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Crime at Sea: Admiralty Sessions and the Background to Later Colonial Jurisdiction

*M. J. Prichard**

The conference program describes the legal history of Nova Scotia as *terra incognita*. Whether this is so for the province's own inhabitants is not a question that someone from the other side of the Atlantic should presume to judge, since ignorance there is not limited to the legal history of Nova Scotia but extends to colonial legal history generally. We have, I fear, been intimidated by the task, and we have tended to leave each erstwhile colony to trace its own legal history. I comfort myself, therefore, with the thought that any transatlantic contribution is likely to be a modest one taking the form of a topic of English legal history in the hope of prompting a corresponding interest in the history of that topic in Nova Scotia. Since Nova Scotia is a maritime province, a maritime topic may not be amiss—some problems of jurisdiction in respect of crimes committed at sea that England experienced in the century or so before and after the founding of Halifax. The problems, such as they were, were experienced in Admiralty Sessions, for it was in Admiralty Sessions that crime at sea was tried for the three centuries between 1536 and 1834. Very little has ever been published about Admiralty Sessions. Holdsworth has barely a couple of pages upon them in the sixteen volumes of his *History of English Law*—yet the records have a unique character and are of interest to the social and economic historian as well as the lawyer.

Admiralty Sessions must be sharply distinguished from the Admiralty Court, which had been in existence since the fourteenth century, for 150 years before the creation of Admiralty Sessions. The Admiralty Court administered Roman civil law in the form of the customary marine laws, and it was staffed and served by lawyers trained exclusively in the Roman civil law, not the English common law; these lawyers, the advocates and proctors, formed a legal profession that was totally distinct from that of the common law. From its earliest days the Admiralty Court excited the envy and enmity of the common law, and, from as early as the reign of Richard II, statute had excluded the Lord High Admiral from adjudication “of all manner of contracts, pleas and

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quarrels and all other things rising within the bodies of the counties as well by land as by water."¹ Those matters were to be tried by the common law courts and not elsewhere. The only concession to the admiral was a jurisdiction over homicides and mayhem done in great ships being and hovering in the main stream of great rivers below the first bridge. The Admiralty Court did claim and exercise jurisdiction in crime prior to 1536, but even by that date it had become predominantly a civil court. Its heyday was the sixteenth century. By the middle of the seventeenth century it had lost most of its civil jurisdiction, particularly its profitable jurisdiction over commercial contracts made on land at home or abroad. From then till its statutory revival in the mid-nineteenth century, it had to confine itself largely to bottomry, collisions and seamen's wages. The only thing that saved the civilians' profession from economic extinction in the eighteenth century was their work in the Prize Courts, particularly during the wars that played so great a part in the early history of Nova Scotia. The struggle between the Admiralty Court and the common law did, however, leave its mark upon the jurisdiction of Admiralty Sessions.

Admiralty Sessions owe their existence to the great statutes 27 Hen. 8, c. 4 and 28 Hen. 8, c. 15. The earlier statute had an elaborate preamble explaining the deficiencies of trial by civil law process in a manner typical of Henrician legislation. It lamented that pirates, robbers, and murderers at sea go unpunished because there can only be conviction by civil law either on confession (not usually obtainable without torture) or by proof of witnesses (not usually left alive by pirates). The later Act re-enacted with significant amendments the substantive provisions of the earlier Act and provided that all treasons, felonies, robberies, murders, and confederacies committed upon the sea or in any other haven, river, or creek, or place where the admirals have or pretend to have jurisdiction shall thereafter be tried by commission directed to the admiral or his deputy and three or four other persons. The trial was to be by the common course of the laws of the land, and the commission was to designate the shire from which the grand and petty juries were to be drawn. The Act thus substituted for the ineffectual civil law process the same process as was used for the trial of indictable offences within the realm, but with the difference that a commission under 28 Hen. 8, c. 15, could be executed wherever the lord chancellor chose, which came to be normally the Old Bailey by 1700; whereas common law commissions had to visit the county or place covered by their commission and could not call a jury from outside the county. The statutory commission was, moreover, limited to capital offences; no provision was made for misdemeanours until 1799.²

1. 15 Ric. 2, c. 3.

