possible means to Notifye the said John Paas, And John Ambrosius Duan, to appear directly to the end that Justice may be executed, which if they refuse to do, or dont comply with in a reasonable time not to exceed Eight months from the date hereof to be approved of by this Court, they shall be proceeded against accordingly.

W^m Strengthfeild ¹⁵

Newport Rhode I^d Oct^r 17th 1746

DENNIS V. THE POSTILLION.¹⁶

I have Considered the Libel of Cap^t John Dennis against the Sloop Postilion & her Cargo Consisting of Sugar Cotton & Negroes as p^r Appraisalment, it is plain from the Said Sloops Papers concurring with the Evidence of the Boatswain of S^d Vessel that she was Own'd at the time of Capture by M^r Romanel, fils & that the Cargo was own'd by several french inhabitants of Martinico as by the warrant of search from the Custom house at Grandterre appears so that the Whole was intirely the Property of the french King his Vassals or Subjects, Enemies to our Sovereign Lord the King & so lawfull Prize, I therefore Condemn the same as a legal Prize to be divided Amongst the Owners & Company as they have or shall agree, Save Only One Negro

¹⁵ Reversed on appeal in 1752. See Ford, *supra* note 12, at 98-99. The court: Earl of Granville, Earl Cholmondely, Lord Berkeley, Lord Edgcombe, Mr. Dodington, Sir G. Lee, Foster, J. Sir George Lee wrote on his brief, "Dutch Ships carrying Goods for the French in time of War both in Europe & America restored." Mr. Chapin remarks, more pointedly, "This is only one of the many cases of the slick Dutch illicit traders obtaining final judgments in their favor." R. I. PRIVATEERS 155.

¹⁶ 4 R. I. ADM. PAP. 110; see CHAPIN, R. I. PRIVATEERS 165.

Named Henry Who pretends to be free, I therefore give him three years to prove his freedom such Proof to be Approved on by this Court w^{ch} if he fail to do I condemn him as Prize as afores^d during w^{ch} time he remain in the Captors hands — I Also order the Captors to pay Cost as the Law directs Newport Oct^r 27, 1746

W^m Strengthfeild

SWEET V. A SCHOONER.¹⁷

Colony of Rhode Island Newport January 21st 1748 [O. S.]

I have considered the Libel of John Sweet Commander of the Brigantine Defiance a private man of War, against a Schooner taken and sent by him into this Port as Prize, and I have also weighed the preparatory Examinations, And it appears to me that said Schooner, being in the Possession of the Subjects of the King of Spain, was taken the thirtieth Day of August last near the Havanna, at which Time and Place, I apprehend by their Excellencies the Lords Justices Proclamation, no Acts of Hostility ought to have been committed against any of the Vassals or Subjects of his Catholick Majesty, and that all Ships, Merchandizes and Effects belonging to them and taken at that Time and Place ought to be restored. But as Monitions have been issued agreeable to Act of Parliament and no Person whatever hath entered any Claim or Pretension to said Vessel, I order the Marshal of this Court to sell said Schooner to the highest Bidder (after having given publick Notice of the Sale) and to deliver the money arising thereon to the Register of the Court, Whome I hereby order, after deducting the legal Charges attending the Sale, to pay the Remainder to the said John Sweet for the Use of himself, his Owners and Company; upon the said John Sweet giving Bond with one Sufficient Surety in the Register's Office to restore and pay the full Sum which said Vessel shall sell for, reduced into Sterling Money of Great Britain to Such Person or Persons, who shall within twelve months Time from the Date of this Decree claim said Schooner, and prove themselves to have been the true Owners of her, at the Time she was taken by the said John Sweet, And I also order the said John Sweet to pay the legal Charges of this Court.

Peter Bours Dep^{ty} Judge Adm^{ty}

TRAPIER V. BANISTER.¹⁸

Colony of Rhode Island &c.

At a Court of Vice Admiralty held at Newport on the fifteenth day of September in the Twenty Third year of his Majesty's Reign Anno Dom. 1749 & from thence Continued by adjournments Untill the Second day of October Ensuing.

Alexander Trapier Appellant } In a libel for wages on board
John Banister Respondent } the Sattee Eagle James Brown Master

Having heard the Libel of the S^d Alexander Trapier, & also the Plea of the S^d John Banister, together with all the Allegations, Answers, & Evidences on both Sides and after due Consideration had thereon: I find, that after deduc-

¹⁷ 6 R. I. ADM. PAP. 150 (1749); see CHAPIN, R. I. PRIVATEERS 158-59.

¹⁸ 7 R. I. ADM. PAP. 51.

