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### Admiralty Law of Arthur Browne

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## The Admiralty Law of Arthur Browne

JOSEPH C. SWEENEY\*

### I INTRODUCTION

*“Dr. Arthur Browne, a commentator whose influence on the development of American admiralty law cannot be overstated.”*

Judge Harold R. Medina<sup>1</sup>

The first treatise on admiralty law in English was Arthur Browne's *A Compendious View of the Civil Law and of the Law of the Admiralty*, published in Dublin in 1797–99, republished in a new edition in London in 1802–03, and republished posthumously in New York City in 1840. The fact that it was written in English guaranteed its usefulness in America, where many attorneys and judges lacked the classical education and familiarity with modern languages necessary to use Browne's sources. For many years it was *the* authoritative commentary on admiralty law, cited by the United States Supreme Court and used by both lower courts and practitioners. This

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\*Professor of Law, Fordham University School of Law (New York City). While serving as a naval officer in Newport, Rhode Island, the author was introduced to the study of eighteenth century Newport by the late Reverend Canon Lockett F. Ballard, Twenty-Fifth Rector of Trinity Church (Newport) (1954–72), in whose memory this piece is offered. The author's research was made possible by the cooperation of the inter-library loan personnel and rare book curators of Fordham University, Columbia University, St. John's University, the Houghton Library of Harvard University, and Trinity College (Dublin). Parts of this article were delivered at the Eighteenth Annual Conference of the Northeast American Society for Eighteenth Century Studies on October 9, 1994. Helpful comments were made on the text by Professor Martin Flaherty, David R. Owen, Esq., Kenneth H. Volk, Esq., Professor George K. Walker, Professor Sean P. Walsh, and my wife, Alice Quill Sweeney.

<sup>1</sup>Maryland Tuna Corp. v. M/S Benares, 429 F.2d 307, 321 (2d Cir. 1970). As will be discussed in greater detail in Part IV, see *infra* notes 260–386 and accompanying text, there are more than fifty cases in which Arthur Browne's text was used in the United States Supreme Court. There are a further 125 cases in which lower courts cited Browne's text. (These figures are necessarily somewhat imprecise because of the failure of early courts to spell out the full names of authors and texts, as is now required by the Bluebook). In the early decisions, Browne's text was cited authoritatively, even when it was merely part of a string cite. In the later decisions, his text was often used by dissenting justices to indicate their preferences for the settled law of an earlier day.

article will review the life and writings of Arthur Browne<sup>2</sup> and examine the changes in admiralty law from the eighteenth century to the present.

## II NOTES FOR A BIOGRAPHY

### A. *The Brownes in America*

Arthur Browne was American and Irish; he was the third generation of his family to live in America. His father and grandfather were priests of the established church, missionaries sent to America by the Society for the Propagation of the Gospel in Foreign Parts (SPG).<sup>3</sup>

Arthur's grandfather, the Reverend Arthur Browne, originally from Drogheda, County Louth, north of Dublin, was born in 1699 and studied at Trinity College in Dublin, where he received his A.B. in 1726 and his A.M. in 1729.<sup>4</sup> He arrived in Newport, Rhode Island, on September 2, 1729, the

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<sup>2</sup>There is no biography of Arthur Browne. One source gives the date of his birth as "1756(?)." See III English Dictionary of National Biography 41 (1882) (hereinafter EDNB). I have not found any record of the date or place of his birth.

A laudatory article, after first noting that Browne was one of the three teachers who contributed the most to the teaching of law at Trinity College, asks why no detailed account of his life or bibliography of his writings has been forthcoming. See O'Higgins, *Arthur Browne (1756-1805): An Irish Civilian*, 20 N. Ir. Legal Q. 255 (1969).

<sup>3</sup>The SPG was established by royal charter in 1701 to provide clergy for the colonies. It was the inspiration of Dr. Thomas Bray, who in 1698 in London had founded the Society for Promoting Christian Knowledge (SPCK) to provide books for the missions and missionary clergy. The objects of the SPG were, first, to furnish religious services for British people in the colonies and, second, to convert the native people. Its work in the United States gradually ceased after the 1783 Treaty of Peace recognized the independence of the United States. From 1702 to 1789, the SPG established 202 missions and sent out 422 priests to the American colonies. No bishop was ever sent. Seven missions were established in Rhode Island before the American Revolution, beginning with Trinity Church in Newport. The SPG required each clergyman to submit a report on his mission every six months. These reports are preserved in the archives of the SPG in London. See Midwinter, *The SPG and the Church in the American Colonies*, 4 Hist. Mag. Protestant Episcopal Church 70 (1935), and C. Pascoe, *Two Hundred Years of the SPG* (1901). Carl Bridenbaugh takes a less benign view of the SPG, calling it "British imperialism in ecclesiastical guise." See C. Bridenbaugh, *Mitre and Scepter: Transatlantic Faiths, Ideas, Personalities and Politics, 1689-1775*, 57 (1962).

<sup>4</sup>Reverend Arthur Browne (1699-1773) was the son of Reverend John Browne, Archdeacon of Elphin in County Roscommon. Reverend Arthur Browne was ordained in 1729 by Edmund Gibson, Bishop of London for the SPG. The Bishop of London's jurisdiction had been extended to all of the American colonies by King Charles I. Reverend Arthur Browne married Mary Cox of Drogheda in 1729; shortly thereafter, the couple sailed for America. They were the parents of nine children: five daughters and four sons. In 1730, he became Rector of King's Chapel in Providence, Rhode Island, where he remained until 1736. (The Providence church had been founded in 1722 with the SPG's assistance; its name was changed to St. John's in 1790.) The Providence church paid £60 per year salary, but in 1736 Queen's Chapel, Portsmouth N.H. offered a salary of £100 per year and Browne moved there.

In addition to parish duties in Portsmouth, Reverend Arthur Browne travelled to new towns in New Hampshire and Maine. He also served as Chaplain to the Governor and Council of New Hampshire after

same year as the philosopher George Berkeley.<sup>5</sup> It had been Berkeley, a member of the Society for the Promotion of Christian Knowledge (SPCK), and later an important member of the SPG, who had persuaded Browne to come to America to serve a Christian people and convert the Indians. There is no evidence, however, that Browne was to be part of the College of St. Paul that Berkeley hoped to establish in Bermuda. After arriving in Newport, Browne served as an occasional preacher at Trinity Church, the beginning of a forty year relationship between the Brownes and that parish.<sup>6</sup>

There was no established church in Rhode Island, although Trinity Church (founded in 1698) was thriving in the busy commercial center of a colony where the majority of the inhabitants were Quakers and Baptists. In 1730, Browne and his bride moved to Providence. Six years later, he and his family moved to Portsmouth, the capital of the New Hampshire colony, where he served as rector at the Queen's Chapel (founded in 1732) until his

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1766. Reverend Arthur Browne appears in Nathaniel Hawthorne's *Tales of a Wayside Inn* in the story of Governor Benning Wentworth. A later rector (Charles Burroughs in 1857) eulogized Reverend Arthur Browne as "faithful, revered and beloved." A collection of his sermons was published in 1757. See E. Pennington, *The Reverend Arthur Browne of Rhode Island and New Hampshire* (1938), and M. Rogers, *Glimpses of an Old Social Capital (Portsmouth, N.H.) as Illustrated by the Life of the Rev. Arthur Browne and his Circle* (1923). His portrait by Copley (1757) is in the General Theological Library, Boston.

<sup>5</sup>George Berkeley (1685–1753) was born near Kilkenny and schooled at Kilkenny College. He received his A.B. in 1704 from Trinity College, became a Junior Fellow and earned an A.M. in 1707, was awarded a B.D. and became an ordained priest in 1710, served as Lecturer and Preacher from 1712 to 1723, made Grand Tours of France, Italy, and the Low Countries as Chaplain in 1713–14 and again in 1716–20, became a Senior Fellow, T.C.D., in 1717, and was awarded a D.D. in 1721. In 1724, he was appointed Dean of St. Columb's Cathedral (Derry), the second wealthiest deanery in Ireland. Thus, at a comparatively young age, he achieved a well-paying job that did not require his presence.

In 1724 Berkeley published "A Proposal for the Better Supplying of Churches in Our Foreign Plantations and for Converting the Savage Americans to Christianity." Berkeley's project to found a college to accomplish these goals was doomed from the beginning because of his choice of distant Bermuda as the site of the college and his failure to cultivate London politicians. Private funds had been raised and appointments made, but realization required a government grant of £25,000, which, although promised, was never paid.

Berkeley and his new wife arrived in Newport on January 23, 1729, in order to prepare a farm for the use of the college and await the government grant. He stayed in Newport for almost three years, finally giving up all hope of receiving the grant. During his Newport stay Berkeley wrote his philosophic dialogue, "Alciphron," and preached often in Trinity Church and the other Rhode Island missions. On his return to England Berkeley was appointed Bishop of Cloyne in County Cork in 1734, not considered a wealthy bishopric in the eighteenth century church, at a salary of £2500 per year.

Berkeley's eight year effort on behalf of the Bermuda College and his writings, especially his poem "On The Prospect of Planting Arts and Learning in America," written in 1726 and revised in 1752 with its famous line, "Westward the course of empire takes its way," demonstrates that Berkeley was so obsessed with the potential of America that he could easily persuade others to follow him on his mission to save and convert America. See A. Luce, *Life of George Berkeley, Bishop of Cloyne* (1949), and E. Gaustad, *George Berkeley in America* (1979).

<sup>6</sup>See G. Mason, *Annals of Trinity Church, Newport, R.I., 1698–1821* (1890), and L. Ballard, *Trinity Church in Old Newport on Rhode Island* (1979) (unpublished manuscript on file with Trinity Church). The SPG connection began in 1704 with the sending of James Honyman, a Scot, to be the second rector.

death in 1773. He was a vigorous opponent of the enthusiastic evangelism of Rev. George Whitefield's "Great Awakening" (1744–8) and a strong supporter of the British Empire. This was, of course, before the American Revolution drove many Anglican clergy out of the country.<sup>7</sup>

Marmaduke Browne, son of Reverend Browne and father of our subject Arthur Browne, was born in 1731 in Providence, Rhode Island; like his father, Marmaduke was a graduate of Trinity College and a priest.<sup>8</sup> In 1753, while completing his studies in Dublin, Trinity Church (Newport) sought Marmaduke's services as a schoolmaster ("catechist") for a new school established for the parish under the will of Nathaniel Kay. Marmaduke declined this offer, however, because it was financially unattractive.

After ordination to the priesthood by Thomas Sherlock, Bishop of London for the SPG, on January 29, 1755, Marmaduke became an itinerant missionary in New Hampshire, visiting Trinity Church (Newport) as a guest preacher. (The land distance from Newport to Portsmouth is about 125 miles, at least a three day journey in the eighteenth century.) He married Anne Franklin of Bristol, England before they set out for America in 1755. A second offer in 1758 was more generous, and Marmaduke moved to Newport as catechist and preacher. In 1760, when the fourth rector, Thomas Pollen, moved to Kingston, Jamaica, Marmaduke became the fifth rector of Trinity Church.<sup>9</sup>

The growth of Marmaduke's congregation required expansion of the church building in 1762 from five to seven bays in order to add forty-six box pews. The renovation also included the extension of the chancel to the street and the addition of a striking canopied "wineglass" pulpit. Meanwhile, the parish school flourished under Reverend George Bisset of Aberdeen, Scotland, who had been sent over by the SPG in 1767 to assist the rector.

The town appreciated Marmaduke's learning and gentle character. He apparently was also highly regarded in the colony because, in 1764, he was selected to be a founding fellow of Rhode Island College (which later became Brown University).<sup>10</sup>

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<sup>7</sup>The oath of allegiance to the King was taken at the time of ordination to the priesthood. Refusal to break this oath, despite Parliamentary dispensation, had caused a schism in Scotland in 1688 wherein the "non-juring" bishops continued their own church without official sanction. On the oath problem see generally B. Steiner, *Samuel Seabury, A Study in the High Church Tradition 157–88* (1971). Many clergy fled or were exiled during the American Revolution. Those who remained believed that the Treaty of Peace of 1783 released them from their allegiance to George III.

<sup>8</sup>See G. Lewis, *Clergymen Licensed to the American Colonies by the Bishop of London, 1745–1781*, 13 *Hist. Mag. Protestant Episcopal Church* 129 (1944).

<sup>9</sup>Mason, *supra* note 6, at 119.

<sup>10</sup>Rhode Island College was organized in 1764 in Warren, Rhode Island, the seventh college established in the English colonies of North America. John Brown and his brothers (Nicholas, Joseph, and Moses) led the effort to move the school to Providence, a much larger town that would eventually succeed Newport as commercial center and state capitol. Nicholas Brown, son of the first Nicholas, gave such a generous contribution to the school that it was renamed in his honor in 1804.

Our author, Arthur Browne, was born about 1756, either in Newport, Rhode Island, or Portsmouth, New Hampshire. He spent his first seventeen years in cosmopolitan Newport, a rich seaport, the capital of the Rhode Island colony, and the seat of an admiralty court. Today, it is not necessary to guess at the appearance of eighteenth century Newport because 350 buildings of that era still stand, including Marmaduke Browne's church, the most elegant Georgian church in America.

The Newport of Arthur Browne's youth was a town of about 9,000 people.<sup>11</sup> Shipping, shipbuilding, and the maritime trades were most important. Distilling molasses into rum, brewing, cooperage (barrel making), tanneries, butchery and meat packing, and grain milling joined the maritime trades of ropewalks, sail-lofts, and ship's carpentry to provide employment for the town. Vessels regularly sailed to the West Indies and to the North American ports of New York, Philadelphia, Annapolis, and Charleston, but less frequently to England because of Boston's dominance of the trans-Atlantic traffic.

Newport had twenty licensed taverns, several printers (one of whom was James Franklin, Benjamin's elder brother with whom "Poor Richard" began his apprenticeship), portrait painters, silversmiths, and more than 120 skilled craftsmen producing high-quality furniture for ship and home. The town supported its own Latin School and there were several other private schools besides that of Trinity Church. A weekly newspaper, *The Newport Mercury*, began publishing in 1758. Wealthy merchants, that class of entrepreneur which was both shipowner and cargo owner, built substantial residences furnished in the finest Georgian style.

The largest church was the Great Meeting House of the Society of Friends (Quakers), built in 1699. In addition, there were about ten other churches of various denominations, as well as such other handsome public buildings as the Colony House (1736), headquarters of the Governor and Legislature until 1843; the Redwood Library and Atheneum (1748), built in the style of an exquisite Greek temple; and the Brick Market (1762), a combination marketplace, office building, and lecture hall in the New England tradition.

The curse of all this prosperity and culture was slavery, a consequence of the West Indies trade. Although tolerated in the town, slavery was not accepted in the surrounding hinterlands. Anti-slavery, preached by the

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<sup>11</sup>The census of 1774 records 9,208 inhabitants. See *Census of Inhabitants of the Colony of Rhode Island 239* (J. Bartlett ed. 1858). See generally E. Crane, *A Dependent People: Newport, Rhode Island in the Revolutionary Era* (1985); C. Jeffreys, *Newport: A Short History* (rev. ed. 1992); and C. Bridenbaugh, *Fat Mutton and Liberty of Conscience* (1974). The story of anti-slavery in Newport is told in *The Minister's Wooing* (1859), the third novel by the ardent abolitionist Harriet Beecher Stowe. Despite its subject matter, *The Minister's Wooing* never rivalled the success of *Uncle Tom's Cabin* (1852), Stowe's first novel.

Reverend Samuel Hopkins (1721–1803), the minister of the First Congregational Church, would succeed by default after the Revolution as the wealth and trade of the town declined; slavery would be prohibited in Rhode Island after 1784, although it would be some years before the prohibition became effective among Newport seafarers.

Arthur's initial studies were in the Parish School of Trinity Church, where the curriculum included English, Latin, arithmetic, and writing. He would surely have received further instruction from his father and grandfather.

In 1767, Arthur's mother Anne died leaving a legacy in Britain for her son. However, litigation developed over the inheritance. To protect his son's interest, as well as secure the parts needed to expand the organ that had been given to the parish by George Berkeley in 1733, Marmaduke Browne, with the permission of his congregation and the SPG, sailed for Europe in June 1769.<sup>12</sup> In 1770, while in the course of his journey, he obtained an A.M. from Trinity College. He also secured the requisite organ parts and the legacy for his son.

The Rhode Island colony, founded in 1636 at Providence and in 1639 in Newport, has been described as "the most modern . . . the most entrepreneurial of the thirteen colonies."<sup>13</sup> During Marmaduke Browne's tenure as rector of Trinity Church, Rhode Island seems to have been free of the hot-tempered and vicious disputations among Christians that characterized that non-ecumenical age.<sup>14</sup> The "problem" for Browne and the other Anglican clergy in Rhode Island were the very numerous, wealthy, and powerful Quakers, for whom the organization and discipline of the Church of England were anathema. Nonetheless, he could report to the Bishop of London that a "good harmony subsists between Churchmen and dissenters," and further that "the Quakers, in particular, express their regard for the Church from the experience they have had of the mildness and lenity of its administration."<sup>15</sup>

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<sup>12</sup>Mason, *supra* note 6, at 130.

<sup>13</sup>See G. Wood, *The Radicalism of the American Revolution* 140 (1992). For a description of the era's maritime affairs, see Wiener, *Notes on the Rhode Island Admiralty*, 46 *Harv. L. Rev.* 44 (1932). Wiener's acknowledged model was Judge Charles M. Hough's *Reports of Cases in the Vice Admiralty and Admiralty Courts of New York* (1925). Most of Wiener's reported cases related to prize. See also C. Ubbelohde, *Colonial Courts of Vice Admiralty* (1966).

Newport gained considerable notoriety for hanging twenty-six "pirates" on July 19, 1723, at Bull's Point "between the flux and reflux of the sea." Of the condemned men, sixteen were in their twenties and one-half were born in England. W. Updike, *Memoirs of the Rhode Island Bar* 293-94 (1842). It is a controversial point whether trials for piracy in the colonies were conducted by the vice admiralty courts or by royal commissioners, one of whom would have been the admiralty judge. See D. Owen & M. Tolley, *Courts of Admiralty in Colonial America: The Maryland Experience 1634-1776* (1995).

<sup>14</sup>See generally S. James, *Colonial Rhode Island 188-204* (1975); Crane, *supra* note 11; and Bridenbaugh, *supra* note 11.

<sup>15</sup>Mason, *supra* note 6, at 113.

Newport also had a wealthy congregation of Spanish and Portuguese Jews, who built an imposing Georgian synagogue in 1759. There were no acknowledged Roman Catholics, and Arthur did not meet any members of that faith until he arrived in Ireland.<sup>16</sup> Indeed, civil rights in Rhode Island, including citizenship, the right to vote, and the right to hold public office were denied to Jews until 1777 and to Roman Catholics until 1783.

The relative peace in ecclesiastical matters, however, did not characterize the political relations between the colony and the mother country. Here there was great turmoil, causing extreme distress to clergymen serving the state and the established order. In 1765, for example, during the Stamp Act crisis, a riot broke out and a mob besieged Augustus Johnston, the stamp master, in his house and extorted his resignation from office. No one could be found to replace him and the stamps were never used.

A repeat riot occurred when the Stamp Act was repealed and the former stamp master was hanged in effigy.<sup>17</sup> The Stamp Act controversy produced a lively pamphlet war between patriots and loyalists in Rhode Island as to the rights of Englishmen and parliamentary taxation of the colonies unrepresented at Westminster.

Also in 1765, a mob burned a small boat belonging to the *HMS Maidstone* and seized a junior officer in order to stop the impressment of local fishermen into the Royal Navy. By this time, the "Sons of Liberty" were organized in Newport and a "Liberty Tree" on Thames Street, the principal thoroughfare, was regularly decorated. In 1769, a customs enforcement sloop, the *Liberty*, was set adrift by a mob, beached, and burned.<sup>18</sup> Two years after this event, just shortly after his return to Newport from Europe, Marmaduke Browne, who had suffered frequent spells of bad health, died on March 16, 1771, just forty years old.<sup>19</sup> His lengthy homeward voyage of eleven weeks was given as the reason for his failing health, fever and subsequent death.

Almost a quarter of a century after the death of his father, Arthur Browne sent to America a marble memorial of his parents, with the likeness of his father carved in Dublin by Edward Smyth, master carver of the sculptures on the Four Courts (1785) and the Customs House (1791). This memorial, installed in 1795 on the gospel (or north) side of the altar in Trinity Church, reads in part, "In token of his Gratitude and affection to the best and

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<sup>16</sup>Arthur Browne later said: "He had never seen a Roman Catholic until he was seventeen years old, and he then soon considered him a prodigy; but he had since by interviews with many respectable men of that sect got rid of his prejudices." O'Higgins, *supra* note 2, at 258 (quoting A. Browne in the House of Commons, 12 Parl. Reg. 189). The first Roman Catholic church in Rhode Island, St. Mary's in Newport, was founded in 1828.

<sup>17</sup>James, *supra* note 14, at 328–34. See also Updike, *supra* note 13, at 67–68, 85–87, and 128–29, and D. Lovejoy, *Rhode Island Politics and the American Revolution 1760–1776*, 128–53 (1958).

<sup>18</sup>James, *supra* note 14, at 319.

<sup>19</sup>Mason, *supra* note 6, at 133.



tenderest of Parents, and of his respect and Love for a Congregation, among whom and for a place where he spent his earliest and his happiest days."<sup>20</sup> Arthur Browne lovingly described the scene of these earliest and happiest days in his *Miscellaneous Sketches*, written in middle age, while riding out to lonely sessions of the courts in the west of Ireland during a period of busy practice and teaching.<sup>21</sup>

Now an orphan at the age of sixteen, Arthur turned to the Newport congregation for assistance. In a letter written on May 16, 1771, while at his grandfather's house in Portsmouth, Arthur described his plight as follows:

Dear Mr. Bours:

It seems to me most proper to write to you concerning the following affair, both as Church Warden, and as being one of my best friends. My grandfather declines drawing upon the Society, informing them of my father's death, of his leaving me wholly unprovided for, by which means there was a great chance of my losing a liberal education at home, whither my father designed to send me. He says I may be pretty sure, if those gentlemen would be so kind as to write (obliterated) of the Society's doing something handsome for me, especially if they would represent me in as favorable a light as they think proper, as a lad of some merit, who, if properly encouraged, might turn out something.

<sup>20</sup>The memorial tablet reads in full:

To the memory of the Reverend Marmaduke Browne, formerly Rector of this Parish, a man eminent for Talents, Learning and Religion, who departed this life on the 19th of March (sic) 1771 and of Anne his wife, a Lady of uncommon Piety and suavity of Manners, who died the 6th of January 1767.

This Monument was erected by their Son Arthur Browne, Esq. now Senior Fellow of Trinity College Dublin in Ireland, and Representative in Parliament for the same, In token of his Gratitude and affection to the best and tenderest of Parents, and of his respect and Love for a Congregation, among whom and for a place where he spent his earliest and his happiest days.

Heu! Quanto minus est,  
Cum aliis Versari  
Quam tui meminisse  
MDCCXCV

The Latin phrase at the end translates, literally, as follows: "How much less it is to converse with others [i.e., the living] than to remember you."

<sup>21</sup>The following passages are typical:

The vistas through the woods, the breaks of light through the trees, with an orient sun and the brightening sky formed a Paradise. . . . The face of the country was beautiful beyond description. . . .

There was a midseason consisting of about six weeks or two months in Spring and as many in Autumn, which exceeded in delight all the creations of poetic fancy.

The innocence of the people made them capable of liberty. Never in any Utopia could there be greater freedom from crimes. . . . Murder and Robbery were unknown.

This obedience to the laws was fostered by religion which flourished with universal vigor. A. Browne, *Miscellaneous Sketches* 195, 197, 202, 203 (1798) (hereinafter *Sketches*). Browne also noted the absence of landlords, tenantry, and beggars, id. at 194, and claimed that neither poverty nor riches were known while nobility (i.e., aristocracy) was unknown and a real equality reigned. Id. at 201.

These are his words, not mine; for not all the vanity natural to man should induce me to write thus of myself, were it not his direction. I know your friendship will excuse this trouble, which, notwithstanding after having troubled you so often, I am to give you, and I hope poor Peter was recovered before you got home. My love to Mrs. Bours.

I received Sam Bours' kind letter, and found that I must chuse a guardian, as he says. I hope poor Mr. Bours has had no more ill turns. My compliments to all friends. My grandfather and all the family join with me in love to you and Mrs. Bours, and believe me always, your affectionate, humble Servant,  
Arthur Browne<sup>22</sup>

John Bours, senior warden, and James Honyman, an admiralty lawyer and son of the long-serving second rector, were appointed by the vestry to draft a letter for its approval.