2. Offences at Sea Act, 1799, 39 Geo. 3, c. 37, s. 1.

Jurisdiction in Admiralty Sessions was thus exercised not by a court with a continuous existence but, as in other criminal cases, by commissioners appointed from time to time. It was the sittings of these commissioners that are known as Admiralty Sessions. Trial was by the common law, and common law judges were always included in the commission. By the eighteenth century, though not always earlier, at least one common law judge was invariably present for any trial, though not normally at other stages of the proceedings. *Trial* was by the common law, but, since there was no permanent court, the sessions were served by the staff of the Admiralty Court, in particular by the admiralty registrar and the admiralty marshal. The effective recording of the proceedings (as distinct from the formal record kept in common law style) was undertaken by the admiralty registrar or his deputy. The records of Admiralty Sessions thus display a Roman law civilian character with "Acts" and, most important of all, examination books (1537-1776) containing the examinations of the accused and the interrogations of witnesses.³ The fact that the records were kept by the staff of a permanent court gave them a continuity that is lacking for other criminal jurisdictions until a relatively late date. Since the admiralty marshal was the court's principal executive officer, the preserved records also contain, for trials in London, the accompanying documents relating to the processes both prior to and subsequent upon the trial, such as the proclamation of sessions posted on the pillars of the Royal Exchange and the warrants for execution between high and low water mark at Execution Dock at the first bend of the Thames below London Bridge. The records of Admiralty Sessions are thus remarkable for their hybrid character, their continuity, and the variety of the non-legal information that they contain, particularly the examinations in which one can find details varying from, for example, early voyages of discovery⁴ to the symptoms of the diseases that afflicted the crew and human cargo of convict ships on their way to Botany Bay.⁵ The latter details would derive from the charges of brutality and murder brought against the master or mate of such ships. I am informed that Halifax was once considered as a possible site for a penal colony, but, if it had become one, I imagine that hypothermia rather than tropical diseases would have featured in accounts of corresponding voyages.

During the sixteenth and early seventeenth centuries, for the first hundred years of its existence, the Sessions were kept busy both in

3. The records of Admiralty Sessions are preserved as H.C.A. 1 in the records of the High Court of Admiralty in the Public Record Office, London. The calendar to H.C.A. 1 contains a valuable introduction to the records by L. Bell.

4. See, e.g., the voyage of the *Barbara* to Brazil, (1540) H.C.A. 1/33/180, ed. R. Marsden, Navy Records Society, vol. 40.

5. See, e.g., *Kimber* (1792), H.C.A. 1/85/72 (death on a slaver); *Trail and Etherington* (1792), H.C.A. 1/85/74,75 (death on a convict ship).

London and in the maritime counties dealing with piracies in local waters. The State Papers of Elizabeth I show, though, that the piracies that came to trial represented only the tip of a very large iceberg. A technical problem of jurisdiction, similar to those we are to examine, prevented legal process from being an effective weapon in the fight against piracy. The real villains who had to be stamped out were not so much the pirates themselves as the men who furnished the ships, and the victuallers and receivers. Such aiders and abettors were tried at Admiralty Sessions from time to time;⁶ the common law disputed the legality of such proceedings, yet washed its hands of jurisdiction on the grounds that piracy was not an offence known to the common law and accessories could not exist without principals.⁷ The problem of accessories was not adequately tackled by statute until 1700, by which time piracy in home waters had diminished very greatly indeed.⁸ Piracy *iure gentium* had become a colonial problem.

By the middle of the seventeenth century the Admiralty Court itself had lost its struggle with the common law courts and by the end of that century Admiralty Sessions had, as we shall see, also surrendered its jurisdiction in rivers and other national waters. In the eighteenth century the commissioners' work in peace time was largely confined to homicides at sea and the growing number of statutory piracies (particularly the wilful destruction of ships in the course of insurance frauds). At the very end of the century misdemeanours were also brought within their jurisdiction. The frequency with which Sessions were summoned dwindled and this was a very real hardship to those charged with, for example, homicide, who might have to wait for more than a year for trial. War usually brought an increase in work, and it became standard practice to include in the Prize Acts passed at the formal outbreak of war a clause requiring Admiralty Sessions to be held twice a year.⁹ The requirement ceased when the particular Prize Act lapsed. With the long peace that followed the Napoleonic Wars, Admiralty Sessions became a picturesque but expensive anomaly; in 1834 a concurrent jurisdiction was conferred upon the newly created Central Criminal Court at the Old Bailey and in 1844 upon all commissioners of oyer and terminer and gaol delivery and, thus, at Assizes outside London.¹⁰ Since that time no special Admiralty Sessions have been held; but it is only within the last twenty years that 28 Hen. 8, c. 15, has been removed from the statute

6. Accessories were not infrequently indicted with their principals in the reigns of Elizabeth I and James I; they might also be indicted separately, e.g., H.C.A. 1/5/166.

7. *The Case of the Admiralty* (1609), 10 Co. Rep. 51 at 53.

8. Piracy Act, 1698, 11 & 12 Will. 3, c. 7, ss. 9, 10.

9. The practice started in 1759 (32 Geo. 2, c. 25, s. 20). It was regarded as "quite unnecessary in time of peace"; H.C.A. 1/62/271.

10. Central Criminal Court Act, 1834, 4 & 5 Will. 4, c. 36, s. 22; Admiralty Offences Act, 1844, 7 & 8 Vict., c. 2.

book.¹¹ Its repeal evoked some nostalgia among those who have ventured into the records of Admiralty Sessions.