LIBEL IN PRIZE CAUSE, STATE COURT.²³

State of Rhode Island & Providence Plantations ss. To the Honorable John Foster Esq Judge of the Court of Justice created for the Tryal of Prize Causes in and throughout the State of Rhode Island and Providence Plantations in America.

Job Pearce Commander of the Private Sloop of War called the Greenwich fitted out at and belonging to the Port of East Greenwich and duly commissioned agreeable to the Resolutions of the most Hon. the Continental Congress to cruise against the Enemies of the united States of America for himself and for and in behalf of the Owners of and the officers and Men belonging to the said Sloop of War by John Cole his Procter comes into this Hon. Court and libels, appeals and propounds and gives your Honor to understand and be informed that on the fourth Day of October A. D. 1776 being on a Cruise against the Enemies of said united States upon the High Seas he together with his officers, Marines & Mariners belonging to said Sloop took and captured the Ship Belle with her appurtenances commanded by Thomas Jones together with her Cargo Consisting of Lumber & dry Fish & bound from Annapolis Royal in Nova Scotia to Jamaica in the West Indies, and that said Ship and her Cargo at and before the Time of Capture was the Property of and belonged to some of the Inhabitants of Great Brittain, and said ship was employed by his Britannic Majesty to carry Troops and Stores from Great Brittain to Hallifax for the Use of his Fleet & armies acting against the united States of America, and the said Job Pearce hath sent said Ship her appurtenances and Cargo into the Port of East Greenwich within your Honors Jurisdiction for adjudication. Wherefore he humbly prays that your Honor would take the Premises into Consideration and grant the proper process and monitions required by Law in such Cases, and proceed as to Right & Justice appertaineth.

John Cole pro Libellant²⁴

Schedule of the Cargo of the Ship Belle

15015 Feet of Boards	22191 Feet of Spars
52600 Feet of Timber	280 Quintals of Fish
47050 Shingles	2 Negro Boys
2900 Hoops	1 Horse
71056 Staves	

PLEAS, VICE ADMIRALTY.

(1) *Wanton v. Freebody et al.*²⁵

And the Defend^{ts} come into Court & for Plea say that the Matters & Things herein contained, are not cognizable within this Court, but the same are Triable in the Kings Courts only & of this pray Judgment

J. Honyman Att pro D^{nt}

²³ Ms., R. I. Archives.

²⁴ This libel was filed on October 22, 1776, and at the trial, held November 9, the *Belle* was condemned. Thereafter, her mate, carpenter, and five seamen petitioned the judge for their wages, adding, "your Petitioners is desirous to Serve the States of America." Ms., R. I. Archives.

²⁵ 1 R. I. ADM. PAP. 108 (1743).

The defendants farther say that the said Joseph Wanton who hath now informed, is not an Officer of the Customs, he not being Qualified therefor, not having taken the Proper Oath required by Law, & therefore the s^d Information ought to be Quashed & of this &c

J. Honyman Att pro D^{nt}

Which Pleas if overuled the Defendants for each of themselves to issue say they are not Guilty in Manner & Form as the Informer hath against them declared & of this &c.

J. Honyman Att pro D^{nt}

(2) *Hopkins v. The Juffrouw Sarah, Huijbling Claimant.*²⁶

And the Defend^t Coenraad Huyblings of Curracoa Mariner a Subject of the High & Mighty Lords the States Gen^l of the United Netherlands comes into this Honble Court, and Saith the Matters & things Sugested and alledged in the Libel aforesaid cannot be proved and therefore not Sufficient (by the Treaties Subsisting between the Crown of England & the High & Mighty Lords afores^d) to Cause or procure a Decree for Confiscation of the Vessel & Cargo &c afores^d and thereupon prays Judgment

Henry Bull Adv:p Defend^t

(3) *Shilcock v. Banister.*

And the Respondent comes into Court, & for Plea saith the Matters & Things herein contain^d are not within the Jurisdiction of this Hon^{ble} Court, for that a special Contract was made at Land within the Town of Newport in the County of Newport, the Twenty Sixth day of March A.D. 1743 between the Proponent, & the respondent who is only part owner of ship S^d Contract was then & there reduced to writing, by Virtue whereof the Proponent entered on Board the Ship within Mentioned, & Proceeded the Voyage &c & therefore the same is cognizable in the Kings Courts only & of this pray Judgment

J. Honyman att. pro Ap^{it}²⁷

Which Plea being overruled the said Respondent farther pleads & says the Libel afores^d ought to be quashed

1^t for that James Vaughan of the City of London in the Kingdom of Great Britain Merch^t are joint Owners of the Ship within named & therefore the Libel afores^d ought to have been brought agst the s^d James as well as the Respondent & of this &c

2^d For that the Proponent doth not say at what Place the Contract afores^d was made nor the Place from which s^d Ship proceeded to South Carolina both of which are things absolutely necessary & of this &c

3^d For that the Proponent says in his Libel the Ship was sold in London &

²⁶ 2 R. I. ADM. PAP. 27. This "plea" is written on the libel, after the judge's signature, a common practice. Sometimes the same piece of paper contains libel, "plea," decree, and bill of costs.