The Newport vestry did represent Arthur Browne in a "favorable light." Its letter of May 29, 1771 to the SPG had to serve many purposes: inform it of the death of Marmaduke Browne; request support for Arthur; approve the selection of George Bisset, Marmaduke's assistant, as sixth rector; and, most important, request that the mission status be continued. This last point was extremely controversial as the parish had become very wealthy and the money of the SPG could have been better spent on other missions.<sup>23</sup>

While Arthur Browne and his family tried to secure the funds needed to pursue his studies, the political struggle in the colonies became bloody. A riot in Boston on March 5, 1770, in which belligerent townsmen taunted British soldiers, led to bloodshed when the guard at the Old State House fired into the mob, killing five workmen. That incident would be developed by Samuel Adams, the genius of revolutionary communication, into "The Boston Massacre."<sup>24</sup> Committees of Correspondence were organized in each colony to hear and respond to Boston's claims of British tyranny and oppression.

No further armed clashes occurred in New England, however, until a mob from Providence attacked the *HMS Gaspee*, a customs schooner that had run aground in Narragansett Bay while chasing smugglers. The commanding officer of the *Gaspee*, Lieutenant William Dudingston, was wounded; he and his crew were captured and put ashore while the mob burned the ship.<sup>25</sup> This event took place in June 1772, after Arthur Browne had left America for

<sup>22</sup>Mason, *supra* note 6, at 145–46.

<sup>23</sup>Ballard, *supra* note 6, at 355–63. The vestry said of Arthur Browne that he is "a lad of singular modesty and of a capacity very rarely to be met with in one of his years" and that "very early in life . . . marks of a lively Genius" were discovered.

<sup>24</sup>See H. Zobel, *The Boston Massacre* 205–301 (1970).

<sup>25</sup>James, *supra* note 14, at 333–36, 345–51.

Ireland to begin his studies at Trinity College. There is no evidence that he ever returned.<sup>26</sup> For him, America would become a Paradise Lost.

In 1774, responding to the British government's punishment of Boston for the December 16, 1773 "Tea Party," Rhode Island sent delegates to the First Continental Congress, thereby joining the complete embargo on trade with Great Britain. After the battles of Lexington and Concord outside Boston (April 19, 1775), the British army was besieged inside the city and the Whig Committee of Public Safety began to assume governmental functions. By May 1775, the Newport Royal Custom House had closed and the Sons of Liberty and other vigilantes were threatening to tar and feather the few remaining royal officers of the Rhode Island colony. Thus, in Rhode Island, as in Massachusetts and other colonies, the authority of the British government withered and died.<sup>27</sup>

On May 4, 1776, the General Assembly of Rhode Island repudiated all allegiance to King George III because "the King had entirely departed from the duties and character of a good king." In assertion of its new independence, Rhode Island commissioned its own privateers to capture British shipping, restored its admiralty jurisdiction, and seized the charter and other symbols of the crown from the last royal governor.<sup>28</sup> The British army that had evacuated Boston in March 1776 occupied Newport until October 1779; after it left, a mob invaded Trinity Church and tore down the royal arms in the chancel.<sup>29</sup>

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<sup>26</sup>As Browne later explained:

... I trust I have said enough to prove there were charms in the country [America], and to show what it is that makes every former resident in America think of it with affection, with melancholy, and with regret; it does not follow that he should wish to return to it; the death of friends; the total change of inhabitants within a few years; the wonderful alteration made by an intervening revolution; his welfare in the country in which he is [Ireland]; the kindness of that country and his obligation to it and the new ties he has formed in it, may totally eradicate such a wish from his heart; but he will now and then cast back a look to it, as if a distant Paradise. . . .

Sketches, *supra* note 21, at 210.

<sup>27</sup>James, *supra* note 14, at 337–51. A brilliant new study of the opening battles of the Revolution is D. Fischer, *Paul Revere's Ride* 261–80 (1994). A further description of the assumption of governmental functions by the Whig Committee can be found in J. Reid, *In a Defiant Stance: The Conditions of Law in Massachusetts Bay—The Irish Comparison and the Coming of the American Revolution* 118–34 (1977). See also G. Wood, *The Creation of the American Republic, 1776–1787*, 127–61 (1969), and R. Morris, *The Forging of the Union, 1781–1789* (1987).

<sup>28</sup>James, *supra* note 14, at 346–47. On the Rhode Island admiralty court see Wiener, *supra* note 13, at 59–62. It functioned only as a prize court from 1776 to 1780; thereafter, it became a court for "all matters and things of a maritime nature" with trial by jury. The Second Continental Congress would call upon the American colonies to form state governments only six days after Rhode Island declared independence. See *infra* note 125, and Morris, *supra* note 27, at 55–79.

<sup>29</sup>N. Isham, *Trinity Church in Newport, Rhode Island: A History of the Fabric* 69–71 (1936).

### *B. Arthur Browne's Formal Education and Legal Training*

Arthur Browne had been admitted to Harvard College in 1771 for the class of 1775, but he never studied there.<sup>30</sup> Provided £25 passage money by the SPG, assured of £40 per year from his inheritance, and armed with the basics of an eighteenth century education that he had received at home and at the Newport parish school, he began his studies at Trinity College in March 1772.

The curriculum included Latin, Greek, logic, philosophy, astronomy, physics, ethics, metaphysics, and mathematics.<sup>31</sup> Browne became a "scholar" in 1774, which should have eased his finances. He received his A.B. in the spring of 1776; during the next year he advanced to Junior Fellow, the first step in an academic or ecclesiastical career.<sup>32</sup> The year of his fellowship was also the beginning of his legal career: in May 1777, at the age of twenty-one, he traveled to London to join Lincoln's Inn and thereby qualify as a barrister. Formal studies were not required of aspiring barristers—

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<sup>30</sup>EDNB, *supra* note 2. Harvard in the 1770s would not have been a congenial place for the clergy of churches established by law in Great Britain and Ireland. (The Congregational church was established by law in Massachusetts.) As Samuel Eliot Morison has noted, only 196 of 1,224, or a mere sixteen percent, of Harvard graduates living in 1776 were "loyalists." S. Morison, *Three Centuries of Harvard* 147 (1936). Morison also quotes a loyalist lady's complaints about the students: "the Independancy and Liberty with which the Youths are brought up, and indulged, makes too many of 'em proficients in Vice." *Id.* at 135.

A major distraction for the students was the presence of the disorderly legislature (The Great and General Court) in Harvard's buildings from March 1770 to March 1773, having been moved there by Governor Hutchinson to escape the Boston mobs. *Id.* at 136–37. Because of the Boston Port Act of 1774 (punishment for the Boston Tea Party of December 1773), the College suspended all public ceremonies, including commencement (which was not resumed until 1781). *Id.* at 145. After the battles of Lexington and Concord, all those "unfriendly to the Liberties and Privileges of the Colonies" were dismissed. *Id.* at 147. Governor John Hancock described Harvard College in 1781 as "the Parent as well as the nurse of the late Happy Revolution." *Id.* at 164.

Harvard College in the 1770s consisted of about 200 students, the President, three professors, and at least four tutors. The most recent volume of Sibley's *Harvard Graduates* (C. Shipton ed. 1975) ceases with the Class of 1771, which had matriculated with fifty-six students in 1767 and graduated sixty-three in 1771. Unlike the seventeenth century situation, Harvard College had ceased to be simply a theological seminary as the Class of 1771 produced fifteen medical practitioners, fourteen clergymen, six lawyers, and five schoolmasters. Arthur Browne's description of Harvard College in *Miscellaneous Sketches* is sufficiently detailed to believe that he may have visited there. See *Sketches*, *supra* note 21, at 196. His aunt Mary was married to Rev. Winwood Serjeant, Rector of Christ Church, Cambridge near Harvard Yard.

<sup>31</sup>R. McDowell & D. Webb, *Trinity College Dublin, 1592–1952*, 45–49, 69–73 (1982).

The Dublin of Arthur Browne's youth was the second city of the British Empire, surpassed only by London. As the capital of Ireland it was the seat of the nearly regal court of the viceroy, the center of shipping, industry, and luxury trades, with a vigorous intellectual life. Unlike Newport, Dublin had many desperately poor people living in crowded, unsanitary conditions, the source of disease and crime. The population was estimated to have grown from 128,570 in 1772 to 175,319 in 1814. See generally C. Maxwell, *Dublin Under the Georges, 1714–1830* (1936).

<sup>32</sup>EDNB, *supra* note 2.

merely attending the moot courts and eating the required number of dinners in the Inn sufficed.<sup>33</sup> Apprenticeship or pupillage, rather than academic study, was the preparation for lawyers in that age.<sup>34</sup>

These years of Browne's professional preparation in Dublin and London were the years of bloody struggle in America after the British army abandoned Boston in 1776 and Newport in 1779. Concentration of British forces in New York and the middle colonies indicated the possibility of a long war or a stalemate. However, America's formal alliance with France in 1778, after the American victory at Saratoga, brought in the French forces. This led to the surrender of the British army at Yorktown in 1781 and, two years later, the evacuation of New York and the Treaty of Peace between Great Britain and the United States of America.<sup>35</sup>

In Ireland, an intense though bloodless struggle preceded the achievement of the legislative independence of the Irish Parliament from Great Britain in 1782. In that year, both parliaments repealed Poyning's Law of 1494, a statute that required prior approval of Irish legislation by the British Privy Council. Ireland's opportunity came as the direct result of the struggle in America: because Great Britain had been forced to send its armies from Ireland and the British Isles to America it no longer had the ability to enforce the old system.<sup>36</sup>

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<sup>33</sup>See D. Hogan, *The Legal Profession in Ireland, 1789–1922* (1986).

<sup>34</sup>Arthur Browne wrote humorously of the "studies" at the Inns of Court in London, where social graces and good fellowship were more important than contingent remainders and springing uses; having struggled to understand Coke on Littelton, then to be told that he had not studied what the law is but what it was. Sketches, *supra* note 21, at 372–81. (Nevertheless, Thomas Jefferson and Joseph Story both thrived on Coke's intricacies in their reading of law.) See also T. Ruggles, *The Barrister, or Strictures on the Education Proper for the Bar* (1792), and B. Abel-Smith & R. Stevens, *Lawyers and the Courts: A Sociological Study of the English Legal System, 1750–1965*, 15–27 (1967) ("In selecting their students, the teachers placed greater emphasis on social than intellectual qualities. Students from Oxford and Cambridge had learnt no law and the benches saw no need to repair the omission.").

Works studied in preparation for Doctor's Commons and the admiralty bar in the late eighteenth century would have been: Grotius, *De Jure Belli ac Pacis* (1625); Bynkershoek, *Quaestiones Juris Publici et Quaestiones Juris Privati* (1737); Vattel, *Le Droit des Gens* (1758); Valin, *Nouveau Commentaire sur l'Ordonnance de la Marine* (1776); Heineccius, *Elementa Juris Naturae et Gentium* (1746); Molloy, *De Jure Maritimo et Navali* (1676); Beawes, *Lex Mercatoria Redivivia* (1752); Clerke, *Praxis Supremae Curiae Admiralitatis* (1743); and possibly *The Black Book of the Admiralty* (in Latin, probably compiled in the fifteenth century).

<sup>35</sup>See generally 3 E. Channing, *History of the United States* 241–345 (1912), and J. Miller, *Triumph of Freedom 1775–1783* (1948). A British view of the American Revolution can be found in P. Mackesy, *The War for America, 1775–1783* (1964). See 8 Stat. 6 for the French alliance and 8 Stat. 80 for the Treaty of Peace between the United Kingdom and the United States.

<sup>36</sup>See generally L. Cullen, *The Emergence of Modern Ireland, 1600–1900*, 193–256 (1981); R. Foster, *Modern Ireland, 1600–1972*, 167–286 (1988); R. McDowell, *Ireland in the Age of Imperialism and Revolution, 1760–1801*, 239–348 (1979) (hereinafter *Imperialism*); Smyth, *The Volunteers and Parliament*, and Malcomson, *The Parliamentary Traffic of this Country*, in T. Bartlett & D. Hayton, *Penal Era and Golden Age: Essays in Irish History, 1690–1800*, 113–61 (1979); A. Malcomson, John Foster: *The Politics of the Anglo-Irish Ascendancy 192–208*, 267–80 (1978); M. Elliott, *Partners in Revolution:*

The "Volunteers," an Irish military force made up principally of the Protestant-landed interest, did organize in 1778, determined to redress Irish grievances resulting from Britain's imperial trade policy. But the Volunteers and the "Ascendancy" generally were also fearful of the possibility of retribution, retaliation, and confiscation by the majority Catholic population asserting its rights to ancestral lands taken by the victorious Protestants in the seventeenth century wars.<sup>37</sup> While political change was in the air in the 1780s, the type of social revolution that would occur in France after 1789 did not seem probable or even possible to "enlightened" minds in England and Ireland. As a result, the 1798 Revolution would be a profound shock.

Having been called to the English bar, Arthur Browne returned to Dublin. In the summer of 1779 Browne received an A.M. from Trinity College, followed by an LL.B. in the spring of 1780 and an LL.D. in the spring of 1784. During this time he also took the first steps of his political career by being elected to one of the college's two seats in Grattan's Irish Parliament in 1783 (and being reelected in 1790 and 1797). He would serve continuously in the Irish House of Commons until it was suppressed in 1801 by the union with Great Britain.

Although the Irish House of Commons had been formally freed from total English control by the repeal of Poynings' Law, it was in fact an unrepresentative, ineffective, and corrupt body.<sup>38</sup> While the Irish Parliament had achieved nominal independence, the executive (the lord lieutenant and

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The United Irishmen and France 35–50, 67–74, 95–123, 197–240 (1982); J. Beckett, *The Making of Modern Ireland, 1603–1923*, 223–83 (1966); *The United Irishmen* 74–87, 115–34, 176–96, 269–96 (D. Dickson, D. Keogh & K. Whelan eds. 1993); R. McDowell, *Irish Public Opinion, 1750–1800*, 16–23, 40–50, 58–68 (1944) (hereinafter *Public Opinion*); D. Doyle, *Ireland, Irishmen and Revolutionary America, 1760–1820*, 137–79 (1981); and Reid, *supra* note 27, at 135–73.

On Poynings' Law, see Note, *The Empire Strikes Back: Annesley v. Sherlock and the Triumph of Imperial Parliamentary Supremacy*, 87 *Colum. L. Rev.* 593, 600 n.48 (1987) by Martin Flaherty. The Irish legislation is in 21 & 22 *Geo. 3*, ch. 47.

<sup>37</sup>See 1 J. Froude, *The English in Ireland 277–81* (1881). Froude's anti-nationalist views led to controversy with W. E. H. Lecky. See W. Lecky, *Ireland in the Eighteenth Century*, selections from his eight volume *The History of England in the Eighteenth Century 17–26, 29–36* (L. Curtis ed. 1972) (1890). Lecky, a graduate of Trinity, eventually would represent Trinity College in the British Parliament at Westminster. An opponent of nineteenth century Home Rule, he nevertheless disapproved of the 1801 Act of Union.

Fear of Catholics may have been absorbed by Arthur Browne from colleagues and students at Trinity College, but it is not evident in his mature writings, except for his first published piece on the Treaty of Limerick in 1788. The closest he comes to a religious discussion was when he wrote, "I am a sincere Protestant. I know the errors of the Church of Rome, but what imports it to me whether a man calls himself a Protestant or Papist if he violates every law of Charity, Humanity and Christianity? I detest him equally." *Sketches*, *supra* note 21, at 5 (end notes). See also *infra* note 52.

<sup>38</sup>There were 300 members of the House of Commons. Of these, 234 came from 117 boroughs and cities, sixty-four from the thirty-two counties, and two from Trinity College (elected by students and fellows.) See J. Lee, *Grattan's Parliament in the Irish Parliamentary Tradition 149–60* (B. Farrell ed. 1973).

the ministers) was not responsible to the Irish Parliament but rather to the ministry in power in London. (Criticism of the acknowledged unrepresentative nature of the Irish House of Commons in no way implies that the English House of Commons was any better in the days of the "rotten boroughs.")

Arthur Browne's political activity was accompanied by further advancement at Trinity College: Junior Proctor in 1784 and Regius Professor of Civil and Canon Law in 1785. While holding this chair he gave the lectures that subsequently formed the basis of the book with which we are concerned. These lectures were very popular with his devoted students and his faculty colleagues considered that he had set a new precedent by taking seriously the duties of his chair of law.<sup>39</sup>

In 1784, Arthur Browne began active practice in his specialties, civil law and admiralty, the subject matter of Doctors' Commons in England. He began as an advocate (barrister) in the courts of delegates, prerogative, admiralty, and consistory. His practice was further enhanced by his appointment as Vicar General of the Diocese of Kildare, where he was judge of the diocesan court dealing with marriages, wills, and ecclesiastical disputes. This was undoubtedly a lucrative appointment.

In 1792, Browne's advanced studies in Greek resulted in his appointment as Regius Professor of Greek, a position he held from 1792 to 1795, 1797 to 1799, and 1801 to 1805.<sup>40</sup> The high point of his academic career was his election in 1795 as Senior Fellow, thereby making him a member of the governing body of Trinity College. Today, a portrait of Browne as Senior Fellow hangs in the Provost's House of the college.

In his legal career, Arthur Browne continued to accumulate the honors of his profession, becoming King's Counsel in 1795 and, in 1803, Bencher of King's Inn (Dublin) and Prime Serjeant.<sup>41</sup> His appointment as the last holder

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<sup>39</sup>McDowell & Webb, *supra* note 31, at 81. An unsigned obituary noted that "For many years no person in the university was more beloved than dr. Browne—he was the idol of the students—they loved him with the affection of fond children, for he strove to retain their affections by a suavity of temper peculiarly his own." *Hibernian Mag.*, Oct. 1805, at 599.

<sup>40</sup>His published studies on the classical Greek language included "Strictures on Lord Monboddo" in *Sketches*, *supra* note 21, at 259–99, and *Some Observations Upon the Greek Accents* (1800). He also published short pieces in the *Transactions of the Royal Irish Academy*.

<sup>41</sup>The Prime Serjeant was the superior officer of a group of barristers with the exclusive right to appear in the Court of Common Pleas, the principal royal court. The name supposedly derives from the Knights Templar that had a special group of *fratres servientes*; the latin *servientes* having become "serjeants" in English. These knights established Temple Church (London) in the twelfth century. Later, the inns of court surrounding the church would become the Inner Temple and the Middle Temple, today the chambers of barristers. At one time judges were chosen exclusively from the serjeants, but this monopoly was lost as the larger order of barristers developed. The "serjeants at law" were dissolved in 1877 in England. See generally T. Plucknett, *A Concise History of the Common Law* 220–39 (5th ed. 1956). For a history of the serjeants in Ireland at an earlier time, see Hart, *The King's Serjeant At Law in Tudor*

of the office of Prime Serjeant resulted in occasional service as a judge at the assizes on circuit, an indication that his career would eventually be capped by a senior judgeship. This, however, was never to be. On June 8, 1805, Arthur Browne died from a sudden illness described as “dropsy” (edema due to kidney disease or congestive heart failure) at the early age of 49, leaving a wife and five children. Three days later, the students and faculty of Trinity College, gowned in academic robes and bearing the symbols of academic achievement, accompanied his body from his home on Clare Street, near the east end of the college yard, to its resting place in Saint Anne’s churchyard.<sup>42</sup>

### *C. The Political Career of Arthur Browne (1783–1801)*

Arthur Browne entered political life as a representative of Trinity College, a Whig<sup>43</sup> in the sense in which the term “Whig” had developed in England,<sup>44</sup> America,<sup>45</sup> and Ireland:<sup>46</sup> that good government resulted from a

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Ireland, 1485–1603, in *Serjeants and Attorneys: Studies in the History of the Irish Legal Profession* (D. Hogan & W. Osborough eds. 1990).

<sup>42</sup>The foregoing description comes from an unsigned obituary that appears in *Faulkner’s Dublin Journal*, June 11 and 13, 1805. Browne’s first wife was Marianne, by whom he had a daughter, MTB (Marianne). The first volume of *Miscellaneous Sketches* is dedicated to his daughter MTB and the second to the memory of his first wife.

<sup>43</sup>Use of the terms “Whig” and “Tory” to contrast political viewpoints arose during the long reign of Charles II (1660–83) and refer to conflicting attitudes towards the personal government of the sovereign.

The Whigs controlled English politics through the reigns of George I (1714–27) and his son George II (1727–60), largely because the Tories had been compromised by connections with the Stuarts, exiled in 1688 to France and later to Rome; the two Stuart intrusions in Scotland in 1715 and 1745 and the support of the Stuarts by Louis XIV and Louis XV of France having confirmed the suspicion of foreign influences on the Tories. See B. Williams, *The Whig Supremacy* (1962).

<sup>44</sup>See L. Namier, *England in the Age of the American Revolution* 358–418 (2d ed. 1961); L. Namier, *The Structure of Politics at the Accession of George III* (1929); E. Smith, *Whig Principles and Party Politics: Earl Fitzwilliam and the Whig Party, 1748–1833*, 36–51, 85–113, 117–122 (1975); F. O’Gorman, *The Whig Party and the French Revolution* (1967); and L. Mitchell, *Charles James Fox and the Disintegration of the Whig Party, 1782–1794* (1971).

<sup>45</sup>Many delegates to the First Continental Congress (1774–75) thought of themselves as Whigs. They were empire loyalists when confronted by the French and Spanish, but did not hesitate to coerce the British Parliament into redressing their economic grievances. Leaders of this Whig group were John Hancock, John Adams, and Samuel Adams of Massachusetts and Patrick Henry and Richard Henry Lee of Virginia. “No taxation without representation” was their battle cry, to be picked up ten years later in Ireland.

The Second Continental Congress (1775–81) did not meet until after the battles of Lexington and Concord and the beginning of the siege of Boston; nevertheless, more than a year of debate ensued before the decision on independence was taken, by which time the Whigs of 1774 had become revolutionaries.

Whig ideology developed out of conflict with the royal influence in the ministries: “Rise of an arbitrary power in the midst of deepening corruption was an only too reasonable and too familiar story told a hundred times over in the pages of Bolingbroke, Trenchard, Gordon, Molesworth, Rapin and Sidney.” B. Bailyn, *Ideological Origins of the American Revolution* 306 (1967). See also J. Miller,



contract between the ruler and the subject, and that the safeguard of the liberties of the citizen was to be found in a mixed government of monarchical, aristocratic, and democratic elements. In Parliament Browne would become the "America" expert, interpreting the changes in the land of his birth to the politicians of his adopted home.

After twenty-three years of the reign of George III and his attempts to control the British Parliament through "influence," the Whig movement in all three countries would agree on a common principle: "power of the crown has increased, is increasing and ought to be diminished."<sup>47</sup> Genuine economic conflict with England also contributed to Whig principles in America and Ireland and may even have been the cause. When it came to the use of military force, the Whigs opposed the King's policy in America. After the British army made war on the Americans, however, the Whig attitude towards the war was at best a detached indifference, in contrast to the bellicose Tories who would pursue war with America to the bitter end. Whig detachment ceased when war with revolutionary France began in 1793, and the English and Irish Whig parties shattered on the question of support for the French Revolution. Some Whigs would join with Edmund Burke in support of the war against regicide France.<sup>48</sup>

Browne's attitude towards Ireland, the adopted land he served for almost a quarter of a century, is difficult to disentangle from his attitude towards England, a land he respected for its Constitution, established church, and enlightenment, but distrusted because of its intolerance of the Irish people and control of the Irish economy, especially its foreign trade.<sup>49</sup> It should be pointed out that Browne was interested in early Irish history and studied it

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Origins of the American Revolution 165-97, 445-56, 497-505 (rev. ed. 1959); G. Guttridge, *English Whiggism in the American Revolution* (1963); W. Benton, *Whig Loyalism: Political Ideology in the American Revolution* (1969); Wood, *supra* note 27, at 3-45; and R. Gummere, *The American Colonial Mind and the Classical Tradition: Essays in Comparative Culture* 97-119 (1963).

<sup>46</sup>Ireland, with its overwhelming Catholic majority of landless, disfranchised peasantry, was quite unlike England with a large, Protestant majority in a highly complex class structure. Royal patronage had been used to control the Irish parliament long before George III used the same tactics to buy the loyalty of the King's friends in England.

One mystery of Irish history for twentieth century scholars is how the narrow Protestant oligarchy, looking out for its own interests, nevertheless developed a Whig ideology (supporting constitutional principles and Irish interests opposed to the principles and interests of Protestant England) in writers and politicians like Molyneux, King, Swift, Lucas, Burke, and Grattan. See generally J. Beckett, *Protestant Dissent in Ireland, 1685-1780* (1946); F. James, *Ireland in the Empire, 1688-1770*, 80-87 (1973); C. O'Brien, *The Great Melody: A Thematic Biography of Edmund Burke* (1992); and M. Elliott, *Wolfe Tone, Prophet of Irish Independence* (1989).