The statute 28 Hen. 8, c. 15, dominated the question of jurisdiction throughout the three hundred years of Admiralty Sessions' existence. When the jurisdictional issues came to be contested in the sixteenth and seventeenth centuries, the common lawyers were willing to allow the admiral, and thus Admiralty Sessions, jurisdiction on the high sea, *super altum mare*. The boundary of the high sea was generally the water's edge, and that edge moved with the tide. Below low water mark the sea was exclusively within the admiral's jurisdiction. Above high water mark the common law alone was applicable. Within the ebb and flow of the tide was *divisum imperium*, not in the sense of concurrent jurisdiction at any one time, but in the sense of alternate phases.¹²

This provided a clear enough answer to any question of jurisdiction upon the open coast but left considerable problems over indentations, estuaries, tidal inlets, and the like. The statute of 1536 provided that the specified offences should be tried by commissioners of oyer and terminer authorized by that Act not only when they had been committed on the sea but also when they were committed in any other haven, river, or creek, or place where the admiral or admirals have or pretend to have power, authority, or jurisdiction. The phrase "have or pretend to have" showed a subtle change from the simple "pretend to have" in the earlier Act, 27 Hen. 8, c. 4. It made it more difficult to deny the statutory commissioners any jurisdiction over havens, rivers, and creeks, but at the same time it made it easier for the common lawyers to concede such jurisdiction to the commissioners under the statute without thereby making any concession as to the jurisdiction of the admiral himself. For it was over civil and commercial litigation, the instance jurisdiction of the admiralty, that the common lawyers and the civilians were mainly embattled; the fate of the criminal jurisdiction was not a matter of great contest. Nevertheless, despite the express words of the statute, Coke and his common law colleagues were not willing to allow to the commissioners any jurisdiction in havens, rivers, creeks, or other arms of the sea within the body of a county. Coke's attitude derived from his desire to confine admiralty jurisdiction in all respects, criminal as well as civil, to the narrowest interpretation of the statutes of Richard II. Since the Act of 28 Hen. 8, c. 15, linked the jurisdiction of the commissioners appointed under it with that of the admiral, however loosely, Coke was unwilling to allow any jurisdiction within the body of a county to the commissioners, lest it might seem to imply a concession to the admiral himself.¹³

11. Criminal Law Act, 1967, s. 10, sch. 3, pt. 1.

12. *Sir Henry Constable's Case* (1601), 5 Co. Rep. 106a.

13. 3 Co. Inst. 113; *Marsh* (1615), 3 Bulst. 27 at 28.

Despite Coke's view the commissioners at Admiralty Sessions tried felonies committed in havens, rivers, and creeks for a hundred years after the passing of the Henrician statute.¹⁴ They continued to do so for a short time after the civil wars and the Restoration of 1660, but it is clear that such cases were by then commonly referred to ordinary county sessions of oyer and terminer and gaol delivery for trial by judges on circuit in the ordinary course of common law.

The crucial case was that of the Woolstealers in 1672;¹⁵ it marked the end of the use of statutory commissioners under 28 Hen. 8, c. 15, to try crime committed upon salt water within the body of a county. Two persons had been arrested in a boat in the Thames Estuary in the act of illegal exportation of wool. The statute prohibiting exportation directed trial of the offenders in the county either where the wool was packed or where the offenders were arrested. There was no evidence of where the wool was packed. The Privy Council sought the advice of the common law judges and Sir Leoline Jenkins, the admiralty judge, whether the offenders ought to be tried at Admiralty Sessions or by ordinary common law sessions of gaol delivery in Essex or Kent. Jenkins relied on the express wording of 28 Hen. 8, c. 18, but the common law judges flatly denied that the offence was triable by Admiralty Sessions. The Thames off Gravesend was still within the body of the counties of Essex and Kent and, therefore, outside admiralty jurisdiction; the offence could not be tried by commissioners of oyer and terminer under 28 Hen. 8, c. 15. In so doing the judges may have been following Coke's opinion, but it is possible that their principal ground was a narrow one, that the statute creating the offence specified a particular county of trial which was incompatible with, and therefore excluded, trial under 28 Hen. 8, c. 15. Jenkins' arguments, though powerful, were not accepted, and thereafter Admiralty Sessions heard and decided no cases of river crimes, except such as came within the proviso to 15 Ric. 2, c. 3.

Abandonment to ordinary common law sessions of felonies committed on rivers meant that Admiralty Sessions in the eighteenth century had no hand in dealing with the ever-growing volume of crime on the Thames. Instead of pursuing a calling of piracy on the high seas, it was simpler to wait for ships to reach the Thames and plunder them there. The practice gave rise to a vocabulary of its own—"river pirates," "night plunderers," "light-horsemen," "mudlarks," "ratcatchers"—and eventually led to the establishment of Colquhoun's River Police.¹⁶ A statute in 1751 attributed the increase in robbery and thefts on navigable

14. Some of the indictments are examined by Exton in his *Maritime Dicaeologie*, book 2, chapter 17.

15. *Nicholls and Husse*; Wynne, *Life of Jenkins*, vol. 2 at 746; All Souls MSS, 206 f.6; 215 f.16.