The plea was overruled, and Huijbling filed a claim. 2 *id.* at 28. After trial, the Dutch ship was condemned, and the Dutch Governor at Curaçao in consequence protested to the English Authorities. See 1 KIMBALL, ed., CORRESPONDENCE OF THE COLONIAL GOVERNORS OF RHODE ISLAND (1903) 231; CHAPIN, R. I. PRIVATEERS 106-07. As to the spelling of the claimant's name, note that "ij" in manuscript is equivalent to "y" with a diæresis. ²⁷ 2 R. I. ADM. PAP. 34.

nevertheless pretends he was discharged from s^d Ship in Newport on the 18th Day of October 1743 & of this &c

And the Pleas afores^d being also overruled the Respondent for Plea says that true it is the Dep^t did proceed a Voyage in the s^d Ship to South Carolina & from thence to London afores^d Where he was discharged on or about the twenty second Day of July A D 1743 Where he reced Seven pounds Sterling Which with the Wages advanced before sailing & the Moneys the Proponent hath otherwise reced is the full of the Proponent's Wages & says he oweth the Proponent nothing in manner & form as in the Libel is set forth & thereupon he prays to be dismist with Costs

J Honyman ²⁸

(4) *Chadwick v. Clarke*.²⁹

The Respondent comes into Court & for Plea saith, that he is, & always was ready to pay the Appellant what he reasionably deserves for his Pilotage aforesaid, but that the Appellants demand is unreasonnable & exorbitant, & of this he prays Judgment

Christopher Clarke ³⁰

CITATION, VICE ADMIRALTY.³¹

Court of V. Admiralty } *GEORGE* the Second by the Grace of GOD of
Newport Rhode Island } *Great Britain, France, and Ireland*, KING, De-
fender of the Faith, &c.

To the Marshall of our Said Court or his Deputy, Greeting:

WE Command you that you Cite John Banister of Newport aforesaid Merch^t to appear at a Court of Admiralty to be holden at Newport aforesaid, on the fourth Day of November at Eleven aClock A M to Answer & Defend a Libel or Information filed on behalf of Thomas Shillcock of Newport aforesaid Marriner as per Information on File more fully sets forth. Fail not thereof, and make due Return hereof with your Doings therein.

Witness Leonard Lockman Esq; at Newport, this Third Day of Novem^r *Anno Domini*, 1743.

Pr Curiam J Gould D Reg^r ³²

[Marshal's Return, *verso*]

Newport Rhoad island Novem^{br} 3 1743

Then Served The Within Precept on the within Named John Bannister and Have Taken Sufficiant Baile

P W^m. King Dep^t Mar^l

²⁸ 2 R. I. ADM. PAP. 35; see the decree, *supra* p. 77.

²⁹ 8 R. I. ADM. PAP. 39 (1751). Though this plea was signed by the respondent, it was obviously drawn by a lawyer. The same is true of many other pleadings signed *pro se ipso*.

³⁰ The libellant, John Chadwick, had demanded £50 Old Tenor for piloting a sloop from Newport to Boston on April 10, 1751. Deputy Judge Wickham found "that the Appellants Demand is more than the Customary price for Piloting Such a Vessell & at Such a Season of the Year," and rendered judgment for £35 and costs.

³¹ 2 R. I. ADM. PAP. 35.

³² This was the printed citation used by the Vice Admiralty Court in Boston, here adapted to use in Rhode Island; compare the present citation used by the U. S. District Court in the District of Massachusetts in suits *in personam*. See 2 BENEDICT, ADMIRALTY (5th ed. 1925) 278.