<sup>47</sup>John Dunning (a Shelburne Whig) made this resolution, which was carried in the Westminster Parliament by a vote of 233 to 215, on April 6, 1786. See generally O'Brien, *supra* note 46, at 212-13.

<sup>48</sup>See *id.* at 501-03; Mitchell, *supra* note 44, at 153-238; and O'Gorman, *supra* note 44, at 90-173.

<sup>49</sup>Browne wrote, "The English Constitution does not object to virtue — it rejoices in it: But its wisdom is, that it can abstract from virtue — it has provided for its absence, and depends more upon

at a time when Irish history and language had not yet become subjects of academic interest.<sup>50</sup>

As an enlightenment Whig, Browne was greatly interested in public education<sup>51</sup> and the protection and encouragement of his spiritual and intellectual home, Trinity College. As the great-grandson, grandson, and son of clergymen of the established church, his favorable attitude toward "tithes" is not difficult to understand, despite its violation of Whig principles.<sup>52</sup>

In other public issues, Browne was interested in the possibilities of farming cooperatives and examining the problems of Irish land tenures, an issue that Ascendancy politicians would regard as very dangerous.<sup>53</sup> He viewed all of these potential changes, however, through the lens of their effect on the welfare of the Protestant-landed interest, which he considered to be the backbone of the Constitution.

We do not find Arthur Browne's name in the list of fifty-six barristers and solicitors among the 425 names in the Dublin Society of United Irishmen in the 1790s.<sup>54</sup> While he might have supported its goal of the inclusion of

conflicts of parties and the balancing of powers to produce its salutary ends." Sketches, *supra* note 21, at 233.

Browne's views on the connection of Ireland to England may have resembled those of Edmund Burke, who wrote, "I cannot conceive how a man can be a genuine Englishman without being at the same time an Irishman . . . [and] I think the same sentiments ought to be reciprocal on the part of Ireland." Dickson, Keogh & Whelan, *supra* note 36, at 103.

A last speculation is that Browne would have agreed with John Adams, Whig revolutionary yet admirer of natural aristocracy and second President of the United States (1797–1801), that England's constitution, "the best, the most equal, the freest in the world," had created a democracy disguised as a monarchy. See Wood, *supra* note 27, at 48.

<sup>50</sup>Imperialism, *supra* note 36, at 153–54. Arthur Browne died before the first Gaelic Society was organized in Dublin in 1807. The teaching of the Irish language had begun informally in Trinity College in the late seventeenth century to preach the reformed religion to the people, but had lapsed in the eighteenth century when it was thought that it might soon disappear. The first professorship in the Irish language was set up in the Divinity School in 1846. See McDowell & Webb, *supra* note 31, at 9–10, 189–191.

<sup>51</sup>Imperialism, *supra* note 36, at 94, and Public Opinion, *supra* note 36, at 40, 116, 232.

<sup>52</sup>See O'Higgins, *supra* note 2, at 258–59; Public Opinion, *supra* note 36, at 123–24; and Froude, *supra* note 37, at 481. The tithe was a charge upon the produce of certain agricultural lands paid to support the clergy of the established church. In Ireland it was not owed by the Protestant landowners but rather by the Roman Catholic tenant. The "Tithe War" of 1831–38 and the disestablishment of the Church of Ireland in 1869 brought an end to the tithe system.

<sup>53</sup>See Public Opinion, *supra* note 36, at 123–25; Imperialism, *supra* note 36, at 523–24; and Froude, *supra* note 37, at 479.

<sup>54</sup>McDowell, The Personnel of the Dublin Society of United Irishmen 1791–94, 2 *Ir. Pol. Stud.* 12–53 (1940–41). The Society was suppressed by the Irish government in May 1794 but continued as a secret society into the early nineteenth century. It was made up of members of all religious traditions who realized that division of the people on religious grounds could only assist the oppressor.

In the ritual of the United Irishmen, the questions and answers used to identify fellow members were:  
Q. What have you got in your hand?

Irishmen of every religious persuasion in government, French republicanism—with its abolition of tithes and confiscation of church lands (let alone the cult of the Supreme Being)—would have repelled him.

Nevertheless, the keystone of his parliamentary career and practice was devotion to civil liberties.<sup>55</sup> Relief of Roman Catholics from legal oppression was one of the interests Browne vigorously supported.<sup>56</sup> This was an elusive goal, for despite partial success—such as the repeal of restrictions on the practice of the professions by Catholics, ownership of property, and the grant of the vote in parliamentary elections, together with the establishment of the Roman Catholic college at Maynooth—Grattan's Parliament could not achieve parliamentary equality for Catholics because a Roman Catholic could not be a member of the Irish Parliament.<sup>57</sup>

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A. A green bough.

Q. Where did it first grow?

A. In America.

Q. Where did it bud?

A. In France.

Q. Where are you going to plant it?

A. In the crown of Great Britain.

T. Pakenham, *The Year of Liberty: The Story of the Great Irish Rebellion of 1798*, frontispiece (1969).

<sup>55</sup>McDowell & Webb, *supra* note 31, at 81 ("he courted ministerial displeasure on more than one occasion by standing up for civil liberties.'). The unsigned obituary in *The Hibernian Magazine*, *supra* note 39, said: "[He] used the most vigorous intellectual efforts to protect the liberty of the subject against the encroachments of power and oppression. His countrymen will not readily forget the zeal with which he protected the freedom of the press, that grand bulwark of our liberties."

<sup>56</sup>It is uncertain how vigorously the penal laws of 1690–91 against Roman Catholics were being enforced throughout Ireland by the time Arthur Browne arrived in 1772. Nominal conformity to the established church was one method of evasion. The growth of a Roman Catholic merchant class would also lead to the end of economic persecution. The unsigned obituary that appeared in *The Hibernian Magazine*, *supra* note 39, commented that on "Catholic emancipation and the suspension of the habeas corpus, he exerted himself to the astonishment of every one who heard him." See also *Imperialism*, *supra* note 36, at 414–15.

The Irish Parliament never admitted practicing Roman Catholics to membership, and in fact membership of Catholics in the United Parliament at Westminster was not achieved until 1829. Religious censuses of eighteenth century Ireland are based on questionable estimates. In 1834, before emigration and famine affected the numbers, a census showed that of a total population of 7,943,940, there were 6,427,712 Roman Catholics (81%), 852,064 Church of Ireland adherents (11%), and 642,356 Presbyterians (8%). *First Report of the Commissioners of Public Instruction, Ireland* (1834).

<sup>57</sup>British Catholics had received concessions lifting ancient prohibitions in 1791 as Catholicism and French imperial policies were no longer synonymous because of French republican hostility to the Roman Catholic church. Efforts at Catholic relief in the Irish Parliament in 1793 were still controversial because of seventeenth century Protestant confiscation of Catholic land, but in that year the franchise in parliamentary elections (subject to property qualifications) was extended to Roman Catholics, together with the right to hold all civil and military offices (with the exception of the highest state offices, high court judicial appointments, and the office of sheriff). The right to take degrees at Trinity College and to keep and bear arms (subject to an oath of allegiance) also were extended. An unexpected consequence of the repeal of anti-Catholic legislation was the rise of the Orange Order (1795).

Prior to the establishment of Maynooth College in 1795 to train men for the Roman Catholic priesthood, it was necessary for aspirants to be sent to France to study and even to be ordained. In the

Nationalist Ireland became convinced that Grattan's Irish Parliament was incapable of leading the way into a democratic and just society. The majority Catholic population, rendered landless by confiscation in the seventeenth century, was muzzled or muted by threats of Protestant persecution in the eighteenth century. Catholic businessmen would find a strong public voice in the 1790s in the Catholic Committee, served by the pen of Wolfe Tone, while Arthur Browne, descended from priests of the established church, spoke out vigorously in favor of Catholic emancipation.

During the war with France, Arthur Browne responded to the direct threat of a French invasion at Bantry Bay by organizing and leading a corps of Trinity College students and fellows.<sup>58</sup> The 1798 Revolution, however, brought confrontation between British suppression of armed rebellion with great violence and the civil rights of those accused of treason and other crimes. Browne was strongly opposed to martial law and the trial of political prisoners by courts martial while the King's courts remained open.<sup>59</sup> In this, his constitutional views were similar to those of John Philpot Curran, defense counsel to the United Irishmen leaders in the summer of 1798 and later counsel to Wolfe Tone.

Tone, wearing a French uniform, had been captured at the battle between English and French warships in Lough Swilly on October 12, 1798. Taken to Dublin and charged with treason, Tone was tried by court martial on Saturday, November 10, 1798, found guilty, and condemned to be hanged on Monday. On Sunday, Tone attempted to take his own life. At the first opportunity, Curran brought the writ of habeas corpus to free Tone from military custody. It was granted on Monday morning, November 12, by Chief Justice Kilwarden (Arthur Wolfe) before the scheduled 1 p.m. execution. In the meantime, the execution was postponed, to the dismay of

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early eighteenth century Protestants viewed this French training as treasonable because of French support for the dethroned House of Stuart. By the end of the century it was fear of French republicanism and deism that compelled the Protestant regime to keep young Irishmen at home for their priestly training and ordination.

<sup>58</sup>The French fleet of forty-three vessels with 16,000 troops appeared off Bantry Bay in December 1796 under the command of General Hoche. Contrary winds and violent weather prevented any landing in force, but the country was aroused to the danger of revolutionary France using Ireland to distract the British from the war in Europe. Arthur Browne was unanimously elected Captain Commandant of the Trinity College Corps (consisting of 300 men). He then studied military strategy and tactics which he condensed into a thirty-five page booklet which he reproduced in *Miscellaneous Sketches* as "Extractions from Guibert." See *Sketches*, supra note 21, at 319-54. His association with the corps continued until his death.

<sup>59</sup>Imperialism, supra note 36, at 597. During the 1798 debate on martial law Browne observed that public opinion had lost interest in parliamentary proceedings. See *infra* text accompanying note 70.

The American case that states this principle is *Ex Parte Milligan*, 71 U.S. (4 Wall.) 2 (1866). In a broad opinion, the Court ruled that a military commission could not try and convict civilians in Indiana on charges of conspiracy to commit treasonable conduct while the civil courts remained open.

the Earl of Clare, because the suicide attempt had left Tone too weak to stand. When Tone died from his self-inflicted wound a week later, the question of the validity of courts martial while the civil courts were still open was left unanswered.<sup>60</sup> Several years later, on July 26, 1803, Kilwarden was murdered on a Dublin street during the unsuccessful uprising led by Robert Emmet, fiancé of the daughter of John Philpot Curran.

The revolution of 1798 brought an official effort to purge Arthur Browne from Trinity College because of his Whig beliefs, forcefully expressed. There had been a brawl in the college involving two scholars who, if not members, were at least sympathetic to the United Irishmen. The two scholars were expelled over the vigorous protest of Browne as Senior Fellow. This incident was one of the factors in the decision to have a "visitation," or purge, of the college by John Fitzgibbon, the Earl of Clare, Vice Chancellor of the College, and Lord Chancellor of Ireland. He was also the leader of the Tory party's right wing and a strong supporter of the connection, even subservience, to England. While Arthur Browne was one of the targets of Fitzgibbon's persecution, the end result was simply a public rebuke, in contrast to the expulsion of twenty undergraduates and the censure and degradation of two Fellows.<sup>61</sup>

#### *D. The Union of the Kingdoms of Ireland and Great Britain*

There can be little doubt that Arthur Browne's reputation as an Irish patriot suffered in the eyes of nationalist Ireland in the nineteenth century because, between January 1799 and February 1800, he changed his mind about the union of Ireland and Great Britain.<sup>62</sup>

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<sup>60</sup>Elliott, *supra* note 46, at 392–402. Tone's trial is reported in 27 T. Howell, *A Complete Collection of State Trials* 616–26 (1809).

<sup>61</sup>McDowell & Webb, *supra* note 31, at 76–78. The unsigned obituary in *The Hibernian Magazine*, *supra* note 39, noted:

Nor were his [Arthur Browne] principles confined within the walls of parliament; he avowed them out of doors, and his ingenuous avowal soon roused the suspicious and petulant indignation of lord chancellor Clare, who when he visited the university in 1798, thought proper to direct insinuations against the character of dr. Browne. But the fair fame of a just senator was not tarnished by the aspersions of a statesman who libelled every one that chanced to hold an opinion different from his own; it was too strong to break at the feeble blast of a black inquisitor, and it happily survived his utmost malevolence. . . . He [Browne] was a professed enemy to the abuse of power, and always stood forward the champion of the people, when measures were proposed in the house of commons, which he conceived injurious to their rights or prejudicial to their interests.

<sup>62</sup>The essential study is G. Bolton, *The Passing of the Irish Act of Union* (1966). The Irish legislation is in 40 Geo. 3, ch. 38; the English legislation is in 39 & 40 Geo. 3, ch. 67. See also A. Browne, *Remarks on the Terms of the Union* (1800), and Anonymous, *Some Documents relative to the late Parliamentary Conduct of Doctor Browne, Representative in Parliament for the University of Dublin* (1800). Cf. J. Barrington, *The Rise and Fall of the Irish Nation* (1833). A cynical view of the January 1799 negative vote is that it was merely for the purpose of raising the price to be paid for the February 1800 vote.

In January 1799, with what was left of the Whig party, Browne successfully opposed the suppression of the Irish parliament and the union of the Irish church and state with Great Britain. His colleagues at the bar and in the university were similarly opposed to the union and remained so after Browne changed his mind. The question is whether his 1800 vote was bought in exchange for office, preferment, or cash. Browne always denied the charge.

In 1783, when Arthur Browne entered political life, there was some hope that Ireland, beginning to control her own destiny, could resolve her economic and social problems. By 1798, "risings" of the United Irishmen had occurred and had been suppressed with great violence by the Irish government and the British military. The bloodshed at Wexford and Antrim, together with the unsuccessful French invasion in Mayo, would shatter the dreams of the United Irishmen for a new Irish nation undivided by religion or class. An occupying army, eventually composed of 100,000 troops, executed the Protestant and Catholic leaders of the United Irishmen and probably killed 30,000 Irish Catholic peasants. The British military presence also ended the possibility of independence achieved with the assistance of French allies. In 1798, the Year of Liberty had become the year of crushing defeat.<sup>63</sup>

William Pitt, the British Prime Minister,<sup>64</sup> with an unshakable majority in the British parliament, had determined that the only way to prevent a recurrence of rebellion in Ireland was the union of the kingdoms and the suppression of the Irish parliament. To carry out this policy Cornwallis and Castlereagh in Ireland were instructed to press the matter until it carried, no matter how often defeated; thus, the proposal's defeat in January 1799 was merely the first skirmish in a long campaign.

Pitt's solid Tory majority at Westminster meant that his only difficulty in achieving the union would come from the corruptible Irish House of Commons, which was expected to be "bought off" in the traditional manner (by titles, jobs, honors, and cash). To unify the kingdoms, forty-eight peerages, along with government jobs, military appointments, ecclesiastical promotions, and a cash outlay of £1,260,000 (to compensate the owners of

<sup>63</sup>Pakenham, *supra* note 54, at 263–97. A splendid novelistic treatment of the 1798 rising is T. Flanagan, *The Year of the French* (1979).

<sup>64</sup>William Pitt the Younger (1759–1806), originally a Whig like his father the Earl of Chatham, became Prime Minister in 1783 at age twenty-two. By 1796, he had become the symbol of implacable Tory opposition to the French Revolution and its "Reign of Terror." After the 1796 election he could regularly count on 250 votes, more or less, opposed by only ninety Whig votes, more or less. The opposition Whig party had shattered after the split between Edmund Burke and Charles James Fox over the French Revolution in 1791. Pitt served as Prime Minister for twenty-two of his forty-seven years. See generally 2 J. Ehrman, *The Younger Pitt* (1983); K. Feiling, *The Second Tory Party 1714–1832* (1959); and O'Brien, *supra* note 46, at 484–96, 501–03.

pocket boroughs) were used to change the negative vote of January 1799 to an affirmative decision in February 1800.<sup>65</sup> Accordingly, on January 1, 1801, the Irish parliament ceased to exist and a new Union Parliament at Westminster began the unhappy experience of attempting to govern both kingdoms.

The change of mind of the Irish Commons was not, however, a simple matter of massive bribery. One-fifth of the membership of the House of Commons had changed in the intervening year, and the disorganized Irish Whigs had no hope that the entrenched Tory ministry in London could be replaced in the foreseeable future by the English Whig party, which was fractured by war and revolution. Although nineteenth century nationalist Ireland chose to believe that only massive corruption could have persuaded the Irish parliament to agree to its final dissolution, twentieth century scholars view the efforts of Castlereagh as a simple continuation of the methods traditionally used to control the fractious and disputatious parliament.<sup>66</sup>

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<sup>65</sup>The political task of obtaining the consent of the Irish Parliament to its own destruction (without an election on the issue) was handled by Lord Charles Cornwallis (1738–1805), the Viceroy, whose reputation as the general who had surrendered the British army to George Washington at Yorktown in 1781 had been resuscitated by successes as Governor General in India (1786–93). Having sold the union on the expectation of Catholic emancipation in the unified parliament, where Catholics would be a smaller percentage of the general population, he resigned in 1801 when George III refused to consent to Catholics in the Westminster Commons because of an imagined derogation from his coronation oath to support the Protestant faith.

The actual details of changing the 1799 negative vote into the 1800 affirmative vote were handled by the Chief Secretary, Robert Stewart, Viscount Castlereagh (1769–1822). A Dublin-born politician who possessed estates in Ulster as the Marquis of Londonderry, Stewart served in the Irish House of Commons from 1790 to 1801. Like Cornwallis, he resigned his Irish office on the King's refusal to carry out Catholic emancipation. Castlereagh subsequently had a brilliant career in the Westminster Parliament as leader of the House of Commons (1812–22) and the successor of Pitt as fierce opponent of Napoleon (whom he exiled to Saint Helena). In despair and stressed beyond endurance, he cut his throat and died as his domestic policies were being successfully challenged. See J. Derry, *Castlereagh* (1976), and I. Leigh, *Castlereagh* (1951). Castlereagh described his task, "to buy out and secure to the crown for ever, the fee simple of Irish corruption."

Cornwallis described the purchase of the Irish parliament in equally colorful terms, "My occupation is to negotiate and job with the most corrupt people under heaven. I despise and hate myself every hour for engaging in such dirty work, and am supported only by the reflection that without a union the British Empire must be dissolved." 3 Froude, *supra* note 37, at 501.

Somerville [& Ross] absolve Browne of corruption in *An Incorruptible Irishman: The Life of Charles Bushe* 122 (1932): "He [Plunket] began by falling upon the apostasy of Dr. Arthur Browne, an American, member for the Dublin University, who having been a violent anti-Unionist, had recently been moved . . . by sincere conviction to change his opinion. Having demolished the unhappy Browne with a completeness worthy of Attila the Scourge of God, Plunket proceeded to lay bare the past history of . . . the wicked plot of the union."

<sup>66</sup>"The anti-unionists then failed to sustain their [1799] victory because they were unable to agree on any constructive alternative to union, owing to the conflicting elements on their side. This failure, and not corruption, ensured the Government's eventual victory. . . . The Government's majority in 1800 was principally secured from interests which had hitherto stood neutral." Bolton, *supra* note 62, at 218–19.

Jonah Barrington, sometime admiralty judge, gossip, and raconteur of eighteenth century foibles to a righteous nineteenth century audience, had lists of those members of parliament who could be bought (and their price) and those who could not be bought. He viewed Browne's change of vote as "one of the most unexpected and flagitious acts of public corruption."<sup>67</sup> The modern historians of Trinity College, however, take a different view. Professors McDowell and Webb say:

On the question of the Union he (Arthur Browne) hesitated for some time, but at the final vote, although he realized that most of his constituents took a contrary view, he came down in favour of it from a conviction that it gave the best promises of peaceful progress for Ireland.

They conclude that the only thing Arthur Browne received for his affirmative vote for the Union was the loss of his seat in Parliament.<sup>68</sup>

But there was another reason for Arthur Browne's change of mind: public opinion. Cornwallis had reported the blood-thirsty attitude of the Irish-Protestant Parliament in 1798 as "averse to all acts of clemency" and described its policy as one that "would drive four-fifths of the community

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<sup>67</sup>Barrington, *supra* note 62, at 460. Barrington in full wrote:

One of the most unexpected and flagitious acts of public corruption was that of Mr. Arthur Brown (sic), member for the University of Dublin. He was by birth an American, of most gentlemanly manners, excellent character, and very considerate talents. He had by his learning become a senior fellow of the University, and was the law professor. From his entrance into Parliament he had been a steady, zealous and able supporter of the rights of Ireland—he had never deviated; he would accept no office; he had attached himself to Mr. Ponsonby, and was supposed to be one of the truest and most unassailable supporters of Ireland.

In the session of 1799 he had taken a most unequivocal, decisive, and ardent part against the Union, and had spoken against it as a crime and as the ruin of the country: he was believed to be incorruptible. On this night he rose, crestfallen and absorbed at his own tergiversation; he recanted every word he had ever uttered—deserted from the country—supported the Union—accepted a bribe from the Minister—was afterwards placed in office, but shame haunted him—he hated himself: an amiable man fell a victim to corruption. He rankled, and pined, and died of a wretched mind and a broken constitution.

In his list of rewards to barristers, Barrington wrote "Mr. Arthur Browne, Commission of Inspector 800 £ per annum." That same list notes two rewards of £5000 per annum; eight rewards of £3300 per annum; one of £1200 per annum; fifteen judgeships with rewards of £600 apiece per annum; two commissions of inspection (like that of Arthur Browne) at £800 per annum; an office in the chancery at £500; an office in the custom house at £500; and a secret pension at £400.

<sup>68</sup>McDowell & Webb, *supra* note 31, at 81. The obituary in Faulkner's *Dublin Journal*, *supra* note 42, said:

Upon the great question of Union, he thought (as he always thought for himself) that it was the only measure which promised security to the Constitution in Church and State and tranquillity to the Country—on these grounds he acted, and though assailed with the most incessant and virulent calumny, by an active and malignant party, he gave to the measure of Union, the full support of his vote and his talent.



into irreconcilable rebellion.”<sup>69</sup> Not only did the Irish Parliament make no effort to remedy any of the grievances of the majority of the population, it was willing to substitute martial law and military government for civil liberty. Thus, Arthur Browne came to believe that the Irish Parliament had forfeited the confidence of the people. He said so clearly in a memorable speech in the Irish House of Commons:

Had I seen, after the rejection of the union last year [1799], any measures brought forward to conciliate the people, to heal the distractions of the country, had I seen any reminiscence of that spirit, which produced the constitution of 1782, coming forward to preserve it, I should not have listened to proposals of union. But for gentlemen to suppose that if Parliament does not support itself it can be supported; to suppose that, without domestic virtues, the nation will trouble itself about its existence, is absurd. The truth is, apathy has gone through the nation upon the subject; the thing is evident—in 1782 the idea of a union could not have been brought forward; in 1785, it could not have been brought forward; why can it now? Because then the Parliament had the warm affection of the nation, now it has not.<sup>70</sup>

Browne’s subsequent appointments to the Board of Accounts in 1801 and to the office of Prime Serjeant in 1803 were tainted with the scandal of the final corruption of the Irish Parliament. Yet these offices, although not paltry, hardly compare with the lavish rewards made by the government to change the votes of uncertain and uncommitted members.

Political opposition to the union was not eternal. Within a short time, the most vociferous opponents were accepting offices from the Crown. Charles Bushe became attorney general and later chief justice of Ireland; John Philpot Curran became master of the rolls; William Plunket became solicitor general, attorney general, chief justice, and lord chancellor; and John Foster, speaker of the Irish House of Commons (1785–1801), was named chancellor of the Irish Exchequer. Arthur Browne’s preeminence at the bar and in teaching, together with his wide circle of friends, classmates, and former students, would surely have guaranteed the few honors he received in the last years of his life.

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<sup>69</sup>Letter from the Lord Lieutenant to the Duke of Portland, July 8, 1798, quoted in Reid, *supra* note 27, at 148 (quoting F. Dermot, *Theobald Wolfe Tone: A Biographical Study* 53 (1939)). Browne’s 1800 views may be said to resemble those of Edmund Burke in 1780–81, supporting genuine independence for America but rejecting independence for the dominant ascendancy in Ireland that was thereby free to perpetuate its domination over the oppressed majority of the Irish people. See O’Brien, *supra* note 46, at 197–201.

<sup>70</sup>Bolton, *supra* note 62, at 172 (quoting Report of Debate in The House of Commons of Ireland on Wednesday and Thursday the 15th and 16th of January, 1800, at 134).