16. See Radzinowicz, *History of English Criminal Law and its Administration*, vol. 2, pp. 349-404.

rivers and ports to the existence of benefit of clergy; it provided that persons stealing goods, wares, or merchandise, of the value of 40 shillings in any ship, barge, lighter, boat, or other vessel or craft upon any navigable river, or in any port of entry or discharge, or in any creek belonging to any navigable river or port of duty or discharge should be excluded from benefit of clergy.¹⁷ First offenders could no longer avoid sentence of death. Ironically, benefit of clergy had never been allowed at Admiralty Sessions.

At this point it is desirable to consider the views of Sir Mathew Hale, which became influential later in the eighteenth century after the publication of *The History of the Pleas of the Crown*. Hale agreed with Coke in excluding the admiral from any jurisdiction over felonies committed within a creek or arm of the sea that was within the body of a county, except where the proviso in 15 Ric. 2, c. 3, allowed him to try cases of homicide and mayhem. But, unlike Coke, he was prepared to allow the commissioners under 28 Hen. 8, c. 15, jurisdiction over offences specified in the Act not only on the sea but also in "great rivers, where the sea flows and reflows below the first bridges, and also in creeks of the sea at full water, where the sea flows and reflows, and upon high water upon the shore, tho these possibly be within the body of the county, for there, at least, by the statute of 15 R. 2, they have a jurisdiction, and thus accordingly it hath been constantly used at all times, even judges of the common law have been named and sat in their commission; . . ."¹⁸

During the eighteenth century Coke's view was, however, paramount and it prevailed. Both Hawkins and East state without hesitation that jurisdiction under 28 Hen. 8, c. 15, did not extend into the body of a county.¹⁹ The proviso to 15 Ric. 2, c. 3, was conceded, but even here the jurisdiction was only concurrent with, not exclusive of, the common law. In the field of legislation it was usual in creating maritime felonies to restrict admiralty jurisdiction to the high sea and to direct all such offences committed within the bodies of counties to be triable at common law.

But in 1812 the twelve judges in *R. v. Bruce* declared Hale's view as to the extent of 28 Hen. 8, c. 15, was to be "much preferred."²⁰ Bruce had been indicted at Admiralty Sessions for the murder of a ferry boy in Milford Haven and the judges sustained the conviction. They were unanimous "that there was no objection to the conviction on the ground of any supposed want of jurisdiction in the commissioners appointed by

17. 24 Geo. 2, c. 45.

18. M. Hale, *The History of the Pleas of the Crown*, vol. 2 at 17.

19. Hawkins, *Pleas of the Crown*, vol. 1 at 154 (1787 ed.); East, *Pleas of the Crown*, vol. 2, 803.

20. *Bruce* (1812), 2 Leach 1093; Russ. & Ry. 243.

commission in respect of the place where the offence was committed." They considered the trial perfectly valid, though the offence had been committed within the body of the county of Pembroke. There seems no reason to suppose that *R. v. Bruce* was not good law then or later. It is true that Cockburn, C.J. assumed in *R. v. Keyn* that jurisdiction under 28 Hen. 8, c. 15, could not extend to waters within the bodies of any county, but it is evident that he did not have *R. v. Bruce* in mind when delivering his opinion.²¹

Drawing the boundary between the jurisdictions of Admiralty Sessions and of the ordinary criminal courts of the county raised also as a problem that may seem quaint but had a social significance. This was the problem of crimes committed both on land and on the sea. In his *Pleas of the Crown*²² Hale writes of the presentment of criminal charges to general commissioners of oyer and terminer: "The grand jury are sworn *ad inquirendum pro corpore comitatús*, and therefore regularly they cannot enquire of a fact done out of that county for which they are sworn, unless specially enabled by act of parliament, but only in some special cases." Having discussed problems involving cases where, for example, wounding occurs in one county but death ensues in another, he adds: "So if a stroke were given *super altum mare*, and the party came into the body of the county, and there died, this is *casus omissus*, and the party is neither indictable by the jury of the county where he died, nor before the admiral, by the statute of 28 *H.8, cap. 15*." This proposition is based on *Lacy's Case* which is thus described by Coke:²³ "And a case was adjudged in this Court [King's Bench], Trin, 25 Eliz. in *Lacy's case*, that whereas Lacy struck Peacock, and gave him a mortal wound upon the sea, of which Peacock died at Scarborough, in the county of York, and Lacy was discharged of it; for those of the county of York could not enquire of his death, without inquiry of the stroke, and of the blow they could not enquire, because it was not given in any county; and those of the Admiral jurisdiction, could not, as of a felony, enquire of the stroke, without enquiry of the death, and they could not enquire of the death, because it was *infra corpus comitatus*."