PROHIBITION.³³

Colony of Rhode Island &^c to wit

[L.S.] By the Honble Gideon Cornel Esq^r Chief Judge of the Superior Court of Judicature &^c in & throughtout the English Colony of Rhode Island & Providence Plantations in New England in America

To Joseph Scott Esq^r Sheriff of the County of Newport in the Colony afores^d or to his lawful Deputy Greeting —

WHEREAS Jonathan Peck Thomas Green Jeremiah Finney Shearjashub Bourn & Samuel Bosworth all of Bristol in the County of Bristol in the Colony afores^d Owners of the Brigantine Greyhound have suggested unto the said Judge That Simeon Potter of Bristol in the County of Bristol Merch^t libel'd the said Brigantine in the Court of Vice Admiralty in said Colony for to have & recover the Sum of Six hundred & fifty one Pounds sixteen Shillings & three pence old Tenor for supplies for the said Vessel agree^{ble} to an Account annexed to said Libel & averr'd that said Sum is due from the Owners of the said Brigantine being advanced & procured at the Instance & Request of said Owners for said Vessel As in & by said Libel (or a Copy thereof may appear) Accordingly the said Court of Admiralty sat in Newport in said Colony the twelfth Day of August A. D. 1747, and at an Adjournment of said Court the said Owners by their Advocate appeared & pleaded that the Matters & Things contained in the aforesaid Libel were not Cognizable in said Court of Admiralty but in the Courts of Common Law only for that all the said Acco^t consists of Articles founded on special Contracts or Agreements of one sort or another made in the County of Bristol upon Land within the Body of the said County & of that pray'd Judgment Which Plea to the Jurisdiction of said Court altho made out & fully prov'd the Judge of said Court of Admiralty (sc) William Strengthfield Esq^r did over-rule & sustain the Jurisdiction of said Court in that Case. AND NOW at the Request of the s^d Jonathan Peck Thomas Green Jeremiah Finney Shearjashub Bourn & Samuel Bosworth You are hereby commanded & required in the Name of his Majesty George the Second by the Grace of God King of Great Britain &c to prohibit & forbid the s^d W^m Strengthfield and all whom it doth or may concern as well the Officers & Members of the s^d Court of Vice Admiralty as others to hold Plea or take Cognizance of the Matters & Things in the afores^d Libel contained or to persue the same until the Affair be determined before the Judges of the Superior Court of Judicature afores^d who will meet on Friday next at three of the Clock in the Afternoon at the Colony House in Newport in the County of Newport & Colony afores^d in Order to hear adjudge & determine concerning the Premises.

GIVEN under my Hand & the Seal of the said Superior Court at Newport afores^d the thirtifirst Day of August in the twenty first Year of his said Majesty's Reign

Gideon Cornell C: J:

³³ 5 R. I. ADM. PAP. 87; see pp. 53-55, *supra*.

BILL OF COSTS, VICE ADMIRALTY.³⁴

Court of Vice Admiralty

Costs Whitehorn vs. Wrack Goods — Viz ^t		
Libel & Advocates Fee.....	£3" 10"	—
Filing & allowing D ^o	2" 10"	—
Citation & service.....	1" 16"	—
Interlocutory Decree.....	3" 10	—
Taking 5 Evidences.....	2" 10	—
2 Adjournments.....	6" 08	—
Warrant of Appraisment.....	1" 12	—
Sumsn D ^o	1" 4	—
Decree definitive &c.....	6	—
Filing papers & taxing Cost.....	— 16	—
	£29" 16" 0	£29" 16 —
Copy of the Decree..... 1 — —		
	£30-16—	£30-16 —

Allow'd S Wickham Dep^t Judge

Judges propot ⁿ	£14" 6-
Advocate	3.10-
Register	7.10-
Marshall	4" 10-
	£29:16.-

BILL OF COSTS, STATE COURT.³⁵

Bills of Cost occasioned by the Claim of William Havens &ci to the Prize Sloop called the Fair American Tried by a Jury in the Court of Admiralty at Newport July 17th 1783 Viz^t

To a Letter inclosing 7 Warrants for Jurors.....	£0" 1" 6
Cash paid to the Boatman for carrying D ^o	0" 1" 4
Warrant to the Sheriff to Notify Oliver Read of Trial	0" 5" 0
7 Warrants to the Townsergents for drawing Jurors...	1" 10" 0
Sheriffs Fees for Notifying Oliver Read &c.....	0" 12" 0
Fees of the Townsergent of Newport for Serving the } Warrant for drawing Jurors	0" 3" 8
Fees of the Townsergent of Middletown for D ^o	0" 2" 0
D ^o of the Townsergent of Jamestown for D ^o	0" 3" 8
D ^o of the Town Sergent of Little Compton for D ^o	0" 1" 6
D ^o of the Townsergent of Tiverton for D ^o	1" 0" 0
Sheriffs Attendance and Services during the Trial } 2 days	... 1" 4" 0

³⁴ Whitehorne v. Brigantine Chaukley's Salvaged Goods, 7 R. I. ADM. PAP. 69 (1749).