*E. The Legal Practice of Arthur Browne (1784–1805)*

*1. Admiralty Cases*

In the fifth appendix to his text, Browne discussed “Admiralty Cases Decided in Ireland” and reported on some of his own cases as advocate (barrister in the admiralty court). He had begun his practice in admiralty in 1784 when, having qualified as a barrister at Lincoln’s Inn, and having received the LL.B. and LL.D. from Trinity College, he was admitted to practice in those Irish courts that were based on Roman law principles. In many of these cases Arthur Browne acted for shipowners.

In *Corish v. The Murphy*,<sup>71</sup> Browne can be found arguing against admiralty jurisdiction. According to Browne, a bottomry bond executed by his client, the half owner of a ship, in exchange for a loan of £99 44’ to buy out the other half owner, was not a bottomry bond within admiralty jurisdiction because the purpose of the loan had no connection with a voyage. Since there was no maritime contract, Browne believed that there was no admiralty jurisdiction.<sup>72</sup>

Browne further argued that a bottomry bond must contain words expressly binding the vessel (a fact that was absent in his client’s case). Browne lost on the latter point and on the general jurisdictional point, since the facts proved did not mention where the contract for the bottomry bond was made (whether on land or at sea) and the court was not willing to presume against its own jurisdiction.<sup>73</sup>

A question of admiralty procedure was involved in *Wood v. The Hannah*.<sup>74</sup> *The Hannah* was captured by a French privateer off the coast of Norway, condemned as prize in the French court of vice admiralty in the French consulate at Christiansand (Oslo), and sold at public auction to the defendants, who rebuilt the vessel and registered her as a Danish (neutral) vessel. On a voyage to Belfast her former owners arrested the vessel under the process of the Irish admiralty court.

Browne sought a writ of prohibition from King’s Bench against the admiralty proceeding, arguing for the Danish owners that the issue was one of the common law of title to property and that the case concerned things done upon the land (condemnation and sale) and not on the high seas.<sup>75</sup> Browne also argued that only the English admiralty court, not the Irish court,

<sup>71</sup>2 Browne at 530 (1795).

<sup>72</sup>Id. at 531. See *infra* notes 157–70 and accompanying text.

<sup>73</sup>2 Browne at 532. See *infra* notes 160–61 and accompanying text. As will be shown, interpretation of the statutes of Richard II constituted a major part of admiralty disputes even in Browne’s time and continues today.

<sup>74</sup>2 Browne at 535 (1799).

<sup>75</sup>Id. at 536.

had jurisdiction in prize and that only King's Bench could determine the jurisdiction of foreign courts. Based on these arguments, Browne won his prohibition.<sup>76</sup>

Browne was not averse to taking any advantage that the law might provide, as shown by the interesting collision case *Briggs v. The Perseverance*.<sup>77</sup> In thick fog in the Irish Sea, the brig *Ann*, close hauled, was proceeding at five knots on a south-southwest course with the wind from the southwest or southwest by west. The brig *Perseverance*, going before the wind (or going large), was proceeding at seven knots on a north-northeast course. *Perseverance* had nine crew on deck with proper lookouts while the *Ann* had a helmsman and no lookouts. The customary Rules of the Road required the *Perseverance* (going large and thereby able to maneuver) to give way to the *Ann* (close hauled).<sup>78</sup> As a result of the collision, the *Ann* sank. As far as can be determined, the case was tried on the evidence of the survivors of the *Ann* alone.

Without the retired Masters (the Elder Brethren of Trinity House) to advise the court, as in London,<sup>79</sup> the Irish judge impanelled an assessor and two party-appointed advisors; the assessor being a serving senior captain of the Royal Navy and the two advisors being retired officers thereof. Judgment was in favor of the *Ann* against the *Perseverance*.

At this point, confusion arose because the process of the court was against the brig *Perseverance* of Swansea, George Tetherly, master, while the party defending (and losing) the trial was the brig *Perseverance* of Appledore, John Tetherly, master. The plaintiffs (the owners of the *Ann*) had been advised of their error before trial but had persisted in order to preclude the testimony of John Tetherly.

Now Browne moved to prevent amendment of the pleadings and, more importantly, the bail bond given in place of the continued arrest of the vessel. Browne may have been arguing on behalf of insurers, but that is unclear. In any event, Browne contended that since the case had been tried against the Swansea brig, there could be no mere amendment to substitute the Appledore brig. The trial court permitted amendment and Browne

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<sup>76</sup>*Id.* at 557. In *Metcalf & Wanton v. Weston*, 8 R.I. Adm. Papers 146 (1761), the admiralty court in Newport condemned a cargo but the Rhode Island Superior Court issued a writ of prohibition, indicating that the conflict over admiralty jurisdiction could also be found in the colonies. Similarly, in a 1747 case where admiralty was prohibited, the dispute between common law and admiralty was decided in an extra-legal arbitration. See Wiener, *supra* note 13, at 54–56.

<sup>77</sup>2 Browne at 539 (1795).

<sup>78</sup>*Id.* at 540. Cf. 1972 COLREGS, Rule 12.

<sup>79</sup>2 Browne at 541. In admiralty cases the judge may take the advice of the Elder Brethren on points of seamanship, although they are not fact-finders. When the judge reaches a conclusion different from the Elder Brethren, the opinion typically explains the reasons for so doing in substantial detail.

appealed, arguing that an amendment was no longer possible. The appeals court, however, rejected his argument.<sup>80</sup>

## 2. Civil Liberties

The case of *Daly v. Magee*<sup>81</sup> deals with censorship and suppression of the press. Arthur Browne represented John Magee, a Whig editor of the *Dublin Evening Post*, a lively, provocative, and arguably even vicious newspaper. Magee had been sued by Richard Daly, manager of the Theater Royal, for libel. A procedure known as a “fiat”<sup>82</sup> was used against Magee. Fiats were common law writs, similar to the more familiar *capias ad respondendum*,<sup>83</sup> by which the defendant’s body was seized by the sheriff to answer a writ of trespass.

The Lord Chief Justice (Earlsfort, later Lord Clonmel) set an excessively high bail which Magee could not make. He therefore remained in the sheriff’s prison for six months until the trial, at which he was held liable to Daly for defamation in the amount of £200. Although Browne had sought to portray the case as one involving the unwarranted persecution of the press, he lost.

Having been defeated by a biased judge in an unusual proceeding in the trial court, Arthur Browne carried the issues to the House of Commons, where a violent but inconclusive debate took place. George Ponsonby simultaneously sought to impeach the Chief Justice because of this case, but again a violent debate broke out and the matter was left unresolved.<sup>84</sup>

Although the outcry produced by the *Magee* case ultimately resulted in the discontinuation of fiats being issued against the press,<sup>85</sup> the Irish government carried on in its effort to suppress unfriendly criticism by any means fair or foul. The *Magee* case and the reaction it provoked also led Tone to produce his first political pamphlet, entitled “A Review of the Conduct of Administration During the Last Session of Parliament.”<sup>86</sup>

<sup>80</sup>2 Browne at 543 (1798).

<sup>81</sup>O’Higgins, *supra* note 2, at 259 (citing *The Trial of John Magee for Printing and Publishing a Slanderous and Defamatory Libel against Richard Daly* (1790)).

<sup>82</sup>*Id.* at 260 (citing Mr. Sheridan’s Argument in the Case of Daly against Magee on a Motion to Discharge the Defendant on Crown Bail (1790)).

<sup>83</sup>The writ of *capias ad respondendum* directed the sheriff to take the person or the thing mentioned in the writ into custody to hold until physical custody could be replaced by a bond or some other form of surety. See Sweeney, *Abolition of Wage Garnishment*, 38 *Fordham L. Rev.* 197, 200 (1969).

<sup>84</sup>See *supra* note 81.

<sup>85</sup>*Id.* at 260.

<sup>86</sup>See Elliott, *supra* note 46, at 83–86.

*F. Parallels in the Career of William Scott*

There are many similarities in the careers of Arthur Browne and Sir William Scott (Lord Stowell), to whom the second or admiralty volume of Browne's treatise is dedicated.<sup>87</sup> Scott, who was born in 1745, was eleven years older than Browne. There were also substantial differences in their backgrounds: Scott was a "high Tory," violently opposed to political change and especially opposed to any form of Catholic emancipation, while Arthur Browne was an independent Whig, suspicious of Tory government and supportive of Catholic emancipation. Further, Scott inherited a substantial fortune from his father, while Arthur Browne made his own living by teaching and practice. Both men, however, benefited from lucrative appointments from the established churches and their courts.

William Scott began his university career in 1760 at Corpus Christi, Oxford, when he was fifteen. He received his A.B. in 1764, became a Fellow of University College in 1765, and was made a Reader in Ancient History in 1774. In 1767 he received his A.M., in 1772 his B.C.L., and in 1779 his D.C.L. Scott entered the Middle Temple in 1777 and was called to the Bar in 1781. In 1779 he began the "year of silence," or unpaid observer status, at Doctors' Commons, after which he assumed active practice as an advocate at Doctors' Commons.

In 1790, when he was forty-five, Scott entered the House of Commons representing a pocket borough (in 1801 he became a member for Oxford University). In 1821, upon becoming Lord Stowell, he was elevated to the House of Lords. In addition to his parliamentary posts, Scott in 1798 was appointed Judge of the High Court of Admiralty—a position he was to hold until his retirement twenty-nine years later. In 1836, Scott died at the age of ninety.

Scott's younger brother, John (Lord Eldon), a longtime friend and supporter of William Pitt the younger, had an even more brilliant career. Appointed Lord Chief Justice in 1799, he became Lord Chancellor in 1801. In these positions John championed equity practice and substantive jurisprudence but, like William, opposed every possible reform.

Undoubtedly William Scott had more practical experience than Browne, especially in view of his service as Advocate for the Navy (the Lords Commissioners for executing the office of Lord High Admiral) from 1782 and as King's Advocate from 1788. Browne, on the other hand, was able to devote more time to teaching and academic pursuits, leading to his synthesis of the subject in his text. Yet during his long time on the bench (including

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<sup>87</sup>See generally H. Bourguignon, *Sir William Scott, Lord Stowell, Judge of the High Court of Admiralty, 1798-1828* (1987).

seventeen years of the Napoleonic Wars), Scott became the authority on prize law and wrote enough admiralty judgments to fill almost eleven volumes of reported decisions, thereby assuring himself an enduring place in both England and America on the subjects of customary international law, prize law, and admiralty jurisprudence.

### III ANALYSIS OF "A COMPENDIOUS VIEW"

#### A. General Perspective and Methodology

Arthur Browne's treatise, *A Compendious View of the Civil Law and of the Law of the Admiralty*,<sup>88</sup> is in two volumes: the first, dedicated to his colleagues at Trinity College, deals with the civil law, that is, the Roman law of Justinian's *Corpus Juris Civilis* and proceeds from it into canon law;<sup>89</sup> the second volume, dedicated to Sir William Scott,<sup>90</sup> deals with the law of nations and the law of admiralty.

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<sup>88</sup>Volume I was published in Dublin in 1797; volume II followed in 1799. A revised and enlarged edition of both volumes appeared in London in 1802-03. This second edition was used in teaching admiralty at the Harvard Law School in 1830, see O'Higgins, *supra* note 2, at 264, and was often cited by the Supreme Court. An American edition (allegedly "with great additions") was released in 1840 by Halsted & Voorhies, a company of law booksellers located at the corner of Nassau and Cedar Streets in New York City. The American edition is essentially a copy of the 1802-03 London edition. If there were "great additions" it was in the changes made by Arthur Browne for the London edition. No changes seem to have been made by the publisher in the 1840 New York edition, despite the differences in legal systems. All citations in this article are to the London edition of Browne's work.

<sup>89</sup>The *Corpus Juris Civilis* (A.D. 534) was prepared by a committee of ten scholars under the Minister of Justice, Tribonian, at the order of the Emperor Justinian I (A.D. 483-565) in the years A.D. 528-534 at Constantinople. It is made up of four books: The Institutes, a treatise on law for beginning law students put together from the works of three earlier scholars: Gaius, Ulpian, and Paulus; The Digest or *Pandects*, an authoritative compilation of those elements of 1,000 years of Roman jurisprudence from the Kings, the Republic, and the Caesars regarded as still operative in 534 A.D.; The Code (or *Codex Iustinianus*) a collection of older imperial decrees having the force of law in 534 A.D.; and The Novellae or Novels, the new legislation (154 sections) of the Emperor Justinian, in Greek (the language of the Eastern Empire) but translated into Latin for use in the West as well as the East; fourteen additional statutes were added by Justinian's successors. An English translation of the work by Scott (1932) runs to 2,342 pages. See generally Berman, *The Origins of Western Legal Science*, 90 Harv. L. Rev. 894 (1977), and M. Cappelletti, H. Merryman & J. Perillo, *The Italian Legal System* 14-22 (1967). For the influence of Arthur Browne upon the civil law in America, see Stein, *The Attraction of the Civil Law in Post-Revolutionary America*, 52 Va. L. Rev. 403, 407, 425 (1966).

<sup>90</sup>As explained *supra* text following note 87, Scott did not become a peer until 1821. As a result, he was still Sir William Scott at the time Browne penned his dedication.

In a note preceding the history of admiralty, Browne wrote, "The author begs that he may not be accused of plagiarism, if on controversial questions he has adopted the very words of Lord Mansfield, and Sir William Scott, even at considerable length. Where can the reader tread so safely as in the footsteps of those most celebrated men, to vary from whose very modes of expression, when they can be had, would be miserable affectation of novelty, with total disregard of utility?" See Bourguignon, *supra* note 87, and F. Wiswall, *The Development of Admiralty Jurisdiction and Practice Since 1800* (1970).

The inclusion of all these subjects in a single work reflects the existing court structure in England where Doctors' Commons and its membership—judges, advocates (barristers), and proctors (solicitors)—had a monopoly on those parts of the law with Roman or civil law roots and without any common law tradition.<sup>91</sup> Thus, the members of Doctors' Commons practiced in the courts dealing with the probate and interpretation of wills, matrimonial disputes and divorce, the property disputes and discipline of the clergy of the established church, and the law of admiralty. There was no formal Doctors' Commons in Ireland, but there was a specialized bar whose members practiced in the equivalent courts based on Roman law.

The author defined his methodology as “the method and order adopted by Mr. Justice Blackstone . . . as nearly as the spirit of the two laws would possibly allow. . . .”<sup>92</sup> William Blackstone<sup>93</sup> published his *Commentaries on the Laws of England* in four volumes from 1763 to 1769, and even twenty-eight years later, when Arthur Browne wrote, that seminal treatise was still reverberating around the English legal world, perhaps in the same way that six centuries earlier the discovery of the complete but long-lost *Corpus Juris Civilis* had exploded on the Middle Ages and, by its methodology, changed the law of Western Europe for all time.<sup>94</sup>

The portion of Browne's text devoted to admiralty proceeded, after Blackstone's analysis, “to mark the great sources of the law of the admiralty in the civil law.”<sup>95</sup> Defending his combination of civil law with admiralty law in a single treatise, Browne wrote that all our principles are derived from

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<sup>91</sup>See G. Squibb, *Doctors' Commons: A History of the College of Advocates and Doctors of Law* (1977), and Wiswall, *supra* note 90.

<sup>92</sup>1 Browne at iii.

<sup>93</sup>William Blackstone (1723–1780) was trained at Pembroke College and later All Souls College, Oxford, prepared at the Middle Temple, and was called to the bar at the age of twenty-three in 1746. He retired from practice to lecture on the common law at Oxford, the first such formal lectures at an academic institution, and was the first holder of the Vinerian Chair of Law (1758–66). In 1761, he entered the House of Commons as M.P. for Hindon, later serving for Westbury. In Parliament his views were those of a country Tory, opposing repeal of the Stamp Act in 1766 and favoring the expulsion of John Wilkes in 1769. In 1770 he became Judge of the Court of Common Pleas. His “*Commentaries on the Laws of England*” appeared in four volumes from 1763 to 1769. Despite ferocious criticism from Jeremy Bentham in England, Blackstone remained required reading for American students of law in the first half of the nineteenth century.

Nevertheless, Browne could criticize Blackstone on a question of prize law, despite his admiration for Blackstone's system of analysis. “The truth is, Blackstone's *Commentaries* are a most useful, great and precious work, but by no means implicitly to be depended upon. Besides the political errors often marked in that great work, there are many legal ones.” 2 Browne at 217.

<sup>94</sup>The University of Bologna introduced the study of law in the twelfth century based on the complete text of the *Corpus Juris Civilis* in Latin. It has been speculated that the manuscript may have been found in the library of the Poggibonsi monastery, where it had been forgotten 600 years earlier. See P. Vinogradoff, *Roman Law in Medieval Europe* (1968); Cappelletti, Merryman & Perillo, *supra* note 89, at 14–22; C. Haskins, *The Renaissance of the Twelfth Century 193–233* (1957); and Berman, *supra* note 89.

<sup>95</sup>2 Browne at vi.

the laws of Rome, listing the nature and effects of contracts; of masters and mariners; average and contribution; collision of ships; shipwrecks and hypothecations. He also noted that admiralty practice was unintelligible without knowledge of the civil law since the court of admiralty "always proceeds according to the rules of the civil law, except in cases omitted."<sup>96</sup>

### B. Historical Basis and Summary

The work begins with speculation on the origin of the office of the Lord High Admiral<sup>97</sup> and the court established under that office.<sup>98</sup> It examines the Roman law<sup>99</sup> and the Rhodian law<sup>100</sup> before reviewing briefly the other authorities known at that time in Western Europe, such as the Laws of Oléron,<sup>101</sup> the Consolato del Mar of Barcelona,<sup>102</sup> the

<sup>96</sup>Id. at 507.

<sup>97</sup>Id. at 23–26. The first Lord High Admiral, according to Browne, may have been appointed by King John (about 1200), although some of the authorities cited by Browne date the first appointment from 1272, in the reign of Edward I. Holdsworth believes the first mention of an Admiral was in 1295. See 1 W. Holdsworth, *A History of English Law* 544 (2d ed. 1937). See also *infra* note 134.

<sup>98</sup>2 Browne at 28. Deputies of the Lord High Admiral were judges of the court from its early days. The Admiral was usually a powerful baron surrounded by clerical advisors and assistants.

<sup>99</sup>Id. at 34–38. Roman law is described as "sterile." Id. at 38. After referring to the *Lex Aquilia* and parts of the *Pandects* and Code, Browne summarizes its provisions: the ship and shipowner are liable for the master's contracts, id. at 35; fault liability applies in collisions except in cases of "accident," id. at 36; and the shipowner is liable for any loss of cargo (merchandise) and passengers' effects unless occasioned by shipwreck or pirates or any other causes which the civil law includes under *major vis*. Id. at 37.

<sup>100</sup>Id. at 38–39. The Rhodian Law is described as the earliest sea laws of which any traces now exist. Id. at 38. Scholars remain divided about the authenticity and content of Rhodian Law. See *The Rhodian Sea Law* (W. Ashburner ed. 1909); Benedict, *The Historical Position of the Rhodian Law*, 18 *Yale L.J.* 223 (1909); F. Sanborn, *Origins of the Early English Maritime and Commercial Law* (1930); Lobingier, *The Maritime Law of Rome*, 47 *Jurid. Rev.* 1 (1935); and Gornley, *The Development of the Rhodian-Roman Maritime Law to 1681, With Special Emphasis on the Problem of Collision*, 3 *Inter-Am. L. Rev.* 317 (1961).

<sup>101</sup>2 Browne at 39–40 (reproduced at 30 *F. Cas.* 1171). The Laws of Oléron allegedly were promulgated during the time of Eleanor of Aquitaine (1122–1204), who served as duchess of the region that included the port of Oléron at the mouth of the Gironde or Garonne River. Eleanor was married in turn to King Louis VIII of France (1137–1152) and King Henry II of England (1152–1189), establishing the legend that the Laws of Oléron, produced by the clerics who administered her court, were the foundation of maritime law in France and England. See generally Stinson, *Admiralty and Maritime Jurisdiction of the Courts of Great Britain, France and the United States*, 16 *Nw. U. L. Rev.* 1 (1921), and Runyan, *Rolls of Oléron and the Admiralty Court in Fourteenth Century England*, 19 *Am. J. Legal Hist.* 95 (1975).

<sup>102</sup>2 Browne at 41. A translation of the Consolato del Mar of Barcelona (thirteenth century?) can be found in S. Jados, *Consulate of the Sea and Related Documents* (1975). See also Smith, *The Llibre del Consolat de Mar: A Bibliography*, 33 *L. Lib. J.* 387 (1940). Its provisions for shipowners' liability for damage done to the cargo by rats is notable:

Art. 68 If any merchandise or cargo is damaged by rats while aboard a vessel, and the patron has failed to provide a cat to protect it from rats, he shall pay the damage; . . . if there were cats aboard the vessel while it was being loaded, but during the journey these cats died and the rats damaged the cargo before the vessel reached a port where the patron of the vessel could purchase additional



Laws of Visby,<sup>103</sup> and the Black Book of the Admiralty (the source book for England).<sup>104</sup>

Under the first title, "Perquisites of the Admiralty Court," there is a discussion of governmental rights in shipwrecks. Then the general title "Jurisdiction of the Instance Court" examines both contract jurisdiction, including charter parties, bills of lading, and seamen, and tort jurisdiction, including property rights in ships. A second chapter on the Instance Court deals with traditional maritime institutions: owners, masters, and mariners; cargo carriage; general average; and rights of security in ships.

A lengthy analysis of the prize court and the law of prize follows. Prize law had again become very active with the outbreak of the war with revolutionary France in 1793 and would continue until the cessation of the Napoleonic wars in 1815.

Court practice occupies the remaining third of the work, beginning with an historical essay on practice in the Roman courts followed by an examination of practice in the Instance Court, the prize court, the criminal jurisdiction, and the operations of the colonial vice admiralty courts, which customarily had a wider jurisdiction than the admiralty court in England.<sup>105</sup>

Browne briefly discussed the admiralty court of the Kingdom of Scotland, which also had a wider jurisdiction than in England<sup>106</sup> over "the seas, fresh water within flood and mark and in all harbors and creeks." This court also had jurisdiction in "mercantile causes, even where they are not strictly maritime." However, the statutory union with England in 1706 seems to

cats; [but] if the patron of the vessel purchases and puts aboard cats at the first port of call where such cats can be purchased, he cannot be held responsible for the damages. . . .

<sup>103</sup>2 Browne at 39-41. The Code of Visby, part of the 500 year old Hanseatic League of German merchants in northern European cities reaching from London to Novgorod, is reproduced at 30 F. Cas. 1189. (Visby is a walled city on the Swedish island of Gotland, south of Stockholm.)

<sup>104</sup>2 Browne at 42. The Black Book of the Admiralty is not a text but rather a compilation of sources for use by admiralty judges and practitioners. Sir Travers Twiss published it in four volumes in 1876.

<sup>105</sup>Id. at 490-95. See C. Ubbelohde, *The Vice Admiralty Courts and the American Revolution* (1960). See also Owen, *Admiralty Practice in the 19th Century*, 13 J. Mar. L. & Com. 147 (1982).

Admirers of the Aubrey/Maturin novels of Patrick O'Brian will appreciate the colloquy between Dr. Stephen Maturin and the deputy judge advocate at Gibraltar:

. . . Stephen asked him how, in naval courts, a suit for tyranny and oppression might be instituted in cases of extreme disparity of rank: . . . whether the matter would have to be referred to the High Court of Admiralty, the Privy Council or the Regent himself.

"Why, sir! . . . if the persecution were tortious and if it happened at sea, or even on fresh water or reasonably damp land, the Admiralty Court would no doubt have cognizance."

"Pray, sir, . . . just how damp would the land have to be?"

"Oh, pretty damp, pretty damp, I believe. The judge's patent gives him power to deal with matters in, upon, or by the sea, or public streams, or freshwater ports, rivers, nooks and places between the ebb and flow of the tide, and upon the shores and banks adjacent—all tolerably humid."

P. O'Brian, *The Far Side of the World* 51 (1984).

<sup>106</sup>2 Browne at 30.

have ended that court, admiralty jurisdiction thereafter being under the Court of Session or the Lord High Admiral (or the commissioners) of Great Britain respecting prize.<sup>107</sup>

Ireland had no Lord High Admiral, but Browne noted the existence "from time immemorial of an instance court of admiralty."<sup>108</sup> The Irish admiralty court was put upon a new footing in 1782, and by Article 8 of the 1801 Act of Union with Great Britain, the instance court for causes civil and maritime only was to continue, with appeals to the Irish court of chancery.<sup>109</sup>

### C. *Perquisites of Admiralty*

Chapter III on the "Perquisites of the Admiralty" deals mostly with the rights of the government after a disaster at sea (civil *droits*) and the rights of government in wartime (prize *droits*). The American edition of 1840 made no substantive changes in this chapter even though the rights of the Crown were inapplicable.