Hale subsequently changed his mind on this question after an exhaustive analysis of the commission issued to the justices of the admiralty in *Lacy's Case*. Basing himself on a theory that the commissioners were by their commission equipped not only with jurisdiction conferred by 28 Hen. 8, c. 15, but also with common law powers to try maritime offences, Hale came to the conclusion that the killing in *Lacy's Case* was not punishable. His view, however, was of no practical consequence because, when a similar case arose in 1729, Parliament passed an Act

21. *Keyn* (1876), 2 Ex. D. 63, 232-235.

22. Vol. 2, 163.

23. In *Bingham's Case* (1601), 2 Co. Rep. at 93a, [16 E.R. 616].

which made murder committed in this way triable in the county where death occurred by an ordinary commission of oyer and terminer.²⁴ The Act dealt both with the case where the blow was given on land and death ensued at sea or abroad, and the case where the blow was given at sea or abroad and death ensued on land. In each case the English county where wounding or death occurred was the venue for trial at common law, and Admiralty Sessions were excluded from jurisdiction.

Lacy's Case was quaint. The real significance of the problem lies in the case where the mortal blow was given by a ship's master or mate to a member of the crew or *vice versa*. Such cases of death resulting from excessively harsh discipline or violent insubordination might, of course, arise upon foreign ships as much as upon British ships. The Act of 1729 did not state that the part of the crime done at sea must be within the jurisdiction of the admiral; it was, therefore, open to argument that the Act applied even where the injury or death occurred upon a foreign vessel on the high seas. After all, the Act applied where the injury or death occurred on foreign soil, so why not where it occurred on a foreign ship? In the middle of the nineteenth century this view was rejected, and it was held that the Act (as re-enacted and extended to manslaughter in 1828²⁵) was "obviously intended to prevent a defeat of justice which, without it, might have arisen, from the difficulty of trial, in cases of homicide where the death occurs in a different place from that at which the blow causing it was given, and that the section ought not therefore to be construed as making a homicide cognizable in the Courts of this country by reason only of the death occurring here, unless it would have been so cognizable in case the death had ensued at the place where the blow was given, . . ."²⁶ Jurisdiction to enquire into cases of excessively harsh discipline by the master or violent insubordination by the crew of foreign ships calling subsequently at British ports was abandoned. However, where blows were struck in foreign ports upon members of the crew of British ships who later died on ship, jurisdiction was preserved, as the cases of *Trail and Etherington* and of *Jemmott* will show.²⁷

The Acts of 1729 and 1828 did not make any provision for similar cases arising in the colonies, even though persons wounded at sea were no doubt landed in the colonies and died there on occasion. Such cases were not triable, at least in strict theory, until the Admiralty Offences (Colonial) Act, 1849, 12 & 13 Vict., c. 96, and the Admiralty Offences (Colonial) Act, 1860, 23 & 24 Vict., c. 122, were passed. The primary purpose of the 1849 Act was to confer admiralty criminal jurisdiction upon the ordinary criminal courts of a colony. It also provided that,

24. 2 Geo. 2, c. 21. The case was *Price* (1729), H.C.A. 1/18/95, 104, 127.

25. 9 Geo. 4, c. 31, s. 8.

26. *R. v. Lewis* (1857), Dears. & B. 182 [169 E.R. 968].

27. See *infra*.

where any person should die in a colony after being feloniously stricken at sea or abroad, the offence might be dealt with as if it had been wholly committed in the colony, and that if any person should die at sea after being feloniously stricken, the offence should be held for the purposes of the Act to have been wholly committed at sea. At first sight the latter provision might appear to have given jurisdiction to the admiral, but in fact it did not, since jurisdiction in both situations was conferred upon the ordinary criminal courts of the colony.

The Act of 1729 and its successors did not deal with all types of homicides committed partly on land and partly at sea; instead, it dealt only with the problem that arose where the blow was struck in one jurisdiction and death occurred in another. It left untouched the situation where the blow itself was extended over two jurisdictions as, for example, where a shot is fired from land and kills someone at sea. Such a case arose in the colonies in 1725,²⁸ and the law officers advised that such a killing was within the jurisdiction of the admiralty. The matter was finally settled later in the century by the common law judges in the case of *Coombes* in 1785, in which it was held that a smuggler who from land had fired at and killed a revenue officer at sea might properly be tried for murder at Admiralty Sessions.²⁹ The judges were careful to decide merely that the prisoner had been "tried by a competent jurisdiction," and not, as has sometimes been suggested, that the courts of common law had no jurisdiction.