³⁵ Ms., R. I. Archives. These were the costs upon the second trial. See p. 65, *supra*.

Townsergents D ^o	0" 12" 0
Paid to the Boatenen for Passages for the Judge and } the Register from Providence to Newport and back }	0" 12" 0
4 Meals Victuals on board the Boats.....	0" 6" 0
For allowing and filing the Claim	0" 3" 0
Stipulation for Cost 2/ Interlocutory Decree 9/8....	0" 11" 8
Drawing and Recording final Decree &c.....	0" 12" 0
6 Days Time Trouble and attendance of the Judge til } his Return }	1" 16" 0
3 Days D ^o of the Register.....	0" 18" 0
Drawing Taxing and exam. the Bill of Cost to the } Register }	0" 2" 0
Allowing D ^o to the Judge.....	0" 2" 0
Cash paid for Victuals and Lodging to J Fry as P ^r Bill	2" 0" 0
	£13" 13" 6

[Indorsement, *verso*]

Providence July 23, 1784

I hereby acknowledge to have this Day Rec^d of Beriah Brown Esq^r Eight Pounds Lawful Silver Money by the Hands of the Hon John Foster Esq^r being part of the Debt Recovered in an Action in my Name at the Dec^r Court Last against William Havens and in full for my part of said [Town?] Debt and of the within Bill of Cost Viz for the Sheriffs Town Sergeants and My own Fees as within Taxed

Theodore Foster Reg^rWARRANT TO DRAW JURORS, STATE COURT.³⁶

State of Rhode Island }
and Providence Plantations }
[L. S.]

To the Town Sergent of the Town of North
Providence in the County of Providence
— Greeting —

You are hereby required to warn a Town Meeting of the Freemen of said North Providence on the Thirty first Day of August instant to draw out of the Box One Petit Juror to serve at the Maritime Court to be holden at the State House in Providence in said County of the Sixth Day of September next at the Hour of Ten in the Forenoon And you are likewise Required to give immediate Notice to the said Juror in writing to appear and serve at said Court at said Time and Place appointed; And you are likewise further Required to make Return to me at said Court with your Doings hereon together with the Name of the Juror who shall have been so drawn and Notified upon the Penalty of Ten Pounds for Failure herein Given under my hand and Seal at said Providence this Twenty Eighth Day of August AD: 1779 —

John Foster Judge of said Court.

³⁶ Ms., R. I. Archives.

[Town Sergeant's Return, *verso*]

North Providence Aug: 31: 1779

Pursuant to the within Warrant I warned a Town Meeting of the Freemen of the Town of North Providence on this Day who met and drew out of the Box Eleazer Whipple as a Juror and I have Notified him to attend and Serve at the Court within mentioned as within Commanded —

by me Jonathan Pike Town Sargant

Fees £4-0-0

JURY VERDICT, STATE COURT.³⁷

We find, That on the Twenty Eighth Day of May AD:1776, the Ship called the True Blue, commanded by one James Stable, mounted with Six Carriage Guns Four Pounders, maned with Sixteen men, together with her Cargo, consisting of Rum, Sugar, Cotten, Pimenta, Ginger Coffe &c bound from Kingston in the Island of Jamaica, to Lancaster in England, was Captured upon the High Seas, by Elisha Hinman Esquire, Commander of the Brigantine called the Cabbot a Vessel of War belonging to the Continental Squadron under the Command of Esek Hopkins, Esq^r and his Officers and Mariners then on board the said Brigantine; And that afterwards on the Fourteenth Day of June AD:1776, the said Ship True Blue, her Appurtenances and Cargo, by Order of the said Elisha Hinman, were brought into the Port of Providence, in the Colony of Rhode Island. — We also find, that at the aforesaid Time of Capture, the said Ship True Blue, her Appurtenances and Cargo, belonged to Mess^{rs} Salisbury's, Merchants in Lancaster, and Inhabitants of Great Britain, and were bound to that Place, for supplying the Enemies of the united Colonies of America.

Daniel Mathewson	John Waterman
John Pratt	Jn ^o Mumford
Gideon Cook	Jon ^a Russell
Nehemiah Allen	Samuel Chace J ^r
Daniel Willcox	Job Fisk
John Dyer	John Updike

³⁷ Hopkins & Hinman v. The True Blue, ms., R. I. Archives. The body of the verdict is in Judge Foster's hand, indorsed on the back, "Form of a Verdict." It is interesting to note that the *True Blue* was condemned on July 4, 1776.