The civil *droits* are flotsam,<sup>110</sup> jetsam,<sup>111</sup> and lagan,<sup>112</sup> referring to the ship's cargo or passengers' goods; wrecks (i.e., the ship herself);<sup>113</sup> and derelicts<sup>114</sup> and deodands.<sup>115</sup>

The disputes between the Lord High Admiral and the Crown in Browne's time ceased with the transfer of these funds to the Exchequer and the Royal Navy (prize law now being codified by statute under the jurisdiction of a naval tribunal).<sup>116</sup> In the United States, however, the situation is complex. One component is the question whether the federal government was created

<sup>107</sup>Id.

<sup>108</sup>Id.

<sup>109</sup>Id. at 32.

<sup>110</sup>When goods (cargo or passengers' effects) thrown (or jettisoned) into the sea, in order to lighten a ship imperiled by storm, continue to float, they are called flotsam. See id. at 50.

<sup>111</sup>Similar to flotsam, but the goods sink and remain under water. Id.

<sup>112</sup>Lagan (or ligan) is the word used to describe goods which, under circumstances similar to flotsam and jetsam, are jettisoned voluntarily but are tied to a buoy so as to be recovered when the storm ceases. Id.

<sup>113</sup>Browne distinguishes the common law definition ("such goods as, after a shipwreck, are cast upon the land by the sea, and left there within some county"), id. at 46, from the admiralty definition of "wreck at sea" ("a ship totally disabled by the force of a tempest at sea, though she doth not founder, and though one or two of her crew may have been by accident left behind, so that she is not a derelict, and being a whole ship and not a fragment, is not usually called flotsam, it is commonly called a wreck"). Id. at 49. His summary of the distinction is, "floating wreck while the tide is in, is in the admiralty; stranded wreck when the tide is out, is in the king." Id.

<sup>114</sup>Meaning "boats or vessels forsaken or found on the seas without any person in them." Id. at 51.

<sup>115</sup>Meaning "things instrumental to the death of a man on shipboard, or goods found on a dead body cast on shore." Id. at 56.

<sup>116</sup>See the 1948 Prize Act, 12 & 13 Geo. 6, ch. 9. See generally C. Colombos, *The International Law of the Sea* 747-56 (6th ed. 1965).

after the independence of the component states, or whether the federal government (the Second Continental Congress) came before the independent state governments (replacing royal colonies). The federal government had not asserted the inherent rights of the crown in the civil and prize *droits* until 1978, when it claimed the sovereign prerogative as devolved from King George III.<sup>117</sup>

The Fifth Circuit Court of Appeals rejected the government's devolution theory, asserted in a dispute with a treasure salvor who was claiming artifacts, especially gold and silver treasure worth \$6,000,000, from the 1622 wreck of the Spanish ship *La Nuestra Señora de Atocha* off of the Marquesas Keys of Florida.<sup>118</sup> The court held that the law of finds had been correctly applied and affirmed title in the plaintiff, noting that the result would be the same under salvage law. There are, however, federal statutes dealing with the ocean areas where treasure seekers may be operating: the 1906 Antiquities Act,<sup>119</sup> the 1979 Archaeological Resources Protection Act,<sup>120</sup> the 1980 Maritime Sanctuaries Act,<sup>121</sup> and the 1987 Abandoned Shipwreck Act (ASA).<sup>122</sup> None of these applied to the *Treasure Salvors* case. To these more narrowly based statutes can be added the more general 1953 Outer Continental Shelf Lands Act<sup>123</sup> and the 1953 Submerged Lands Act.<sup>124</sup>

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<sup>117</sup>See *The Siren*, 80 U.S. (13 Wall.) 389 (1871), a claim of prize by the crew of a union naval vessel against a confederate blockade runner scuttled and fired by her crew on the day Charleston surrendered to union forces. The district court rejected the claim for prize, a decision which was later affirmed by the Supreme Court. In the course of the opinion Justice Swayne wrote:

In our jurisprudence there are, strictly speaking, no *droits* of admiralty. The United States have succeeded to the rights of the crown. No one can have any right or interest in any prize except by their grant or permission. All captures made without their express authority enure ipso facto to their benefit.

*Id.* at 393.

Much later, Justice Sutherland found the source of the foreign relations powers of the United States (and the President as the sole organ of foreign policy) outside the Constitution in the devolution of international sovereignty from George III to George Washington. See *Curtiss-Wright Export Corp. v. United States*, 299 U.S. 304 (1936). Justice Sutherland's historical theory has not stood up to critical analysis. See Levitan, *The Foreign Relations Power: An Analysis of Mr. Justice Sutherland's Theory*, 55 *Yale L.J.* 467 (1946); Lofgren, *United States v. Curtiss-Wright Export Corporation: An Historical Assessment*, 83 *Yale L.J.* 1 (1973); and L. Henkin, *Foreign Affairs and the Constitution* 19-26 (1972).

<sup>118</sup>*Treasure Salvors, Inc. v. Unidentified, Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 337, 1978 AMC 1404, 1412 (5th Cir. 1978).

<sup>119</sup>Act of June 8, 1906, ch. 3060, 34 Stat. 225, now codified at 16 U.S.C. §§ 431-33 (1988). The Act is restricted to lands owned or controlled by the United States and is confined to "the smallest area compatible with the proper care and management of the objects to be protected." A presidential proclamation is necessary to establish a national monument. To date, a total of 162 national monuments and memorials have been proclaimed or designated.

<sup>120</sup>16 U.S.C. § 470aa-mm (1988).

<sup>121</sup>16 U.S.C. §§ 1431-39 (1988).

<sup>122</sup>43 U.S.C. §§ 2101-06 (1988). See Giesecke, *The Abandoned Shipwreck: Affirming the Role of the States in Historic Preservation*, 12 *Colum.-VLA J.L. & Arts* 379 (1988).

<sup>123</sup>43 U.S.C. §§ 1331-56 (1988).

The question of the states of the United States as inheritors of the royal prerogative is also complicated. During the period after independence but prior to the federal constitution, states created admiralty courts, often with juries.<sup>125</sup> Because of the popularity of the jury as fact-finder, use of state courts in admiralty cases was *not* suppressed after the federal constitution gave jurisdiction in cases of admiralty and maritime law to federal courts. The "Savings Clause" in the 1789 Judiciary Act preserved maritime disputes before state juries where the common law was competent to provide a remedy.<sup>126</sup>

Reception of the common law had varied from state to state, but a frequent formula was that the non-statutory law of England up to the time of settlement (seventeenth century), or up to the Declaration of Independence in 1776, would be binding until changed by the state legislature.<sup>127</sup>

Coastal states have asserted the rights of the crown either by devolution from King George III or by new statutes. As the science of marine

<sup>124</sup>43 U.S.C. §§ 1301–15 (1988). See *infra* note 132.

<sup>125</sup>The Second Continental Congress had recommended that the states establish admiralty courts on November 22, 1775, seven months before the Declaration of Independence. State admiralty courts with trial by jury were created by state constitutions in Maryland and Virginia (1776), and by statute in Massachusetts (1775) and New Jersey (1776). New York's admiralty court, which did not use juries, was created in 1777. Other states creating admiralty courts by constitution but silent as to jury trial were Delaware and North Carolina (1776). Admiralty courts created by statute and silent as to jury trials were formed in Rhode Island, New Hampshire, Georgia, and South Carolina (1776), as well as in Pennsylvania (1778). Under the Articles of Confederation (effective 1781), Congress created a Prize Court of Appeals. See H. Bourguignon, *The First Federal Court: The Federal Appellate Prize Court of the American Revolution, 1775–1787* (1977).

<sup>126</sup>The Federal Judiciary Act, Act of Sept. 24, 1789, ch. 20, 1 Stat. 76, § 9, provides:

That the district courts . . . shall also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of import, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it . . .

The present version, found in 28 U.S.C. § 1333(1) (1988), provides, "saving to suitors in all cases all other remedies to which they are otherwise entitled." This change accommodates the use of equitable principles as well as the common law. See D. Robertson, *Admiralty and Federalism* 126 (1970).

Although state courts have been forbidden to create the *in rem* remedy, see *The Moses Taylor*, 71 U.S. (4 Wall.) 411 (1866), and *The Hine v. Trevor*, 71 U.S. (4 Wall.) 555 (1866), state attachment procedures *in personam* extended to vessels as property are not forbidden. See *Rounds v. Cloverport*, 237 U.S. 303 (1915), and *Madruza v. Superior Court*, 346 U.S. 556, 1954 AMC 405 (1954). This distinction is due to the fact that admiralty procedures *in rem*, leading to judicial sale and condemnation, give title good against all the world, while state attachments, leading to a sheriff's sale, provide the purchaser with the sheriff's title, subject to the validity of the original claim, judgment, execution, and sale.

<sup>127</sup>See generally Horwitz, *An Instrumental Conception of Law, 1780–1820*, in *Law in American History* 292–98 (D. Fleming & B. Bailyn eds. 1971); G. White, *The American Judicial Tradition* 43–47 (enlarged ed. 1988); R. Pound, *The Formative Era of American Law* 6–8, 107, 144 (1938); and 1 W. Crosskey, *Politics and the Constitution in the History of the United States* 578–609 (1953). See also E. Brown, *British Statutes in American Law, 1776–1836* (1964).

archaeology has developed, treasure salvors are now able to find and recover valuable artifacts from the wrecks of ships and have sought to assert rights as finders or as salvors. The states, however, have zealously contested these assertions.<sup>128</sup> In these contests the states, relying on the Eleventh Amendment to the Constitution,<sup>129</sup> have refused to consent to suit or counter-suit by "salvors," who have asserted the exclusive jurisdiction of the federal courts in admiralty to determine salvage disputes (since the common law is incompetent to provide a remedy).

The response of Congress to these disputes, at the request of the states, was the ASA,<sup>130</sup> which abolished the law of salvage and the law of finds<sup>131</sup>

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<sup>128</sup>See, e.g., *Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 1983 AMC 181 (1982), on remand 689 F.2d 1254, 1983 AMC 181 (5th Cir. 1982). This dispute earlier had been in the Supreme Court. See 420 U.S. 531 (1975) (rejecting Florida's claim to the site) and 425 U.S. 791 (1976). See generally Owen, *Some Legal Troubles with Treasure: Jurisdiction and Salvage*, 16 J. Mar. L. & Com. 139 (1985). See also *Platoro Ltd., Inc. v. Unidentified Remains of a Vessel*, 508 F.2d 1113, 1975 AMC 1216 (5th Cir. 1975), 614 F.2d 1051, 1981 AMC 1097 (5th Cir. 1980), and 695 F.2d 893, 1984 AMC 2288 (5th Cir. 1983), for another Spanish treasure ship from the coast of Texas.

<sup>129</sup>The Eleventh Amendment became part of the Constitution in 1795 in direct response to anti-federalist outrage to *Chisholm v. Georgia*, 2 U.S. (2 Dall.) 419 (1793), the Supreme Court's first substantive decision. The Eleventh Amendment (allegedly written by then Vice President John Adams) limits the jurisdiction of the federal courts where suits have been brought against states by citizens of other states or foreign nations. It thus changes those provisions of Article III, § 2 of the Constitution that had permitted actions in the federal courts by citizens of another state against a state.

In *Hans v. Louisiana*, 134 U.S. 1 (1890), the Supreme Court ignored the exact language of the Amendment to endorse the general concept of the sovereign immunity of states whereby citizens could not sue their own states in federal court. The Eleventh Amendment still confuses the Supreme Court. See *Welch v. Texas State Dep't of Highways*, 483 U.S. 468, 1987 AMC 2113 (1987).

<sup>130</sup>See *supra* note 122.

<sup>131</sup>On the law of finds, see *Wiggins v. 1100 Tons, More or Less, of Italian Marble*, 186 F. Supp. 452, 1960 AMC 1774 (E.D. Va. 1960). The ASA was challenged in *Zych v. Unidentified, Wrecked and Abandoned Vessel*, 941 F.2d 525, 1992 AMC 532 (7th Cir. 1991). The court remanded for a finding as to whether the wreck was "embedded," noting the possibility that the ASA was unconstitutional under an "exclusiveness of admiralty" analysis, whereby Congress cannot alter the traditional admiralty jurisdiction by statute since Article III's court-creation power does not authorize legislation. In this view a constitutional amendment would be necessary to achieve the congressional purpose.

On remand, 811 F. Supp. 1300, 1993 AMC 2201 (N.D. Ill. 1992), the district court held that the ASA did not oust the traditional admiralty remedies of salvage and finds because of its requirement that the embedded wreck has to be abandoned. As to salvage, the court found that the law of finds rather than the law of salvage would be applied by traditional admiralty law when no claim to the wreck is made; the ASA does not apply unless the wreck has been abandoned and when it creates ownership in the states of embedded wrecks, no one can assert a claim against the states because of the Eleventh Amendment. As to finds, there is no owner by definition, as the wreck has been abandoned, thus again when the ASA creates ownership in the states the admiralty court can only award title to the states and no one can assert a claim against the state because of the Eleventh Amendment; further, finds was probably never part of admiralty jurisdiction. See *supra* note 129. The Seventh Circuit affirmed, see 19 F.3d 1136 (7th Cir. 1994), restating the rationale slightly, stressing the 1868 abandonment of the vessel since salvage presumes an owner and the law of finds presumes abandonment but the Eleventh Amendment automatically forbids ownership claims against the state.

In the dispute over Congress' 1948 decision to expand admiralty jurisdiction, see 46 U.S.C. app. § 740 (1988), the Ninth Circuit upheld the statute. See *infra* note 353. The Supreme Court has assumed the

over shipwrecks "embedded" in submerged lands or coral formations or listed on the National Register of Historic Places *and* located within three nautical miles from shore.<sup>132</sup> Thus, there is no longer any question about applying the law of salvage or, alternatively, the law of finds to marine archaeological discoveries on the high seas.<sup>133</sup>

To summarize, if the property is an ancient shipwreck discovered on the ocean bottom under the high seas, the law of finds may be applied where the wreck has been abandoned and the discoverer who brings up artifacts from the bottom will be awarded title. If the original owner abandoned the wreck to its insurers but the insurers have not abandoned it, the discoverer will have only a maritime lien for salvage. If the shipwreck is discovered in state territorial waters (that is, three miles from the low water mark), where it is embedded, having been previously abandoned, neither salvage law nor the law of finds will be applied and the states may impose whatever rules or conditions they consider appropriate. If the shipwreck is discovered in the territorial waters of the United States beyond the states' waters (twelve miles from the low water mark), or on the continental shelf, or in the water column of the exclusive economic zone, the discoverer may be subject to the law of finds (if abandoned) or to the law of salvage, subject to the federal statutes applicable to marine sanctuaries and historic wrecks. Courts may in all situations require some type of preservation in the interests of science with respect to any historic artifacts.

Most of Browne's chapter III on the perquisites of admiralty is today of historical interest only, as the principal controversy is now forgotten. That involved a struggle between the rights of the Lord High Admiral and his

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validity of the 1948 Act; see *Gutierrez v. Waterman Steamship Co.*, 373 U.S. 206, 1963 AMC 1649 (1963). Cf. *Victory Carriers, Inc. v. Law*, 404 U.S. 202, 1972 AMC 1 (1971).

Another relevant doctrine of uncertain limits proclaims the inability of states to alter the uniformity of the unwritten general maritime law. Cf. *Southern Pacific Co. v. Jensen*, 244 U.S. 205 (1917), discussed *infra* notes 306–21; *Detroit Trust Co. v. The Thomas Barlum*, 293 U.S. 21, 1934 AMC 1417 (1934); and *Askev v. American Waterways Operators, Inc.*, 411 U.S. 325, 1973 AMC 811 (1973).

<sup>132</sup>In *United States v. Louisiana*, 363 U.S. 1 (1960), the Supreme Court had held that the federal government, rather than the states, controlled the continental shelf areas of the ocean with all their resources—especially petroleum reserves. Congress effectively overturned the decision in the 1953 Submerged Lands Act, 43 U.S.C. §§ 1301–15 (1988). The Act awards to adjacent coastal states all the interest which the federal government had in the continental shelf within three miles of the low water mark. In subsequent decisions, states in the Gulf of Mexico have been awarded the continental shelf out to nine miles from the low water mark. See *United States v. Florida*, 363 U.S. 121 (1960), in which Florida's Atlantic coast boundary is three miles while its Gulf of Mexico boundary is nine miles.

<sup>133</sup>See *Columbus-America Discovery Group v. Unidentified, Wrecked and Abandoned Vessel Believed to be S.S. Central America*, 1988 AMC 2957, 1989 AMC 1955, and 742 F. Supp. 1327, 1990 AMC 2409 (E.D. Va.), *rev'd* on other grounds, 974 F.2d 450, 1992 AMC 2705 (4th Cir.), *cert. denied*, 113 S. Ct. 1625 (1992); *Marex-Titanic, Inc. and Titanic Ventures v. Wrecked and Abandoned Vessel Believed to be R.M.S. Titanic*, 2 F.3d 544, 1993 AMC 2799 (4th Cir. 1993); and *Moyer v. The Wrecked and Abandoned Vessel Known as the Andrea Doria*, 836 F. Supp. 1099 1994 AMC 1021 (D.N.J. 1993).

court (rights originating in a grant from the King to the Lord High Admiral) versus the rights of the King “*jure coronae*,” the inherent rights of kingship without the intervention of the admiralty court. Even in Browne’s time there was no longer an individual with the title of Lord High Admiral, the office being administered by commissioners.<sup>134</sup>

In this controversy and in the subsequent questions about maritime contract jurisdiction, Browne was required to trace<sup>135</sup> the problem back to a 1389 statute limiting the jurisdiction of the admiralty court to things done upon the sea, as well as a subsequent statute restating that admiralty was not to deal with things within the body of the counties.<sup>136</sup> Browne therefore distinguished between wreck of the sea coming to land and thereby subject to the King’s prerogative rights and wreck of the sea, still at sea, and thus within admiralty jurisdiction.<sup>137</sup>

In the United States the controversy over admiralty jurisdiction took on a political tone at an early time, but with two unexpected twists. Justice Story had been appointed to the Supreme Court by President Madison as a Democratic-Republican. During a long association with Chief Justice John Marshall, however, Story came to adopt many of Marshall’s Federalist views.<sup>138</sup> The Federalist party—the party of Eastern business and banking—had created a congenial instrument in the federal government. Since Federalists saw danger to property interests in the state governments

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<sup>134</sup>The commissioners for executing the office of Lord High Admiral were appointed in 1673 under Charles II when his Roman Catholic brother (later James II) was excluded from holding the Admiral’s office because of his failure to comply with the Test Act (to receive the Holy Eucharist according to the rites of the Church of England). Since the Hanoverian succession (1714), the office has been held by commissioners. See 2 Browne at 32–33. In 1964, when the Admiralty became part of the Department of Defense, the title Lord High Admiral was offered to and assumed by Queen Elizabeth II.

<sup>135</sup>2 Browne at 46–47, 79, 86, 91–93.

<sup>136</sup>The 1389 statute, 13 Rich. 2, ch. 5, dealing with “thing(s) done upon the sea,” was reenacted two years later to specify “all manner of contracts, pleas and quarrels and all other things rising within the bodies of the counties.” See 15 Rich. 2, ch. 3.

Richard II (1367–1400) succeeded his grandfather in 1377 as a boy of ten (subject to control by regents until 1389). One of the weakest of England’s kings, he was badly advised by unpopular favorites and clashed repeatedly with Parliament. Following the Black Death, the country suffered very hard times, leading to the Peasants’ Revolt of 1381 under Wat Tyler that was suppressed with great bloodshed. Henry of Lancaster (later Henry IV) captured King Richard II, who was subsequently deposed by Parliament in 1399 and murdered by his jailers at Pomfret Castle. See G. Trevelyan, *England in the Age of Wycliffe* (1909). Shakespeare’s *Richard II* (probably written in 1595) is renowned for its glowing praise of his native land in words spoken by John of Gaunt, Act II, Scene I, lines 40–50: “This royal throne of kings. . . This blessed plot, this earth, this realm, this England.”

<sup>137</sup>2 Browne at 48–49.

<sup>138</sup>See R. Newmyer, *Supreme Court Justice Joseph Story, Statesman of the Old Republic* (1985), and G. Dunne, *Justice Joseph Story and the Rise of the Supreme Court* (1970). Joseph Story (1779–1845) was appointed to the Supreme Court in 1811 after one term as a congressman (1808–09). After the founding of the Harvard Law School in 1817, he taught there as Dane Professor of Law until his death. In addition to his numerous judicial opinions, Story wrote twelve treatises on commercial law and the constitution.

controlled by Jefferson's followers, the expansion of the jurisdiction of the federal courts was a positive good in Federalist eyes.<sup>139</sup>

When confronted with an argument against the jurisdiction of the federal admiralty courts based on the ancient jurisdiction of the admiralty court of England, Story pronounced that the constitutional grant was intended to be much broader because of its use of the word "maritime" in addition to admiralty. This reading enabled Story to conclude that an action by an insured against a marine insurer for payment of a claim based on a contract of marine insurance was within the American admiralty jurisdiction, even though it would not be within the English admiralty jurisdiction, since the insurance contract was made on land.<sup>140</sup> Thus, the word maritime enabled Justice Story to capture all contracts conceptually maritime for America's admiralty courts.<sup>141</sup>

When it came to tort jurisdiction, however, Story the historian overcame Story the nationalist. In *The Thomas Jefferson*, a case concerned with the wrongful withholding of wages on a steamboat plying the Ohio, upper Mississippi, and Missouri Rivers, Justice Story denied tort jurisdiction. The English admiralty court had jurisdiction over torts on the high seas or within the ebb and flow of the tide on rivers navigable from the sea.<sup>142</sup> Thus, there

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<sup>139</sup>C. Warren, *The Supreme Court in the History of the United States* i, 189–95, 319–29, 414–22 (rev. ed. 1926).

<sup>140</sup>See *DeLovio v. Boit*, 7 Fed. Cas. 418 (No. 3,776) (C.C.D. Mass. 1815). Justice Story, sitting as a Circuit Court Judge, found that admiralty jurisdiction did exist in a twenty-six page opinion full of citations to continental European scholars, English cases, and Arthur Browne's text. English precedent could be disregarded because the statutes did not extend to the colonies (as yet undiscovered in 1389); more to the point, the colonial courts of vice admiralty had a very wide jurisdiction over maritime contracts and torts; lastly, the statutory language, speaking of kings and lord high admirals, was inappropriate in a modern republic. Having removed English "admiralty" jurisprudence, Story turned to the word "maritime" in the constitutional and statutory grants of jurisdiction, reading it liberally so as to confer on United States admiralty courts the widest commercial maritime jurisdiction, as in continental Europe.

<sup>141</sup>*Id.* at 442–44. Story pronounced that American admiralty jurisdiction in contract would extend to "all contracts (wheresoever they may be made or executed, or whatsoever may be the form of the stipulations) which relate to the navigation, business or commerce of the sea." *Id.* at 444.

<sup>142</sup>*The Thomas Jefferson*, 23 U.S. (10 Wheat.) 428 (1825). The ebb and flow doctrine led to conflicting decisions concerning steamboats on the tidal Mississippi at and above New Orleans, more than 100 miles from the mouth of the Mississippi River. See *infra* notes 288–305.

The political crisis of the time of the decision may have affected Story's decision to turn away from Federalist principles. By 1824, the Federalist party was dead, having nominated its last presidential candidate (Rufus King) in 1816. The Democratic-Republican party of Jefferson, Madison, and Monroe was about to burst apart following the "Era of Good Feelings" of the Monroe presidency. In 1824, five potential candidates emerged from the Democratic-Republican party: John Quincy Adams (Monroe's Secretary of State), Andrew Jackson (victorious general and leader in popular voting), Henry Clay (Speaker of the House of Representatives), William H. Crawford (Secretary of the Treasury), and John C. Calhoun (Secretary of War). Calhoun withdrew before the inconclusive general election. Since no candidate had a majority of the electoral vote, the election was thrown to the House of Representatives (voting by states in accordance with the Twelfth Amendment).



could be no traditional "admiralty" jurisdiction; furthermore, there could be no "maritime" jurisdiction since maritime meant pertaining to the sea; a river hundreds of miles from the sea could not pertain to the sea, there being no ebb and flow of the ocean tides.