The question of admiralty jurisdiction over offences committed in foreign rivers and ports appears not to have raised the same violent disagreement that arose over arms of the sea in England. At the height of the controversy between the common law and the admiralty at the beginning of the seventeenth century, the common lawyers did indeed seek to exclude the admiral from any jurisdiction over matters arising in foreign ports and havens even when they were "out of the King's dominions." Exclusion was sought not because the matters arose within the body of a county but because "the admiral is for the sea, and the Court for maritime cases" and the jurisdiction of the admiral was limited "by the statutes" [of Richard II?] to the seas only and "no port is part of the sea, but of the continent."³⁰ This argument was, however, directed against the civil jurisdiction of the admiral in respect of contracts concluded in foreign ports and was never pressed in connection with the criminal jurisdiction either of the admiral or of the commissioners. The civilians' view of the extent of admiralty jurisdiction appears to have prevailed unchallenged during the seventeenth and eighteenth centuries in criminal cases. Such cases were never common and, indeed, only one has

28. Forsyth, *Cases and Opinions on Constitutional Law*, p. 219 [hereinafter Forsyth].

29. (1785), 1 Leach 388.

30. *Don Diego de Acuna v. Joliff and Tucker* Hob. 78, 79.

been noticed in the eighteenth century: that of a “melancholy accident” in 1776 in which a sailor was drowned during a struggle with the mate while the ship was in the River Tagus.³¹ There are hints also that the admiralty lawyers may have been willing in the case of foreign ports to exercise jurisdiction to the extreme limits that had been claimed in *Lacy’s Case*, namely, to the high water mark, even when the tide was not in, and also in respect of offences committed partly at sea and partly on land.

A case in 1792 raised the question of offences committed partly on land and partly at sea. Donald Trail and William Etherington, the master and mate of the *Neptune*, a convict ship, were charged at Admiralty Sessions with the murder of the ship’s cook at Macao on the way to Botany Bay.³² According to the minutes of the session the killing was said to have occurred “in the *Neptune*,” but the informations—besides revealing other instances of gross brutality on the ship—suggest that, although the blows may have been struck on board ship, death may have occurred on land “in the Hospital at Macoa.” Both the accused were acquitted, not as a result of any doubt as to jurisdiction, for the question was never taken, but as a result, it would seem, of the prevailing reluctance to convict any ship’s officers of murder where death occurred as a result of conduct which, though excessively brutal, might be looked upon as disciplinary.

Ironically, the first suggestion that the criminal jurisdiction of the admiral did not extend to foreign ports or rivers came not from a common lawyer but from a civilian. In an undated opinion as king’s advocate, Marriott affirmed the jurisdiction of the admiralty of England over offences committed on the high seas, but expressed the view “that when murders or felonies are committed in any port, river, creek, or haven of the territory of any foreign power, those crimes do then fall under that particular local and territorial jurisdiction, which jurisdiction is always understood to reach as far as the power of protection reaches—that is to say, within the command of gunshot from the shore, for the power of punishment is always equal to and coincident with and inseparable from the power of protection.”³³ This opinion reflects the influence of the development in international law of notions of the sovereignty and exclusive jurisdiction of a state over its own territory; it is not surprising that such notions should first find their expression in England in civilians rather than in common lawyers.

Lord Stowell, however, did not share Marriott’s view; for when an English sailor, William Jemmott, was indicted in 1812 for larceny on board a British [?] ship in a natural harbour in Cuba, and an objection to

31. *Kidd* (1776), H.C.A. 1/59/32ff.

32. *Trail and Etherington* (1792), H.C.A. 1/61/66, 176; 1/85/75, 206.

33. Forsyth, *supra*, note 28, p. 217.

the jurisdiction was taken by his counsel, Gurney, the court, consisting of Sir William Scott and Le Blanc, J., ruled that "there was no doubt upon the subject and the Court had clearly a jurisdiction in respect of offences committed in all foreign harbours and waters as well as on the High Sea." Jemmott was, accordingly convicted and sentenced to death.³⁴ Some doubt, however, seems to have been felt, either on the question of jurisdiction or, more probably, on the question of benefit of clergy, for Jemmott was respited four times after being ordered for execution and appears to have escaped the gallows. Despite the growth in international law of the notion that a state has exclusive jurisdiction within its own territory, the principle that admiralty criminal jurisdiction extends to foreign harbours and rivers has been reiterated on several occasions since the jurisdiction was transferred to the common law courts.

The problem of jurisdiction over foreigners and foreign ships probably troubled the colonies little, if we may judge from the infrequency with which it troubled Admiralty Sessions before the nineteenth century. The statute 28 Hen. 8, c. 15, specified the various kinds of offences to which it extended and the waters in which they might be committed; but it said nothing about the offender or about the ship, if any, on which the offences took place. Clearly there was no consciousness of a problem and no thought that anything need be said on the matter: offences that were previously triable before the admiral were now to be tried by commission. Admiralty Sessions was thus left to work out its own principles of jurisdiction over foreigners for acts done upon the high seas, and throughout its history it seems, consciously or unconsciously, to have observed a "law of the flag": it assumed jurisdiction over acts done on English (and subsequently British) ships, whether they were done by subjects or by foreigners, but made no attempt to exercise jurisdiction over acts done on foreign ships. To the latter part of this rule there were exceptions, but to the first half no exception was ever made as a matter of law, though the question of nationality may of course have influenced the question of prosecution on occasion. The indictment did not have to specify the nationality of the prisoner: it was enough that the offence was committed on a British ship. The question excited so little comment at Admiralty Sessions that it is difficult to find any case in which the jurisdiction was challenged, though there have been several cases since 1834 in which the point has been raised. In 1807, in *R. v. Depardo*, the prosecution had no difficulty in producing recent instances of prosecutions of foreigners at Admiralty Sessions for offences committed on British ships on the high seas.³⁵ The nationality of the prisoner was, however, relevant in one respect, since a

34. H.C.A. 1/61/471.

35. (1807), 1 Taunt. 26. The case was not tried at Admiralty Sessions.

foreigner had the right to a jury *de medietate linguae*, that is, to a jury comprised half of subjects and half of foreigners. But, since the accused could not specify the nationality of the foreigners to be chosen and had no say in their selection, he almost invariably waived his right.

The rule that admiralty jurisdiction does not extend to acts done on foreign ships has always been subject to exceptions. The first and by far the most important of these was universally recognized: piracy. The pirate was regarded as *hostis humani generis*, the common enemy of all nations and subject to the jurisdiction of all equally. He fell to be tried by the state that caught him; no doctrine of *renvoi* was admitted, and it was the almost invariable practice of England, as of others, to reject any requests for the surrender of a pirate to stand trial in his own country. Any other practice would not have been tolerated by the merchants he had despoiled, since one of their few chances of redress was to bargain with a condemned pirate for his life. In the sixteenth and seventeenth centuries piracy was by far the commonest offence tried at Admiralty Sessions, so that the exception effectively concealed the rule from sight; indeed, there is so little evidence of any conscious thought about the matter that it would be wrong to talk of a "rule." The question would rarely arise. Unless the offence had repercussions outside the vessel, there was no reason why Admiralty Sessions should take cognizance of offences committed on foreign vessels on the high seas, and in any case such offences were very unlikely to be brought to the attention of the English authorities. No master or owner of a foreign vessel would willingly court the inevitable delay and cost that attended criminal proceedings. In port there might be more reason to take jurisdiction, but there would doubtless be the same reluctance to report the matter. Apart from piracy there would appear to be no more than a half dozen cases, during the three centuries of the court's existence, in which Admiralty Sessions exercised jurisdiction over acts done by foreigners on foreign ships on the high seas. All but one of these occurred during the reign of Charles II in the years immediately following the Third Dutch War and, arising as they did out of Stuart pretensions to sovereignty of the British seas, they were largely political in character.³⁶

In general the immunity from admiralty criminal jurisdiction of foreign ships upon the high seas would extend to British subjects upon such ships. British subjects could, however, render themselves liable to prosecution at Admiralty Sessions by the very act of serving on a foreign vessel in two ways: by serving on a foreign warship or privateer in hostilities against countries with which Britain was at peace, and by serving on such ships against Britain or its allies in time of war. The

36. Most notable were the prosecutions of foreigners for failure to strike their flag and lower their topsails upon meeting royal ships in the British seas, e.g., *Christian Bartlot* (1675), H.C.A. 1/10/29.

latter offence was, of course, the more serious one, amounting generally to high treason, though punishable also as a statutory piracy. Such cases were not uncommon in the later eighteenth century. Prosecution for the service on a foreign privateer in times of peace was rare; in the absence of any Foreign Enlistment Act, it was treated as an offence at common law, at any rate when done in defiance of a royal proclamation.

Smuggling offences might perhaps be expected to provide instances in which foreigners were tried for acts committed on foreign ships on the high seas, since the statutes against illegal exporting and importing frequently prohibited acts which might be done as well upon the high seas as in ports or on the coast and as well by foreigners as by subjects. In fact, however, very few smuggling offences were ever tried at Admiralty Sessions. The Hovering Acts of the eighteenth and early nineteenth centuries gave rise to one important case at Admiralty Sessions, which emphasized the limits within which those Acts applied to foreign vessels.³⁷ Those Acts authorized a measure of visitation, inspection, and, where appropriate, seizure of vessels hovering off the coast with customable and prohibited goods within specified distances. The distances were progressively extended from two leagues to one hundred leagues. The Acts extended to ships that belonged in whole or in part to British subjects and to ships of which a proportion of the crew were British subjects; it could thus apply to foreign vessels within the specified number of leagues if they were partly owned by a British subject or had a sufficient number of British subjects among the crew. For this reason the Hovering Acts have been regarded as an exception to the general principle of the freedom of the high seas. Lord Stowell, describing the limits of the Acts as "more or less moderately assigned," justified them as an exception allowed by the "common courtesy of nations . . . for their common convenience."³⁸