After Story's death, the Jacksonian Democrat, Roger B. Taney,<sup>143</sup> wrote the opinion that one might have expected from a Federalist. In *The Genesee Chief*,<sup>144</sup> Taney abandoned the ebb and flow of the tide as a limit on the riverine jurisdiction of the federal admiralty courts and overruled *The Thomas Jefferson*,<sup>145</sup> based on the inherent nature of admiralty jurisdiction over public navigable waters. Twenty-two years later, in 1873, the jurisdiction of the admiralty court in the United Kingdom was similarly freed from the ancient limitation on its jurisdiction.<sup>146</sup>

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In the House Clay's followers gave their votes to Adams, leading Jackson's supporters to charge that they had made a "corrupt bargain" and thereafter making life difficult, if not impossible, for President Adams. By the 1828 election there had been a "coagulation" of the forces. Jackson (with Calhoun as Vice President) won the election for the "Democratic" party. The Clay-Adams forces became the National-Republican, later Whig (1836), and still later Republican party (1856). States' rights (including slavery) remained the principal issue but conservative opinion no longer regarded an expansion of federal jurisdiction as essential to protect business.

In 1845, the last year of his life, Justice Story assisted secretly in the preparation of a statute extending admiralty jurisdiction to the Great Lakes (5 Stat. 726, now 28 U.S.C. § 1873 (1988)) on condition that either party could demand a jury. The statute was upheld, although rendered obsolete (except for the jury trial provision) in *The Genesee Chief*, discussed *infra* note 144. See generally Note, From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century, 67 Harv. L. Rev. 1214 (1954).

<sup>143</sup>Roger Brooke Taney (1777-1864), originally a Federalist, had become a Jacksonian Democrat by the time he was elected Attorney General of Maryland in 1826. As Attorney General of the United States under President Jackson (1831-33), he drafted Jackson's veto of the Second Bank of the United States and was appointed an associate justice of the Supreme Court but rejected by the Senate in 1835. On the death of John Marshall, Taney was appointed Chief Justice and confirmed by the Senate in a political deal in 1836. See C. Swisher, Roger B. Taney (1935).

<sup>144</sup>*The Propeller Genesee Chief v. Fitzhugh*, 53 U.S. (12 How.) 443 (1851). The nationalism evident in the *Genesee Chief* contrasts strongly with *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393 (1857), Taney's infamous decision holding that Congress could not abolish slavery in the territories and that the institution of slavery in the older states was protected by the Constitution as "property." *Dred Scott* was overruled by the Civil War and the Thirteenth Amendment, ratified in 1865, and the Fourteenth Amendment, ratified in 1868.

<sup>145</sup>53 U.S. at 458-59. See also *The Eagle*, 75 U.S. 15 (8 Wall.) (1868), holding that admiralty jurisdiction applied on the Great Lakes (actually the Detroit River) by virtue of the 1789 Federal Judiciary Act rather than the 1845 statute.

<sup>146</sup>See 3 & 4 Vict., ch. 65 (1840); 9 & 10 Vict., ch. 99 (1846); 13 & 14 Vict., ch. 26 (1850); 17 & 18 Vict., ch. 104 (1854); 24 Vict., ch. 10 (1861); and 31 & 32 Vict., ch. 71 (1868) (all enacted before the transfer of the Admiralty Court to the Probate, Admiralty and Divorce Division of the High Court of Justice by the Judicature Act, 1873). The connection to Roman law was broken in 1970 by the reassignment of the Admiralty Court to Queen's Bench. See further Wiswall, *supra* note 90, and Fitzgerald, Admiralty and Prize Jurisdiction in the British Commonwealth of Nations, 60 Jurid. Rev. 106 (1948).

See also Jackson, Admiralty Jurisdiction—the Supreme Court Act of 1981, [1982] LMCLQ 236.

## D. Maritime Contracts

### 1. Contracts at Sea

Browne began with sources: "The instance court is governed by the civil law, the laws of Oléron, and the customs of the Admiralty, modified by statute law."<sup>147</sup> Closer to his own time were the controversies of the seventeenth century between the admiralty court and the common law courts (King's Bench, Common Pleas, and Exchequer),<sup>148</sup> wherein by writ of prohibition Edward Coke,<sup>149</sup> Chief Justice of the Court of Common Pleas, sought to confine admiralty jurisdiction by the statutes of Richard II.<sup>150</sup> The reasons for this struggle remain unclear: possibly it was due to a high-minded effort to preserve Anglo-Saxon jury trial against Roman inquisitorial practices (the courts of Doctors' Commons found facts by judge alone). The other possibility is less high-minded: a quarrel over fees. The consequence was that Browne had to deal with the residue of two hundred years of skirmishing between common law and admiralty that had produced much confusion in English case law and that has been repeated in the United States up to the present.

A statute of Henry VIII<sup>151</sup> enlarged admiralty jurisdiction to include cargo damage, charter parties, general average, marine insurance, seaworthiness and negligent navigation of vessels, and bills of exchange, as well as all contracts made abroad, thereby confirming a "maritime" jurisdiction similar to continental practice.<sup>152</sup> But Coke's prohibitions overcame even this statute and, despite the general language of the Tudor statute, its terms

<sup>147</sup>Browne at 29. Admiralty appeals were to "the king in chancery, who appoints delegates by commission to hear and determine it." *Id.* at 29–30.

<sup>148</sup>King's Bench descended from the King's personal administration of justice in the *curia regis*, with extensive criminal and civil jurisdiction after 1066. Common Pleas had extensive real estate jurisdiction but became, after 1178, the court for the trial of civil actions between individual subjects. Exchequer was originally a court in the royal treasury and later, by fictitious pleading, a court for civil actions between individual subjects (after 1154). See T. Plucknett, *A Concise History of the Common Law* 139–56 (5th ed. 1956).

<sup>149</sup>Edward Coke (1552–1634) served as Solicitor General (1592), Attorney General (1594), Chief Justice—Common Pleas (1606), and Chief Justice—King's Bench (1613). He was dismissed in 1616, was again M.P. in 1620, and was imprisoned in 1622 for opposition to royal prerogative. He published his *Law Reports* in 1600–15 and later his four *Institutes* (after 1628). Coke was a fierce defender of the common law courts against other courts of royal prerogative, such as admiralty and chancery. See generally Holdsworth, *supra* note 97, at 553–56, and Mathiason, *Some Problems of Admiralty Jurisdiction in the 17th Century*, 2 *Am. J. Legal Hist.* 215 (1958).

<sup>150</sup>Plucknett, *supra* note 148, at 662–64.

<sup>151</sup><sup>2</sup>Browne at 28. (Henry VIII was the first English King to claim the title King of Ireland, doing so from 1541.)

<sup>152</sup>See generally 3 J. Wigmore, *A Panorama of the World's Legal Systems* 881–929 (1928), and E. Gold, *Maritime Transport* 18–30 (1981).

were interpreted as being subject to the statutes of Richard II.<sup>153</sup> Accordingly, Browne was required to define marine contracts as “contracts made on the sea,<sup>154</sup> whose consideration is maritime, and not ratified by deed<sup>155</sup> nor under seal.”<sup>156</sup>

Browne then reviewed the fictitious pleadings used to bring cases into admiralty despite the location of the making of the contract being on land, as well as the fictions used to force disputes arising at sea into the common law courts.<sup>157</sup> Browne contradicted the doctrine of the law courts that a contract truly made at sea lost admiralty jurisdiction if the execution of the contract was to be on land, using the example of a master obtaining necessities while at sea by promising to pay money on land.<sup>158</sup>

Without concern for inconsistency he took up the question of the practice of the admiralty court in cases of suppliers (materialmen) where the tackle, furniture, and provisions were clearly for use at sea, though the contract was made on land. This and other special examples (bills of lading, charters, and marine insurance) led Browne to conclude that “all contracts which relate purely to marine affairs”<sup>159</sup> should be cognizable in admiralty, especially because of the ease and speed of the *in rem* process of the admiralty court.

Justice Story clearly followed Browne’s conclusion “that the subject matter and not locality should determine the jurisdiction as to contracts.”<sup>160</sup> American courts—including the Supreme Court<sup>161</sup>—have added exceptions to Story’s conceptual doctrine of the contract jurisdiction, but the trend is now in Story’s direction.

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<sup>153</sup>2 Browne at 94.

<sup>154</sup>Id. at 72. See also id. at 78–79 and 88. Browne defined “sea” as “that part of the water which is below low water-mark when the tide is out, and up to high water-mark when the tide is in. . . .” Id. at 91.

<sup>155</sup>Id. at 72.

<sup>156</sup>Id. at 96.

<sup>157</sup>Id. at 73.

<sup>158</sup>Id. at 74.

<sup>159</sup>Id. at 88.

<sup>160</sup>See *DeLovio*, supra notes 140–41 and accompanying text.

<sup>161</sup>In *Minturn v. Maynard*, 58 U.S. (17 How.) 477 (1854), the Supreme Court held that admiralty contract jurisdiction did not apply to general agency contracts of vessel management. This was overruled in *Exxon Corp. v. Central Gulf Lines*, 500 U.S. 603, 1991 AMC 1817 (1991). Justice Marshall concluded that, “Rather than apply a rule excluding all or certain agency contracts from the realm of admiralty, lower courts should look to the subject matter of the agency contract and determine whether the services performed under the contract are maritime in nature.” Id. at 612, 1991 AMC at 1824. Cf. supra note 141.

## 2. *Maritime Liens*

Browne's study of maritime liens had to account for the homeport doctrine,<sup>162</sup> by which repairs and supplies to a ship in her homeport would not create a maritime lien because the furnishers of repairs and supplies were presumed to have relied on the personal credit of the shipowner. Of course, this doctrine was legislatively abolished in the United States in 1910.<sup>163</sup>

In another context Browne stated, "The cargo is tacitly bound for the freight, which is preferred to all other debts affecting the cargo, though prior in time,"<sup>164</sup> a liability of the cargo itself whether the goods are carried under charter or bill of lading.<sup>165</sup> In another place he indicated the possessory nature of this lien, "The master might always retain the merchandise until paid his freight," but this statement does not resolve the question.<sup>166</sup>

Browne distinguished bottomry from the maritime lien for necessities (or hypothecation). Bottomry being a recent development, he had no Roman history or practice to fall back on and therefore defined it as a contract made at the homeport for money lent upon the vessel on the condition that if the ship were lost the lender would forfeit its money, but if the ship returned in safety the lender would receive its principal plus a rate of interest that could exceed the legal rate.<sup>167</sup>

The lien for necessities or hypothecation is described as follows: "The master . . . cannot hypothecate the ship except for its own necessities, and that abroad; and the vessel itself is thereby subject to seizure in the court of admiralty to satisfy the debt, but no one is personally liable."<sup>168</sup>

Browne favored extending admiralty jurisdiction at least to the part of the bottomry contract dealing with the ship and tackle, while the personal

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<sup>162</sup>The General Smith, 17 U.S. (4 Wheat.) 438 (1819). Browne here wrote: "it seems now settled that the ship cannot be hypothecated at home before the voyage commences. . . ." 2 Browne at 80. The accompanying footnote cites Lord Mansfield that, at home, it is simply a mortgage.

<sup>163</sup>See Federal Maritime Lien Act of 1910, 46 U.S.C. §§ 971-75, recodified as 46 U.S.C. app. §§ 31341-31343 (1988). Prior to 1971, suppliers were required to inquire concerning the existence of a charter and to examine it, wherein the denial of a right to lien the ship would be revealed in the "prohibition of liens" clause. This obligation was removed by amendment to 46 U.S.C. § 973. In the absence of the obligation, the shipowner has the heavy burden of proving the supplier's knowledge of the clause.

<sup>164</sup>2 Browne at 191.

<sup>165</sup>Id. See generally *The Bird of Paradise*, 72 U.S. (5 Wall) 545 (1866) (charter parties), and *Alcoa S.S. Co. v. United States*, 338 U.S. 421, 1950 AMC 1 (1949) (bills of lading).

<sup>166</sup>2 Browne at 82, 154.

<sup>167</sup>Id. at 196.

<sup>168</sup>Id.

liability of the borrower would be at law.<sup>169</sup> This division of remedy occurs because admiralty process was *in rem* and not *in personam*.<sup>170</sup>

### 3. Carriage of Cargo

Browne clearly distinguished charter parties (a contract for use of the whole ship) from bills of lading (given for a single article, or more, laden on board a ship that has sundry merchandises shipped for sundry accounts).<sup>171</sup> Browne later dealt very briefly with charter parties and bills of lading simultaneously, using very few cases; thus it may be concluded that disputes between the cargo-owning interest (shippers or consignees and their insurers) and the shipowning interest (shipowners and their insurers) were infrequent at the time Browne wrote his text.

During the age of sail the theory that every voyage was a common venture was a reality. Many ships were owned in part by merchants (often in shares as small as sixty-fourths), and cargoes were similarly joint investments of many merchants. Accordingly, cargo owners may also have been shipowners and shipowners may also have been cargo owners, so that each voyage became a joint venture of many investors.<sup>172</sup> Bulk cargoes were seldom in great demand except in wartime. Voyages were usually not to deliver a cargo to specific consignees but were made "on speculation," accompanied by a "super cargo," who looked out for the goods and arranged for their sale at the various ports of call. This mingling of shipowning and cargo-owning interests may account for the apparent absence of litigation over cargo damage.

#### (a) Charter Parties

Browne listed the minimum contents of a charter party as: 1) the name and burthen (deadweight tonnage) of the vessel; 2) the name of the master and freighters (charterers, if any); 3) the place and time of loading and unloading; 4) the lay days and demurrage; and, 5) the penalties for non-performance.<sup>173</sup>

Today each trade has its own form charter with familiar "boiler plate" clauses providing the certainties and tolerable ambiguities common to that

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<sup>169</sup>*Id.*

<sup>170</sup>*Id.* at 98-101 and 132 n.8. The Supreme Court has confused the once clear distinctions between *in rem* and *in personam* in the context of transfers between federal district courts. See *Continental Grain Co. v. Federal Barge Lines, Inc.*, 364 U.S. 19, 1961 AMC 1 (1960).

<sup>171</sup>2 Browne at 81-82.

<sup>172</sup>A. Chandler, Jr., *The Visible Hand: The Managerial Revolution in American Business* 15 (1979).

<sup>173</sup>2 Browne at 189.

trade.<sup>174</sup> This custom apparently did not yet exist in Browne's day. Further study of the staples of eighteenth century shipping—the slave trade<sup>175</sup> and the triangle trade<sup>176</sup>—would be necessary, however, to reach definite conclusions about charter party forms and the method of “fixing” charters.<sup>177</sup>

Browne specified a rule that has been altered in both England and America when he stated, “A complete embargo, occasioned by war or reprisals, dissolves the charter party,”<sup>178</sup> and again, “In case of embargo, the charter party is dissolved without charges to either party. . . .”<sup>179</sup> His statements would be correct as to the international law consequence that upon a declaration of war a subject (or citizen) may not trade with the enemy (neither with the enemy state nor an enemy private citizen).<sup>180</sup> However, as the Suez Canal cases in both the United Kingdom and the United States make clear, the addition of 8,000–10,000 miles to a voyage because of the closing of a major international waterway as the result of war does not invalidate a charter.<sup>181</sup>

### (b) *Bills of Lading*

Browne also listed the minimum contents of a bill of lading: 1) the quality, quantity, and mark of the goods; 2) the names of the shipper and consignee;

<sup>174</sup>See generally M. Wilford, T. Coghlin & J. Kimball, *Time Charters* (3d ed. 1989); Admiralty Law Institute: Symposium on Charter Parties, 49 Tul. L. Rev. 743 (1975); and the collection of forms in 2B & 2C Benedict on Admiralty (7th rev. ed. 1986).

<sup>175</sup>See generally P. Curtin, *The Atlantic Slave Trade: A Census 127–62* (1969); W. Du Bois, *Suppression of the African Slave Trade to the United States, 1638–1870* (1896); and J. Pope-Hennessy, *Sins of the Fathers: Atlantic Slave Traders, 1441–1807, 226–245* (1968).

<sup>176</sup>See generally Bruchey, *Success and Failure Factors: American Merchants in Foreign Trade in the 18th and early 19th Century*, 32 Bus. Hist. Rev. 272 (1958); Bailyn, *Communications and Trade: The Atlantic in the 17th Century*, 13 J. Econ. Hist. 378 (1953); Andrews, *Anglo-American Trade in the Early 18th Century*, 45 Geographical Rev. 99 (1955); and S. Morison, *The Maritime History of Massachusetts, 1783–1860, 16–40* (1921).

<sup>177</sup>See the description of fixing charters in *Great Circle Lines Ltd. v. Matheson & Co.*, 681 F.2d 121, 1982 AMC 2321 (2d Cir. 1982).

<sup>178</sup>2 Browne at 189. A reprisal in customary international law was a use of force short of war to punish a violation of international law.

<sup>179</sup>*Id.*

<sup>180</sup>See *Calmar Steamship Corp. v. Scott*, 345 U.S. 427, 1953 AMC 952 (1953), and *The Claveresk*, 264 F. 276 (2d Cir. 1920).

<sup>181</sup>See *American Trading & Produce Co. v. Shell Int'l Marine Co.*, 453 F.2d 939, 1972 AMC 318 (2d Cir. 1972) (a “mere” 33% increase in shipowner's costs for the Cape of Good Hope route does not frustrate the charter). See also *Transatlantic Finance Co. v. United States*, 363 F.2d 312, 1966 AMC 1455 (D.C. Cir. 1966). A sale of goods case having a similar result (due to the closing of the Suez Canal) is *Tsakiroglou & Co. v. Noble Thorl G.M.b.H.*, [1962] A.C. 93.

3) the places of departure and unloading; 4) the names of the master and ship; and, 5) the value of the freight (i.e., cargo).<sup>182</sup>

Bills of lading are to be prepared in triplicate for the shipper, consignee, and master of the ship. In further distinction from the charter party, Browne said that the charter party settled the terms of carriage while bills of lading determine the contents of the cargo.<sup>183</sup> It was not then the custom to have the bill of lading perform the threefold function of receipt, negotiable document, and contract of carriage.<sup>184</sup> Financing trade by letters of credit and C.I.F. contracts would not become common practice until the latter part of the nineteenth century.

Respecting the bill of lading as a negotiable instrument Browne noted, "The indorsement and delivery of a bill of lading is, prima facie, an immediate transfer of the legal interest in the cargo."<sup>185</sup> Dealing with the question of the possibility of dispute over the property in the goods because of triplicate original bills, Browne laid down the rule, still followed, that "the person who first gets legal possession of one of them (bills) by delivery from the owner or shipper has a right to the consignment."<sup>186</sup>

Browne appears to be disrupting the normal boundaries between contract and tort in his discussion of cargo damage liability. He wrote that "if the cargo be damaged, the owner of the cargo has in his turn his remedy against the ship or its owner," and, "If either party fails in his part of the contract, the other is free, though it may be imprudent too rigidly to insist on the strict letter of the agreement . . . [a]nd he has also his remedy in damages against the party who failed in fulfilling his contract."<sup>187</sup> Although Browne seems to be setting up the tort of breach of contract of carriage,<sup>188</sup> the rigid distinctions between contract and tort at the common law would not have been part of the frame of reference of a civilian, for whom tort and contract were both simply obligations (with contract obligations growing out of the parties' agreement and tort obligations arising by operation of law).<sup>189</sup>

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<sup>182</sup>Browne at 190.

<sup>183</sup>*Id.*

<sup>184</sup>See generally *Yeramex Int'l v. S.S. Tendo*, 595 F.2d 943, 1979 AMC 1282 (4th Cir. 1979), and *Westway Coffee Corp. v. M/V Netuno*, 675 F.2d 30, 1982 AMC 1640 (2d Cir. 1982); cf. *Bally, Inc. v. The Zim America*, 22 F.3d 65, 1994 AMC 2762 (2d Cir. 1994).

<sup>185</sup>Note also that by the Act of 26 Geo. 3, ch. 86, § 3, the shipper must state in the bill of lading "the true nature, quality, and value of such gold" in order to impose liability on the master or owners of a ship for loss to any "gold, silver, diamonds, watches, jewels, or precious stones by reason of any robbery etc." 2 Browne at 145-46.

<sup>186</sup>*Id.* at 190. See generally *Allied Chemical Int'l Corp. v. Cia de Navegacao Lloyd Brasileiro*, 775 F.2d 476, 1986 AMC 826 (2d Cir. 1985), and G. Gilmore & C. Black, *The Law of Admiralty*, §§ 3-4 to 3-5, at 96-100 (2d ed. 1975).

<sup>187</sup>2 Browne at 191.

<sup>188</sup>See P. Keeton, *Prosser and Keeton on the Law of Torts* § 92, at 658-67 (5th ed. 1984).

<sup>189</sup>See F. Lawson, *A Common Law Lawyer Looks at the Civil Law* 138-63 (1953).

It is not possible to know whether Browne would have admitted the defenses which the Supreme Court found to be the general maritime law in *The Niagara v. Cordes*.<sup>190</sup> In another place, speaking of charters, he says, "If none of the contracting parties are in fault, and the failure is occasioned by an act of government, neither party suffers. If by the act of Heaven, or of an enemy, the ancient and modern laws are said to differ, though I believe they do not."<sup>191</sup> Thus, governmental action (quarantine, restraint of princes, or arrest pursuant to the process of courts) was mutually excludable—neither shipper nor carrier were responsible,<sup>192</sup> whereas the effect of *vis major* (Act of God) and acts of public enemies could be assigned to either party.<sup>193</sup>

### (c) *Deviation and Freight*

Browne compares the results under the Hanseatic Laws of Visby with cases of his time respecting geographical deviation.<sup>194</sup> Thus, where a shipper has loaded his goods for a voyage to one destination, but the voyage is to a different and more distant destination, the shipper pays "half the damage that might happen to such ship."<sup>195</sup> When a ship destined for one port arrives at another, the master and his chief mariners must swear under oath that they arrived at a port different from the destination port because of constraint or necessity.<sup>196</sup>

Browne noted that normally freight is "collect" and not "pre-paid," that is, there is no freight due until the completion of the voyage. Accordingly, the carrier has no right to a pro rata share of the freight for the proportion

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<sup>190</sup>62 U.S. (21 How.) 7 (1859) ("the act of God, or the public enemy, or by the act of the owner of the goods").

<sup>191</sup>2 Browne at 195.

<sup>192</sup>*Id.*

<sup>193</sup>*Id.* at 192, 195. By the Act of 26 Geo. 3, ch. 86, § 2, "No owner of any vessel shall be subject to answer for any loss or damage which may happen to goods shipped on board such ship, by reason of any fire happening on board the said ship." 2 Browne at 145–47. Browne notes that, "This act, in reality, only enacts the provisions of the old marine laws. See the 41st article of the laws of Wisbuy and the 13th of the second fragment of the Rhodian laws."

In the United States there is a special statute exonerating the "owner" from liability for "fire" unless caused by "design or neglect" of the owner. See 46 U.S.C. app. § 182 (1988) (enacted in 1851 in response to the Supreme Court's decision in *The Lexington*, 47 U.S. (6 How.) 343 (1848), discussed *infra* notes 365–86). No special fire defense appears in the Harter Act, but there is a fire defense in COGSA. See 46 U.S.C. app. § 1304(2)(b) (1988). At present, the various courts of appeal differ as to whether the owner must first prove seaworthiness before raising a fire statute defense. Compare *Sunkist Growers, Inc. v. Adelaide Shipping Lines, Ltd.*, 603 F.2d 1327, 1979 AMC 2787 (9th Cir. 1979), cert. denied, 444 U.S. 1012 (1980), with *In re Ta Chi Nav. (Panama) Corp. (The Eurypylos)*, 677 F.2d 225, 1982 AMC 1710 (2d Cir. 1983).

<sup>194</sup>2 Browne at 192.

<sup>195</sup>*Id.*

<sup>196</sup>*Id.*



completed before shipwreck. Browne said nothing about clauses in charters or bills of lading that provide for freight prepaid and freight deemed earned on loading.<sup>197</sup>

## *E. Maritime Torts*

### *1. Locality Rule*

Browne's simple proposition was that locality is the criterion of admiralty jurisdiction, so that admiralty has a remedy for injury done to person or property upon the seas.<sup>198</sup> This jurisdictional rule has undergone the greatest doctrinal change in American admiralty theory with the addition of an element beyond location on the navigable waters now needed to establish a maritime tort.

Early case law, such as *The Genesee Chief*,<sup>199</sup> *The Plymouth*,<sup>200</sup> *Atlantic Transport Co. v. Imbrovek*,<sup>201</sup> as well as more recent decisions, such as *Nacirema v. Johnson*<sup>202</sup> and *Askew v. American Waterways Operators, Inc.*,<sup>203</sup> did not mention a required element other than location, although it might be said that those cases dealt only with problems in locality and no other possible element had been raised by the parties in those cases.

The modern case law requiring that traditional maritime activity be present to invoke federal admiralty jurisdiction may represent nothing more than a technique to clear the crowded dockets of the federal courts. The Supreme Court found this required element in *Executive Jet Aviation, Inc. v. City of Cleveland*<sup>204</sup> at a time when proposals were being considered to

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<sup>197</sup>Id. at 193–94. On the differences between freight collect and freight pre-paid in the context of United States limitation of liability proceedings, see *Complaint of Caribbean Sea Transport, Ltd.*, 748 F.2d 622, 1985 AMC 1995 (11th Cir. 1984).