The hovering laws were exceptional, and regarded as such, and it was well recognized in the eighteenth century that felonies created by statute, even though of a specifically marine character, were part of English municipal law and did not extend to foreign vessels upon the high seas. Thus, it was clearly conceded that the statutory felony of wilfully destroying a vessel in order to defraud its owner or insurer could not be committed by the destruction of a foreign ship on the high seas by its (foreign) master.³⁹ If any doubts lingered, they were laid to rest by the well-known case of the *Franconia* forty years after the holding of Admiralty Sessions was discontinued.⁴⁰

37. *Marinel Krans* (1823), H.C.A. 1/61/739. See Ld Teignmouth and C. Harper, *The Smugglers* (1923), vol. 1 at 133.

38. *The Le Louis* (1817), 2 Dodson 210 at 245.

39. *de Loreda* (1765), H.C.A. 1/61/19; East P.C. II at 1098.

40. *Keyn* (1876), 2 Ex. D. 63.

It is not the purpose of this paper to do more than touch upon a few of the jurisdictional issues that presented themselves in England during the seventeenth and eighteenth centuries. Many of those issues evolved out of the interplay of three distinct jurisdictions: the common law courts and commissions, the Admiralty Court, and Admiralty Sessions. For a period of 150 years, in the eighteenth and first half of the nineteenth century, there existed, for the colonies, a similar tripartite judicature: just as the local colonial courts and the vice-admiralty courts were the counterparts of the common law courts and commissions and the Admiralty Court respectively, so various statutory experiments were the counterpart of Admiralty Sessions. It may not be out of place by way of postscript to note the extent to which these statutory experiments were shaped by the experience of Admiralty Sessions. The problem of exercising admiralty criminal jurisdiction in colonial and other distant waters first presented itself after the Restoration;⁴¹ the effort of bringing prisoners back for trial led to an attempt to try them locally by vice-admirals exercising the extra-statutory authority of the Lord High Admiral.⁴² The prevailing legal opinion, however, appears to have been that they could only be tried under the statute 28 Hen. 8, c. 15, and that this statute had no application to the colonies.⁴³

A solution was provided by the statute 11 & 12 Will. 3, c. 7, in 1699.⁴⁴ Like 28 Hen. 8, c. 15, it provided for trial by commission, which was to be directed to the governor and naval military and civil officers in the locality; but unlike 28 Hen. 8, c. 15, it directed that trial was to be by inquisitorial procedure, not by jury. For over a century the statute of 1699 furnished the counterpart of Admiralty Sessions for the colonies, at any rate in legal theory,⁴⁵ though jury trial was also used after 1717.⁴⁶ After its founding, Halifax was included among the places to which commissions were issued, and it would be interesting to discover to what extent the commissions to Halifax were utilized.⁴⁷ It is clear, however, that the solution provided in 1699 was found to suffer from serious defects, notably that it did not extend to murder, treason, or felonies subsequently enacted.⁴⁸ In 1806 Parliament substituted for it a procedure that reflected faithfully that of 28 Hen. 8, c. 15. Offences committed upon the sea or in any haven, river, creek, or place where the admiral or admirals have power, authority, or jurisdiction were to be

41. H.C.A. 30/587/13 (1661).

42. Forsyth, *supra*, note 28, p. 111.

43. See L. Bell's introduction to the H.C.A. 1 records, *supra*, note 3.

44. s. 4.

45. Chalmers, *Opinions of Eminent Lawyers*, pp. 204, 219 [hereinafter Chalmers].

46. *Bonnet* (1718), 15 *State Trials* 1231 (trial by jury). Compare 4 Geo. 1, c. 11, s. 7.

47. H.C.A. 1/64/32 (1761).

48. Chalmers, *supra*, note 45, p. 219 (1761) but compare H.C.A. 1/64/43. See also H.C.A. 1/32/38 (1782), on the practical difficulties caused by the infrequency of commissions.

tried by the common course of the laws of the realm for offences on land and not otherwise in any colonies under commissions from the lord chancellor as under 28 Hen. 8, c. 15.⁴⁹ This procedure outlived its counterpart in England by a decade or so; but, just as separate Admiralty Sessions were discontinued there after 1834, so in 1849, one hundred years after the founding of Halifax, they were discontinued in the colonies, and jurisdiction was transferred to the ordinary criminal courts of the colony.⁵⁰

49. Offences at Sea Act, 1806, 46 Geo. 3, c. 54.

50. Admiralty Offences (Colonial) Act, 1849, 12 & 13 Vict., c. 96. See G. Marston, 14 U.B.C. L.R. 299 (1980).