<sup>198</sup>2 Browne at 201–02. See also id. at 110 (“civil or private injuries to the person, committed on the seas are remediable in this [admiralty] court; but there, and in all matters of tort, locality is the strict limit. . . . In torts, locality ascertains the judicial power.”).

<sup>199</sup>See supra note 144.

<sup>200</sup>70 U.S. 20 (1866).

<sup>201</sup>234 U.S. 52 (1914) (longshoreman recovers under maritime tort).

<sup>202</sup>396 U.S. 212, 1969 AMC 1967 (1969) (longshoreman's statutory recovery).

<sup>203</sup>See supra note 131.

<sup>204</sup>409 U.S. 249, 1973 AMC 1 (1972) (absence of maritime tort jurisdiction on crash of cargo aircraft into Lake Erie on flight from Cleveland to White Plains, New York, with planned stop at Portland, Maine. This flight, mostly over land, was not a traditional maritime activity as would be the New York to London flight. Liability of the city was based on its failure to deal with flocks of seagulls at the lakefront end of the runway; the aircraft engines, having ingested the birds after takeoff, suffered a power failure and crashed into Lake Erie.).

lessen or eliminate the case load by, for example, excluding vessels under 300 gross tons from the federal courts.<sup>205</sup>

Having opened up tort doctrine to further limiting elements, the next effort was to eliminate a large category of collision cases from the federal courts under a states' rights rationale. In *Foremost Insurance Co. v. Richardson*,<sup>206</sup> however, the Court found admiralty jurisdiction for vessel collisions to be too deeply imbedded to be eliminated on a quasi-political rationale. *Foremost*, however, had mentioned navigation in its discussion of collision jurisdiction. Having redefined the maritime nexus by reference to navigation,<sup>207</sup> lower courts required actual navigation for "traditional maritime activity." The Supreme Court, however, removed actual navigation as a requirement in *Sisson v. Ruby*.<sup>208</sup> Current doctrinal disputes concern the number and type of factors necessary to establish the nexus to traditional maritime activity.<sup>209</sup>

## 2. Collision

The mystery is why there are so few reported collision cases in Browne's treatise, given the increased volume of shipping produced by persistent war with France and other continental nations from 1760 through 1815. The first and second world wars produced a large volume of ordinary shipping litigation—excluding prize—and one would expect the same in earlier wars, but there is no evidence of substantial collision litigation and no ready explanation for its absence. Browne analyzed the collision situation under three types: when two ships are too near each other in port; when one is at anchor and the other under sail; and where both are sailing and strike together.<sup>210</sup>

Legal consequences in Roman law depended on fault. If the injury occurs without fault and by accident, neither party recovers;<sup>211</sup> but "if the party

<sup>205</sup>The debate began with the merger of the Supreme Court's Admiralty Rules into the Federal Rules of Civil Procedure in 1966, followed by suggestions to the American Law Institute by Chief Justice Warren in 1969. A proposed codification was introduced as Draft Bill 1876 in the 92nd Congress (1972), but the admiralty bar opposed it and nothing has been enacted. See generally Force, Determining Admiralty Tort Jurisdiction: An Alternative Analytical Framework, 21 J. Mar. L. & Com. 1 (1990).

<sup>206</sup>457 U.S. 668, 1982 AMC 2253 (1982).

<sup>207</sup>Id. at 677, 1982 AMC at 2258-59.

<sup>208</sup>497 U.S. 358, 1990 AMC 1801 (1990).

<sup>209</sup>See *Kelly v. Smith*, 485 F.2d 520, 1973 AMC 2478 (5th Cir. 1973), cert. denied, 416 U.S. 969 (1974). The *Kelly* court listed four factors: functions and roles of the parties; types of vehicles and instrumentalities; causation and type of injury; and traditional concepts of admiralty. Cf. *Delta Country Ventures, Inc. v. Magna*, 986 F.2d 1260, 1993 AMC 855 (9th Cir. 1993).

<sup>210</sup>2 Browne at 204-05. Professor Bourguignon suggests that collisions in crowded rivers and harbors would have been decided in common law courts. Bourguignon, *supra* note 87, at 96.

<sup>211</sup>2 Browne at 203-04.

occasioning the accident was in fault, he was to make full restitution and reparation to the injured.”<sup>212</sup> Browne then turned to the Laws of Visby. Under Visby, where a ship under sail damages another ship under sail, “the damage is to be borne by the ship that did it, unless her mariners swear they could not help it, and then to be borne by each equally.” Secondly, “if two ships strike against one another, and receive damage, *the loss shall be borne equally between them*, unless the men on board one of them did it on purpose; in which case that ship shall pay all the damage.”<sup>213</sup> Lastly, Browne mentioned a rule of several liability to cargo: where, by accident, one ship perishes, the cargo loss “shall be valued and paid for pro rata by both owners, and the damage of the ship shall also be answered for by both, according to their value.”<sup>214</sup> This latter statement is ambiguous. Does it mean that the allocation of fault is to depend on the value of the ships in collision, and, if so, as of what time is the value to be determined, before or after the collision?<sup>215</sup>

Browne called on Bynkershoek’s treatise to aid in interpreting this statement:

... the mercantile world was not reconciled to the idea that where it happens by accident, the doer of it should be perfectly free from the obligation of making some payment or retribution, because if so, it would always be imputed to accident, and it would often be extremely difficult to prove the contrary; on the other hand, if the principles of the noxal actions of the Romans, and of the action de pauperie were here applied, viz. that the theory which was the immediate cause or instrument of damage, should be given up, or otherwise the whole damage paid, it would be too severe a rule to be applied, if the case really happened by accident and misfortune: they therefore chose a middle course. In case of accident, the loss was to be divided between both parties, in equal proportions; in case of wilful fault or negligence, the guilty person was to pay the whole.<sup>216</sup>

Browne then goes to the question of the vicarious liability of owners for the torts of masters and mariners. Under Roman law, each owner is liable to contribute in proportion to its share of ownership unless the master was authorized to do the act that caused the damage, in which case the owners’

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<sup>212</sup>Id. at 204 (described as “the decree of fate”).

<sup>213</sup>Id.

<sup>214</sup>Id. (citing Articles 29, 51, and 71 of the Visby Code). American law has consistently adhered to the joint and several liability of colliding vessels to notionally innocent cargo. See *The Alabama and The Gamecock*, 92 U.S. (2 Otto) 695 (1875); *The Atlas*, 93 U.S. (3 Otto) 302 (1876); *The Chattahoochee*, 173 U.S. 540 (1899); and *United States v. Atlantic Mutual Insurance Co. (The Esso Belgium)*, 343 U.S. 236, 1952 AMC 659 (1952).

<sup>215</sup>2 Browne at 205. Turkish law under the Ottoman Empire provided that in a both-to-blame collision the larger vessel was to bear the greater proportion of fault.

<sup>216</sup>Id.

liability would be “*in solidum*” or joint and several, noting Bynkershoek’s observation that masters are not authorized or instructed to run down ships.<sup>217</sup>

Bynkershoek’s writings are approved as “guides in our courts,”<sup>218</sup> and a case is put of a collision occurring through failure to carry lights at night, a fault of the master but not of the owners since not authorized by them. Browne prefers to say that while it is a fault of the owners, the liability does not extend beyond the value of the ship.<sup>219</sup> This interpretation by Browne may illustrate the Anglo-American concept of the *in rem* liability of the ship for her own torts.<sup>220</sup>

Browne’s last analysis on the subject of collision is from the Laws of Oléron:

... if a vessel moored and lying at anchor be struck by another vessel under sail, the damage shall be in common, because old decayed vessels have sometimes been purposely put in the way of better; and if in harbour, where there is little water, the anchor of one lies dry, the other may remove it, and the party preventing him must answer the damage; and every ship not having a buoy to the anchor is liable for any damage happening thereby.<sup>221</sup>

The first part of the quotation would be an exception to the presumption of fault when a moving vessel strikes a properly anchored vessel.<sup>222</sup>

American law with respect to liability in both-to-blame cases was subject for many years to the inequitable rule of equal division of damages,<sup>223</sup> inherited from English law.<sup>224</sup> When the United Kingdom ratified the 1910 Brussels Collision Convention, English law was freed from the equal division rule. Because the convention also abolishes the rule of joint and several liability of colliding vessels to innocent cargo, the United States has refused to ratify the 1910 convention.<sup>225</sup> It was not until 1975 that the United States Supreme Court rejected the rule of equal division of damages as

<sup>217</sup>Id. at 205–06 (citing chapters 18–23 of Bynkershoek’s *Quaestiones Juris Privati*).

<sup>218</sup>Id. at 206.

<sup>219</sup>Id. at 207.

<sup>220</sup>Id. at 206. See *The China*, 74 U.S. (7 Wall.) 53 (1868).

<sup>221</sup>2 Browne at 207 (citing Articles 14 and 15 of the Laws of Oléron).

<sup>222</sup>See *The Louisiana*, 70 U.S. (3 Wall.) 164 (1866); *The Clara*, 102 U.S. 200 (1880); and *The Oregon*, 158 U.S. 186 (1895).

<sup>223</sup>See *The Schooner Catharine v. Dickinson*, 58 U.S. (17 How.) 170 (1855).

<sup>224</sup>See *The Woodrop-Sims*, 165 Eng. Rep. 1422 (Adm. 1815), a decision of Sir William Scott. The House of Lords applied the rule of equal division of damages in a Scottish case, *Hay v. Le Neve*, 2 Shaw’s Rep. 395 (H.L. 1824).

<sup>225</sup>International Convention for the Unification of Certain Rules of Law With Respect to Collisions Between Vessels (Brussels, Sept. 23, 1910), reprinted in 6 Benedict on Admiralty, Doc. No. 3–2 (7th rev. ed. 1986).

unjust and adopted the rule of proportional fault.<sup>226</sup> The United States rule of joint and several liability of colliding vessels to innocent cargo<sup>227</sup> was not even changed by the creation of the negligent navigation defense in the Harter Act,<sup>228</sup> and the effort of carriers to get around joint and several liability through bill of lading clauses has been struck down as a violation of public policy.<sup>229</sup>

### 3. *Seamen's Injuries*

Browne's discussion of mariners deals principally with wages,<sup>230</sup> desertion,<sup>231</sup> the supreme rule of the master,<sup>232</sup> flogging,<sup>233</sup> barratry,<sup>234</sup> and the obligation of mariners to save and preserve the cargo to the utmost of their power.<sup>235</sup> He noted that all the old maritime laws provide that if a seaman is "wounded in the ship's service, he ought to be cured at the expense of the ship, but if he is wounded in riots and quarrels, he must pay his own

<sup>226</sup>See *United States v. Reliable Transfer Co.*, 421 U.S. 397, 1975 AMC 541 (1975).

<sup>227</sup>See *supra* note 214.

<sup>228</sup>46 U.S.C. app. §§ 190-96 (1988). See *The Chattahoochee*, *supra* note 214.

<sup>229</sup>See *The Esso Belgium*, *supra* note 214.

<sup>230</sup>2 Browne at 155, 157, 166, 177-82. Browne quoted Lord Mansfield to the effect that if a ship is taken by the enemy before the voyage has been completed, the seaman is entitled to nothing because "freight is the mother of wages, and the safety of the ship is the mother of freight." *Id.* at 177.

<sup>231</sup>*Id.* at 156-57, 164. Although seamen are permitted to go ashore for a short and reasonable period of time if the ship is safely anchored, the Hanseatic Laws dealt harshly with seamen who went ashore without permission: such men were to be kept in prison on bread and water for one year if the ship suffered for want of hands. *Id.* at 164. The modern attitude towards shore leave can be crudely put: "there won't be perversion if the crew gets diversion." See *Aguilar v. Standard Oil Co.*, 318 U.S. 724, 1943 AMC 451 (1943), and *Warren v. United States*, 340 U.S. 523, 1951 AMC 416 (1951).

<sup>232</sup>"[T]he mariners are to pay due obedience to the master, who hath the supreme rule on ship-board, and whose power and authority are by the law much countenanced." 2 Browne at 160.

<sup>233</sup>*Id.* (described as "moderate and due correction," referring to one blow in the Laws of Oléron and Consolato del Mar, but also noting that under the Laws of Oléron the penalty for striking the master was the loss of a hand). Browne preferred the punishment of loss of wages to corporeal violence. *Id.* at 160-70.

Richard Henry Dana's experiences aboard the brig *Pilgrim*, recorded in his classic work *Two Years Before the Mast* (1840), made him a strong opponent of flogging and an advocate for its abolition. In Congress, Senator John P. Hale (1806-75) (R-N.H.), the first senator elected on an anti-slavery platform, was the strongest proponent of the abolition of flogging.

Flogging aboard United States naval and merchant vessels finally was abolished by the Act of Sept. 23, 1850, 10 Stat. 515. Today, the penalty for mariners' offenses aboard ship is called "logging," whereby amounts are deducted from wages for offenses against ship's discipline.

<sup>234</sup>2 Browne at 172 (quoting Beawes, *Lex Mercatoria*, as an epidemical disease of seamen). The English Marine Insurance Act of 1906, 6 Edw. 7, ch. 41, to which the Lloyd's S.G. Policy is appended, notes in the Rules for Construction of the S.G. Policy: "11. The term 'barratry' includes every wrongful act wilfully committed by the master or crew to the prejudice of the owner, or, as the case may be, the charterer."

<sup>235</sup>2 Browne at 175. See *The Niagara*, *supra* note 190.

charges.”<sup>236</sup> Further, if he becomes sick during the voyage and is left on shore, he is entitled to his whole wages, after deducting what has been laid out for him, quoting the Laws of Oléron, described as “particularly humane,” whereby the master is to furnish the sick sailor “with lodging and candlelight, and also to spare him one of the ship’s boys, or hire a woman to attend him, and likewise to afford him such diet as is usual in the ship for men in health. . . .”<sup>237</sup>

Browne’s provisions seem to be very close to maintenance and cure in the general maritime law and the International Labour Organization’s 1936 Treaty on Seamen’s Injuries.<sup>238</sup> Today, most of the maritime world has adopted workers’ compensation as the exclusive remedy for seamen. In the United States, however, workers’ compensation has been vigorously rejected by the seamen’s unions and a tripartite scheme or “trident” of remedies is still available in American courts for seamen who are injured in the service of the ship or who become diseased during the temporal existence of the articles of employment.<sup>239</sup> The trident of remedies, of course, consists of maintenance and cure,<sup>240</sup> Jones Act negligence,<sup>241</sup> and unseaworthiness of the ship.<sup>242</sup>

#### F. General Average

Arthur Browne’s notes on the system of general average were prepared eighty years before the appearance of the York-Antwerp Rules.<sup>243</sup> In three

<sup>236</sup>Browne at 184. See *Warren v. United States*, 340 U.S. 523, 1951 AMC 416 (1951); *Farrell v. United States*, 336 U.S. 511, 1949 AMC 613 (1949); *Vaughan v. Atkinson*, 369 U.S. 527, 1963 AMC 1131 (1962); and *Vella v. Ford Motor Co.*, 421 U.S. 1, 1975 AMC 563 (1975).

<sup>237</sup>Browne at 182–83.

<sup>238</sup>See *Shipowners’ Liability Convention of 1936*, I.L.O. Conv. No. 55, *Shipowner Liability in Cases of Sickness, Injury or Death of Seamen*, 54 Stat. 1693, T.S. No. 951, 77 L.N.T.S. 407.

<sup>239</sup>This trident of remedies may be heard before a jury, even though maintenance and cure and unseaworthiness traditionally were tried to the court alone, because the Jones Act, 46 U.S.C. app. § 688 (1988), gives a right to jury trial that has been extended to all three remedies when pleaded alternatively. See *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 1959 AMC 832 (1959), and *Fitzgerald v. United States Lines*, 374 U.S. 16, 1963 AMC 1093 (1963).

<sup>240</sup>See *Harden v. Gordon*, 11 F. Cas. 480 (No. 6,047) (C.C.D. Me. 1823) (describing seamen as “wards of the Admiralty”). See also *Laws of Oléron*, Articles VI and VII.

<sup>241</sup>The Act was found to be constitutional in *Panama R.R. Co. v. Johnson*, 264 U.S. 375 (1924).

<sup>242</sup>The *Osceola*, 189 U.S. 153 (1903) (dictum). Early cases recognizing the unseaworthiness remedy were brought by longshoremen. See *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 1946 AMC 698 (1946), and *Mahnich v. Southern S.S. Co.*, 321 U.S. 96, 1946 AMC 1 (1944). The unseaworthiness remedy was abolished for longshoremen in 1972. See 33 U.S.C. § 905(b) (1988). It remains effective, however, for seamen. See *Mitchell v. Trawler Racer, Inc.*, 362 U.S. 539, 1960 AMC 1503 (1960).

<sup>243</sup>The York-Antwerp Rules were the first maritime product of the International Law Association (ILA). Promulgated in 1877, they represented a melding of French and British practices. The ILA was founded in 1873 in Brussels, in the aftermath of the Franco-Prussian War (1870–71) and the American Civil War (1861–65), to reform and codify customary international law. The York-Antwerp Rules have

pages he offers a glimpse of the provisions, antedating statutory and even judicial marine insurance law. In general average, losses incurred for the safety of ship, personnel, and cargo are spread among the financial interests in the voyage or venture. Thus, a contribution "proportionably" must be made towards losses for the safeguard of the ship or of the goods and lives on the ship in time of tempest.<sup>244</sup>

Loss "voluntarily suffered" is described as the great principle of general average. Browne then explains that "voluntary" does not necessarily mean "consenting," nor is every loss included. Thus, if masts or yardarms are destroyed by the tempest there is no voluntary loss, but if the same masts and yardarms are cut away there would be a general average. Similarly, if a ship runs on shore and is broken up but the cargo saved, there is no voluntary loss unless the ship was purposely grounded to save the cargo.<sup>245</sup> When a general average act has been performed, "All persons for whose benefit the act was done, the freighters [shippers], the master, the owners, the sailors, the passengers, must contribute." Sailors, however, are usually freed from the necessity to contribute.<sup>246</sup> Furthermore, "All things in the ship, except the victualling and provisions of the ship and the bodies of the men (unless servants) must bear a proportionable share in the contribution."<sup>247</sup> Lastly,

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been frequently revised (most recently in 1924, 1949, 1974, and 1994), and are incorporated by reference in charter parties, bills of lading, and other maritime contracts worldwide. See generally *Eagle Terminal Tankers, Inc. v. Insurance Co. of U.S.S.R.*, 637 F.2d 890, 1981 AMC 137 (2d Cir. 1981). See also R. Lowndes & G. Rudolf, *The Law of General Average and The York-Antwerp Rules* (11th ed. 1990), and L. Buglass, *Marine Insurance and General Average in the United States* (3d ed. 1991). The current rules are reprinted at 1995 AMC 293.

In *Ralli v. Troop*, 157 U.S. 386, 403 (1895), the Supreme Court defined the elements of general average as follows: "a voluntary and successful sacrifice of part of the maritime adventure, made for the benefit of the whole adventure, and for no other purpose, and by order of the owners of all the interests included in the common adventure or the authorized representative of all of them." Today, the "authorized representative" is usually the master.

<sup>244</sup>2 Browne at 198. "There is a general average act when and only when, any extraordinary sacrifice or expenditure is intentionally and reasonably made or incurred for the common safety for the purpose of preserving from peril the property involved in a common maritime adventure." Rule A, York-Antwerp Rules (1994).

<sup>245</sup>2 Browne at 199. Cf. *Barnard v. Adams*, 51 U.S. (10 How.) 270, 303-04 (1850):

if the common peril was of such a nature, that the 'jactus,' or thing cast away to save the rest, would have perished anyhow, or perished 'inevitably,' even if it had not been selected to suffer in place of the whole, there can be no contribution. . . . The necessity of the case must compel [the master] to choose between the loss of the whole and part. . . .

<sup>246</sup>2 Browne at 201.

<sup>247</sup>Id. Cf. Rule XI of the York-Antwerp Rules (1994) (concerning wages and maintenance of the crew during prolongation of the voyage and, at a port of refuge, until the ship either resumes the voyage or is condemned).

“[T]he master ought not to deliver the goods until the contribution is settled, they being tacitly pledged, as they are for the freight.”<sup>248</sup>

### *G. Limitation of Liability*

Noting the severity of the maritime liability of shipowners for damage or injury in cases of accident, fire, or theft, a major modification was introduced in English law by the statute of 1786,<sup>249</sup> which limited the liability of owners of ships to “the value of the ship, with all her appurtenance, and the full amount of the freight due or to grow due.” The precondition is the absence of knowledge of the owners and the fact that the master or mariners shall not be privy to loss or damage by reason of any fire or by reason of any robbery or embezzlement, secreting or making away with any gold, silver, diamonds, jewels, precious stones, or other goods or merchandise. Browne noted the origin of this statute in an earlier act dealing only with embezzlement by the master and mariners;<sup>250</sup> furthermore, he speculated that these English statutes merely enacted the provisions of the Rhodian law<sup>251</sup> and the Laws of Visby.<sup>252</sup>

Respecting distribution of the proceeds from the limitation fund made up of ship, appurtenances, and freight, Browne wrote that the shippers “shall receive their satisfaction thereout in average, in proportion to their losses.”<sup>253</sup> Equitable principles and the aid of the equity courts were to be enlisted for the resolution of disputes as to the value of the ship and the claims of the shippers.<sup>254</sup>

<sup>248</sup>Browne at 201. Today, a bond will be required for general average contribution before the cargo will be delivered to the consignee. See *The Jason*, 225 U.S. 32 (1912), and *Dibrell Bros. v. Prince Line*, 58 F.2d 959, 1932 AMC 896 (2d Cir. 1932).

<sup>249</sup>Browne at 145 (discussing 26 Geo. 3, ch. 86). Cf. 46 U.S.C. app. § 183 (1988) (“without the privity or knowledge of such owner”). The United States Limitation of Liability Act was justified in Congress, in part, by the need to compete with the British merchant marine. See Act of Mar. 3, 1851, ch. 43, 9 Stat. 635, Rev. Stat. §§ 4282–4290. See also Donovan, *The Origins and Development of Shipowners’ Limitation of Liability*, 58 Tul. L. Rev. 999 (1979). The very heavy burden of proof on shipowners to establish absence of privity prevents many owners from relying on the Act. See *Spencer Kellogg & Sons, Inc. v. Hicks (The Linseed King)*, 285 U.S. 502, 1932 AMC 503 (1932), and *Matter of Oil Spill by the Amoco Cadiz*, 954 F.2d 1279, 1992 AMC 913 (7th Cir. 1992).

<sup>250</sup>Browne at 145. See 7 Geo. 2, ch. 15.

<sup>251</sup>Rhodian Law, § 13 (second fragment).

<sup>252</sup>Laws of Visby, art. 41.

<sup>253</sup>Browne at 146. Cf. *Hartford Accident & Indemnity Co. v. Southern Pacific Co.*, 273 U.S. 207 (1927). See also *The Mauch Chunk*, 154 F. 182 (2d Cir.), cert. denied, 207 U.S. 586 (1907) (equitable subordination of claims of the other colliding vessel).

<sup>254</sup>Browne at 146.



*H. Possession of the Vessel*

Excepting felonious or piratical takings, for which the criminal jurisdiction was applicable, and takings as prize for which prize jurisdiction only was applicable, Browne favored applying admiralty jurisdiction to "illegal possession of the ship in any other way."<sup>255</sup> Disputes concerning ownership and control (but not title) led to petitory or possessory suits in admiralty.<sup>256</sup> Because the admiralty court could not determine title, Browne said the court was confined to the possessory action, the issue of possession for which the common law courts had concurrent jurisdiction.<sup>257</sup> The common law courts had exclusive jurisdiction over title disputes.

On the vexatious question of an illegal taking of a ship followed by a sale in open market, Browne disputed the view that admiralty lost jurisdiction because the sale was on land. He felt that since admiralty had cognizance of the principal issue (the illegal taking), it should also have jurisdiction of the incidental issue, at least where the whole made one continued act (the sale after the taking being a continuation of the violence).<sup>258</sup> Respecting practice, the action *in rem* would be available for possessory actions.<sup>259</sup>

#### IV ARTHUR BROWNE'S TEXT IN THE UNITED STATES SUPREME COURT

Until American texts such as Conkling,<sup>260</sup> Benedict,<sup>261</sup> and Flanders,<sup>262</sup> as well as Justice Story's *Abridgment of Abbot*,<sup>263</sup> began to appear, Browne's text was usually authoritative, either standing alone or as part of a string of citations. Later, as American precedents became more plentiful, Browne's

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<sup>255</sup>See *supra* text accompanying note 172 (noting that because ocean ventures during this time typically involved many part-owners disputes concerning the control and use of ships were frequent).

<sup>256</sup>2 Browne at 113. Citing Browne's text, Justice Story, sitting in the Circuit Court in *The Tilton*, 23 F. Cas. 1277 (No. 14,054) (C.C.D. Mass. 1830), distinguished petitory suits for title from possessory suits and found no reason for the American courts to continue the distinction. In disputes about the uses to which a vessel is put when owners cannot agree on a proposed voyage or charter, the guiding principle in this country is that the vessel must be earning money. See *The Annie H. Smith*, 1 F. Cas. 968 (No. 420) (S.D.N.Y. 1878).

<sup>257</sup>2 Browne at 113.

<sup>258</sup>*Id.* at 116. Resolving the question of concurrency, Browne said that an action *in rem* for restitution of the ship should be in admiralty, while an action for damages could only be at common law by a writ of replevin or a case for trover.

<sup>259</sup>*Id.* at 118, 396-97, 402-06, 430-32. In *The Tilton*, *supra* note 256, owners having a 75% interest in the vessel had begun an action *in rem* for possession alleging wrongful withholding by the three remaining owners. Supplemental Admiralty Rule D clearly provides for process by a warrant of arrest of the vessel in "Possessory, Petitory and Partition Actions."

text became the resource of dissenters seeking to preserve earlier substantive customs and practices.

### A. Prize Law and International Law

The first Supreme Court opinion to cite Browne's text as authority was *Jennings v. Carson*,<sup>264</sup> a prize case from the American Revolution dealing with a ship and cargo seized by an American privateer and condemned by the Admiralty Court of the State of New Jersey in 1778. The New Jersey order was appealed to the Court of Appeals in Prize Cases under the Continental Congress (before ratification of the Articles of Confederation) and reversed by that court in 1780 with an order for restitution. After the government under the United States Constitution came into force in 1789, the neutral owner of the condemned ship libelled the privateer (and subsequently his executors) for the proceeds of the prize sale. The opinion of Chief Justice Marshall for an unanimous court affirmed dismissal of the libel. Browne's text was used to establish admiralty's jurisdiction over prize cases, even in the absence of a statute,<sup>265</sup> and the arrest *in rem* of a ship as the foundation of admiralty jurisdiction.<sup>266</sup>

Browne's text would be used in prize cases throughout the United States' war with Great Britain (1812–14), as well as during the revolutions in Latin America as those countries sought independence from Spain.<sup>267</sup> It was also cited in cases under Jefferson's Embargo Act where condemnation of United States vessels was sought for violation of the prohibition on international trading;<sup>268</sup> it was further used in discussions of crimes such as piracy,<sup>269</sup> murder,<sup>270</sup> and oyster-poaching and illegal nets.<sup>271</sup>

<sup>260</sup>A. Conkling, *Admiralty Jurisprudence* (1848).

<sup>261</sup>E. Benedict, *The Law of American Admiralty* (1850).

<sup>262</sup>H. Flanders, *Treatise on Maritime Law* (1852).

<sup>263</sup>J. Story, *Abridgment of Abbot's Treatise of the Law Relating to Merchant Ships and Seamen* (1810).

<sup>264</sup>8 U.S. (4 Cranch) 2 (1807).

<sup>265</sup>*Id.* at 22–23.

<sup>266</sup>*Id.* at 24.

<sup>267</sup>See *Rose v. Himely*, 8 U.S. (4 Cranch) 241 (1808); *The Nereida*, 13 U.S. (9 Cranch) 388 (1815); *The Gran Para*, 20 U.S. (7 Wheat.) 471 (1822); *The Arrogante Barcelones*, 20 U.S. (7 Wheat.) 496 (1822); and *La Nereyda*, 21 U.S. (8 Wheat.) 108 (1823).

<sup>268</sup>See *United States v. The Schooner Betsy and Charlotte*, 8 U.S. (4 Cranch) 443 (1808); *The General Pinkney v. United States*, 9 U.S. (5 Cranch) 281 (1809); *Williams v. Armroyd*, 11 U.S. (7 Cranch) 423 (1813); and *The Octavia*, 14 U.S. (1 Wheat.) 20 (1816).

<sup>269</sup>See *United States v. Smith*, 18 U.S. (5 Wheat.) 153 (1820), and *The Brig Malek Adhel*, 43 U.S. (2 How.) 210 (1844).

<sup>270</sup>See *United States v. Bevans*, 16 U.S. (3 Wheat.) 336 (1818).

When the law of war was invoked against the Southern Confederacy in the Civil War the Court turned to Browne;<sup>272</sup> but his work was also useful to the dissenters in *The Confiscation Cases*.<sup>273</sup> During the second year of the war Congress enacted a statute to confiscate the property of rebels as part of a provision to suppress insurrection and punish treason.<sup>274</sup> The statute did not make detailed provisions; in one part it merely ordered the proceedings to conform as nearly as possible to the proceedings in admiralty or revenue cases. Justice Strong's Republican majority opinion upheld the confiscation of Slidell's land under this statute, noting that admiralty proceedings were selected as the model because "strict conformity" and "technical niceties" were not required in admiralty.<sup>275</sup> The major objection to these rash and even hysterical confiscation proceedings was that the proceedings tolerated alternative and cumulative allegations of treason without strict proof.

Justices Clifford and Field, both Democrats, and Justice Davis (President Lincoln's 1860 campaign manager) dissented; Clifford merely saying that the majority opinion "is opposed to the whole current of the decisions of the admiralty courts and to the rules laid down by the most approved writers upon admiralty law."<sup>276</sup> Arthur Browne's treatise is listed among the most approved writers.

Finally, there is a prize case which is the source of the doctrine of the absolute immunity of foreign sovereigns in United States courts: *The Schooner Exchange v. McFadden*.<sup>277</sup> The Supreme Court refused to review the history of a Baltimore schooner because at the time of her arrest in Philadelphia the vessel was a French warship. Dallas, the United States Attorney for Pennsylvania, citing Browne, argued for absolute sovereign immunity and the absence of admiralty jurisdiction. Chief Justice Marshall's rejection of jurisdiction was held to be required by customary international

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<sup>271</sup>See *Smith v. Maryland*, 59 U.S. (18 How.) 71 (1855) (oysters), and *C.J. Hendry v. Moore*, 318 U.S. 133, 1943 AMC 156 (1943) (an unusual forfeiture of an illegal net in a criminal rather than a civil proceeding under California's game laws).

<sup>272</sup>See *Mrs. Alexander's Cotton*, 69 U.S. (2 Wall.) 404 (1864).

<sup>273</sup>87 U.S. (20 Wall.) 92 (1873).

<sup>274</sup>Act of July 17, 1862, ch. 195, § 7, 12 Stat. 589.

<sup>275</sup>87 U.S. at 110.

<sup>276</sup>*Id.* at 113 (citing 2 Browne at 401).

<sup>277</sup>11 U.S. (7 Cranch) 116 (1812). The vessel had sailed under the orders of her Baltimore owners on October 27, 1806, bound for San Sebastian, Spain, but was captured by French warships and condemned by a French prize court. When the vessel, renamed *Balaou*, sailed into Philadelphia in 1811 under French colors for emergency repairs she was arrested by her original owners. Browne's text was used by the government to establish the absence of admiralty jurisdiction on the question of title. See *id.* at 121 (citing 2 Browne at 110).

law and necessary for the effective conduct of international relations by the executive.<sup>278</sup>

### B. Admiralty Jurisdiction

Because the conferral of admiralty jurisdiction is located in Article III of the Constitution, which creates the federal courts, admiralty jurisdiction in the United States always raises questions of constitutional dimensions, whether the federal courts have the power to decide the dispute or whether the state courts must decide. Admiralty jurisdiction in Arthur Browne's time did not involve constitutional questions of federalism but rather the choice of legal system (common law or Roman law) and the type of fact finder (jury or judge). Furthermore, the United States Constitution granted federal court jurisdiction in "all cases of admiralty and maritime jurisdiction,"<sup>279</sup> and on the principle that the Constitution does not use superfluous terms, the word "maritime" could only broaden the remnant of English admiralty jurisdiction familiar to Arthur Browne. Thus, Browne's treatise was an unlikely source for arguments in American constitutional disputes. Nevertheless, Browne's historical background would be used in these cases as arguments to expand or contract federal court jurisdiction.

To summarize the doctrine, contracts conceptually maritime<sup>280</sup> and torts involving traditional maritime activity but occurring on navigable waters<sup>281</sup> are today within American admiralty jurisdiction. The fact finder in admiralty is normally the judge alone, but this is by custom, not by statute or constitution. The Judiciary Act of 1789 preserved the right of jury trial through the use of the state courts with juries,<sup>282</sup> did not mandate jury trials,<sup>283</sup> and referred the courts and practitioners initially to the practices of

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<sup>278</sup>The absolute foreign sovereign immunity of the *Schooner Exchange* was applied to government-owned merchant ships in *Berizzi Bros. v. The Pesaro*, 271 U.S. 562 (1926). Executive suggestions of such immunity were given binding effect in *Ex Parte Republic of Peru*, 318 U.S. 578 (1943). In 1952, however, the State Department changed the immunity from absolute to restrictive so as to exempt the "private," as opposed to the "public," acts of foreign sovereigns. Finally, in 1976, Congress enacted the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330 and 1602-1611 (1988), conferring jurisdiction on the federal courts to determine whether foreign sovereigns are exempt respecting commercial activities.

<sup>279</sup>See Article III, § 2.

<sup>280</sup>See *The Lexington*, supra note 193; *New England Mutual Marine Insurance Co. v. Dunham*, 78 U.S. (1 Wall.) 1 (1871); and *Exxon v. Central Gulf Lines*, supra note 161.

<sup>281</sup>See *The Plymouth*, supra note 200; *Executive Jet*, supra note 204; *Foremost*, supra note 206; and *Sisson*, supra note 208.

<sup>282</sup>See Act of Sept. 24, 1789, ch. 20, 1 Stat. 76, § 9 ("saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it").

<sup>283</sup>*Id.* ("And the trial of issues in fact, in the district courts, in all causes except civil causes of admiralty and maritime jurisdiction, shall be by jury.")

the civil law.<sup>284</sup> Following a hostile reaction to “Roman” practices, Congress provided that the practices in the federal admiralty courts would follow the practice of admiralty courts.<sup>285</sup> Under these practice directives, American admiralty courts would not customarily use juries as the fact finders.<sup>286</sup>

While use of Browne’s text was essential to Justice Story’s circuit court decision on admiralty contract jurisdiction,<sup>287</sup> it was not until much later, in *Waring v. Clarke*,<sup>288</sup> that the Court used Browne’s text on these questions. In two earlier cases concerning admiralty jurisdiction on the rivers, Browne’s text had been urged by counsel but not applied by the Supreme Court. In *Peyroux v. Howard (The Planter)*,<sup>289</sup> and *The Orleans v. Phoebus*,<sup>290</sup> the issue was admiralty jurisdiction on the Mississippi River, with the *Orleans* reaching a result contrary to *The Planter*.

Story’s *Orleans* opinion confined admiralty jurisdiction to the high seas and the ebb and flow of the tide, as in *The Thomas Jefferson*.<sup>291</sup> “Interior” navigation thus was not within admiralty jurisdiction despite the enormous growth in steamboat and barge traffic on the rivers and canals.

In *Waring v. Clarke*,<sup>292</sup> a collision on the Mississippi River (ninety-five miles above New Orleans and 203 miles from the sea) forced the Court to revisit the question of the effect of the ebb and flow of the tide on American admiralty courts and resulted in an expansion of jurisdiction. This case was decided after the death of Justice Story, who, in *The Thomas Jefferson*, had rejected admiralty jurisdiction on the wage claim of a seaman who worked

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<sup>284</sup>See Act of Sept. 29, 1789, ch. 21, § 2, 1 Stat. 93 (“And the forms and modes of proceeding in causes of equity, and of admiralty and maritime jurisdiction, shall be according to the course of the civil law”).

<sup>285</sup>See Act of May 8, 1792, ch. 36, § 2, 1 Stat. 276 (“And the forms and modes of proceeding . . . in those of equity and in those of admiralty and maritime jurisdiction, according to the principles, rules and usages which belong to courts of equity and to courts of admiralty respectively, as contradistinguished from courts of common law”).

<sup>286</sup>In 1920, however, Congress provided for the right of trial by jury in cases of personal injury or wrongful death of seamen. See 46 U.S.C. app. § 688 (1988).

<sup>287</sup>See *DeLovio*, supra note 140 (Browne’s text was an essential part of this decision).

<sup>288</sup>46 U.S. (5 How.) 441 (1847).

<sup>289</sup>32 U.S. (7 Pet.) 324 (1833). In a case arising out of repairs to a steamboat at its homeport of New Orleans, the defendant denied admiralty jurisdiction because there was no “ebb and flow” of the tide. The plaintiff, however, successfully proved tidal influence. Under the authority of *The General Smith*, see supra note 162, there was no maritime lien unless provided by state law. As noted earlier, the doctrine was washed away by the passage of the 1910 Federal Maritime Lien Act. See supra note 163.

<sup>290</sup>36 U.S. (11 Pet.) 175 (1837) (partition action among disputing owners, the issue being the past uses of the vessel north from New Orleans to Pittsburgh).

<sup>291</sup>See supra note 142.

<sup>292</sup>See supra note 288 (citing 2 Browne at 92 and 110). As is explained infra note 386, Justice Daniel concurred in the opinion. Justice Grier concurred as to the result and as to the issue of the existence of admiralty jurisdiction.

on a vessel operating from Shippingport, Kentucky to Missouri and back,<sup>293</sup> noting that “the voyage not only in its commencement and termination, but in all its immediate progress, was several hundreds of miles above the ebb and flow of the tide.”<sup>294</sup>

Story’s *Orleans* opinion,<sup>295</sup> which confirmed the absence of maritime jurisdiction beyond the ebb and flow of the tide, had led to great confusion in New Orleans, one of the most important ports in the United States where there are no tidal changes but the effect of the distant ocean tides can be seen on the strong southerly current of the river. In *Waring*, Browne was not essential for the majority, although it was cited.<sup>296</sup> Rather, Justice Woodbury’s thirty-six page dissent found great comfort in Browne’s analysis of the statutes of Richard II and its restrictions of admiralty to things done upon the sea.<sup>297</sup>

*The Genesee Chief v. Fitzhugh*<sup>298</sup> involved a collision on Lake Ontario between the propeller *Genesee Chief* and the schooner *Cuba*. Chief Justice Taney passed over arguments based on the Great Lakes Act of 1845<sup>299</sup> and based his decision on the character of the waters as public navigable waters and thereby within the admiralty and maritime jurisdiction as known and understood when the Constitution was adopted.<sup>300</sup> Browne’s text was passed over on the question of jurisdiction but was used on the evidentiary question of the incompetency of a witness.<sup>301</sup>

*Jackson v. The Steamboat Magnolia*<sup>302</sup> also dealt with admiralty jurisdiction as a question of constitutional law, applying the logic of *The Genesee Chief* to an inland river of Alabama 200 miles from the sea. The Court, having applied the public navigable waters theory first to the Great Lakes in *The Genesee Chief*, and then to the Mississippi River in *Fretz v. Bull*,<sup>303</sup> was now sufficiently confident of its navigable waters doctrine to invade a sovereign state’s territory with federal admiralty jurisdiction, to the intense despair of Justice Daniel, who saw “the hand of federal power . . . thrust into everything, even into a vegetable or fruit basket . . . [where it was] liable to

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<sup>293</sup>See supra note 142. For Justice Story this was an unusually short opinion (just two pages), without any of his customary references to history and classical authors.

<sup>294</sup>23 U.S. at 429.

<sup>295</sup>See supra note 290.

<sup>296</sup>46 U.S. at 464.

<sup>297</sup>Id. at 468, 472, 482, 489, 500, 503.

<sup>298</sup>See supra note 144.

<sup>299</sup>See supra note 142.

<sup>300</sup>See 53 U.S. at 454–57.

<sup>301</sup>Id. at 450.

<sup>302</sup>61 U.S. (20 How.) 296 (1857).

<sup>303</sup>53 U.S. (12 How.) 466 (1851) (ebb and flow of the tide could not be argued in a collision occurring opposite Prophet’s Island, Louisiana, some 260 miles above the mouth near Baton Rouge).

be arrested on its way to the next market town by the high admiralty power. . . ."<sup>304</sup> Daniel's hatred of national power led him to conclude that not even the constitutional grant could change the nature of Arthur Browne's admiralty jurisprudence as it existed in England in 1789.<sup>305</sup>

The last case of constitutional dimension in which Browne's text would be used (in dissent) was *Southern Pacific Co. v. Jensen*,<sup>306</sup> a five-to-four decision that is cited today for the proposition that because the non-statutory general maritime law must be uniform throughout the United States, state legislation may not vary its terms.<sup>307</sup>

The case involved the applicability of the New York State Workmen's Compensation Act<sup>308</sup> to the death claim of the widow and orphans of a railroad employee who was unloading lumber in a truck from the hold of a steamship in berth; the truck was customarily loaded with cargo on the ship, driven on a gangway out of the ship onto the pier, and then to a place on the pier where it was unloaded. Jensen (the decedent) was killed on the gangway as he proceeded backwards into the hatchway.

The New York State Workmen's Compensation Commission had awarded Jensen's widow \$5.87 per week during widowhood, \$100 for funeral expenses, and two years compensation in a lump sum in case of remarriage; his minor children were each awarded \$1.96 per week until age eighteen. The employer objected to the award as an unconstitutional burden upon interstate commerce and a violation of the Fourteenth Amendment. The New York State Court of Appeals, however, had affirmed the award.<sup>309</sup>

It is necessary to apply a broader context than admiralty jurisdiction to understand the majority opinion, written by Justice McReynolds,<sup>310</sup> one of

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<sup>304</sup>61 U.S. at 320.

<sup>305</sup>Id. at 310 (citing 2 Browne at 490).

<sup>306</sup>See supra note 131.

<sup>307</sup>244 U.S. at 216-17.

<sup>308</sup>See Consolidated Laws of New York, ch. 67, as reenacted and amended by Laws of 1914, ch. 41, and as further amended by Laws of 1914, ch. 316.

<sup>309</sup>See 215 N.Y. 514 (1915). *New York Central R.R. Co. v. White*, 243 U.S. 188 (1917), upheld New York's second Workers' Compensation Act as constitutional; New York's first Workers' Compensation Act had been held unconstitutional as a violation of the Fourteenth Amendment's guarantee of substantive due process. See *Ives v. South Buffalo R. Co.*, 201 N.Y. 271, 94 N.E. 431 (1911). In like manner, New York's attempt at wage and hour legislation, as applied to a baker, had been held unconstitutional in *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>310</sup>James C. McReynolds (1862-1946) was born in Elkton, Kentucky. After receiving an A.B. from Vanderbilt (1882) and an LL.B. from the University of Virginia (1884), he entered practice in Nashville. A Democrat supporter of Cleveland in the struggle over gold, he was made an Assistant Attorney General by Theodore Roosevelt in 1903 and served for four years. In 1913, President Wilson appointed McReynolds Attorney General and, in 1914, named him to the Supreme Court. McReynolds sat on the Court until 1941 and used his position to disapprove all New Deal legislation (initially as part of the majority but in dissent after 1937). He was notoriously anti-semitic and was uncivil to Justices Brandeis and Cardozo.

the most conservative justices to sit on the Supreme Court, who would later be thought of as one of the four horsemen (of the apocalypse)<sup>311</sup> because of his total opposition to any governmental regulation of business activity. Thus, McReynolds would adopt any rationale to extirpate confiscatory legislation that deprived the employer of its three common law defenses to employee injuries: contributory negligence, assumption of the risk, and fellow servant negligence. A substantive due process rationale, however, was not readily available in *Jensen* due to the Court's finding, in the companion case of *New York Central R.R. Co. v. White*, that the Act was constitutional.<sup>312</sup>

Justice McReynolds began by noting that the Supreme Court had merely held the New York statute "valid in certain respects."<sup>313</sup> He then proclaimed that Congress had paramount power to establish the maritime law which is to prevail throughout the country, and that in the absence of statute the general maritime law as accepted by the federal courts must operate uniformly in the whole country because the Constitution aimed at uniformity and consistency on all subjects of a commercial character.<sup>314</sup> Turning to Jensen's job as a stevedore (in fact, a longshore worker), Justice McReynolds described his employment as subject to a maritime contract and his injuries as maritime. Thus, application of the New York State statute would destroy the uniformity in maritime matters that the Constitution was designed to establish.<sup>315</sup>

Justice Holmes's dissent speared McReynolds' preference for common law remedies with succinct analysis: "The common law is not a brooding omnipresence in the sky but the articulate voice of some sovereign or quasi-sovereign that can be identified; although some decisions with which I have disagreed seem to have forgotten the fact."<sup>316</sup> More important, Holmes could not understand why McReynolds was choosing to ignore the statutory exception to the grant of admiralty and maritime jurisdiction to the federal courts, i.e., the exception "saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it" (obviously in the state courts) contained in the Judiciary Act of 1789.<sup>317</sup> To Holmes there was no reason why the mere silence of Congress should

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<sup>311</sup>Justices McReynolds, Sutherland, Van Devanter, and Butler were given that nickname in the struggles over New Deal legislation. All were over seventy in 1937 and were undoubtedly the targets of the 1937 Roosevelt court-packing plan. See generally L. Baker, *Back to Back: The Duel between FDR and the Supreme Court* (1967).

<sup>312</sup>See *supra* note 309.

<sup>313</sup>244 U.S. at 211.

<sup>314</sup>*Id.* at 215.

<sup>315</sup>*Id.* at 217.

<sup>316</sup>*Id.* at 222 (undoubtedly referring to *Lochner*, *supra* note 309).

<sup>317</sup>See *supra* note 126.



exclude the statutory or common law of a state from supplementing the wholly inadequate maritime law from the time of the Constitution.<sup>318</sup>

Arthur Browne's treatise appeared in the thirty-two page dissent of Justice Pitney, cited for the proposition that breaches of contract could be within the jurisdiction of the common law or admiralty depending on the fictitious pleading as to the place of making the contract: at sea for admiralty jurisdiction or on land for common law jurisdiction.<sup>319</sup> Pitney concluded that the grant of jurisdiction to admiralty did not exclude the concurrent jurisdiction of common law courts already recognized in the "savings to suitors." He found that an eclectic methodology was practiced both at common law and in admiralty prior to the Constitution and that nothing in the Constitution compelled its abandonment;<sup>320</sup> thus the Judiciary Act contemplated concurrency with the option for the benefit of suitors (plaintiffs), not defendants.<sup>321</sup> Arthur Browne's treatise served to elucidate and demonstrate the operation of the jurisdictional limits imposed through historical processes on the powers of courts that specialize in problems of ocean transport.

### C. Admiralty Practice

In *Atkins v. Fibre Disintegration Co.*,<sup>322</sup> the Court dealt with the crucial question of attachment of property in order to obtain jurisdiction over a respondent when the respondent could not be found within the district. The libellant, a vessel owner, commenced an action *in personam* in the United States District Court for the Eastern District of New York against the respondent, a charterer, merely describing respondent as a corporation, without further identification, although in fact respondent was incorporated in New Jersey. The marshal's return noted that the respondents "were not found in my district and I attached all the property of the respondents found in their factory in Red Hook Point . . . Brooklyn."<sup>323</sup>

The respondent moved to quash the attachment, alleging the presence of the corporation's officers at the factory in Brooklyn within the district.<sup>324</sup> The merits of the dispute, which involved a charter party, concerned loading

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<sup>318</sup>244 U.S. at 223.

<sup>319</sup>*Id.* at 230 (citing 2 Browne at 112, 115). In 1917 Justice Pitney wrote opinions upholding the constitutionality of three different state compensation acts: *New York Central R.R. Co. v. White*, 243 U.S. 188 (1917) (New York); *Hawkins v. Bleakly*, 243 U.S. 210 (1917) (Iowa); and *Mountain Timber Co. v. Washington*, 243 U.S. 219 (1917) (Washington).

<sup>320</sup>244 U.S. at 237.

<sup>321</sup>*Id.* at 243.

<sup>322</sup>85 U.S. (18 Wall.) 272 (1874).

<sup>323</sup>*Id.* at 273. See also 2 F. Cas. 78 (No. 601) (E.D.N.Y. 1868).

<sup>324</sup>85 U.S. at 273.

demurrage and breach of the safe port clause by grounding at the second loading port (matters not subsequently reviewed on appeal).

The district court ordered the respondent to pay \$13,302 in damages to be realized out of the stipulations (similar to letters of undertaking) that had been substituted for the attached property.<sup>325</sup> The original motion to quash the service was never decided as the respondent made a new motion to set aside all proceedings (for lack of jurisdiction) on the ground that the commencement of the proceeding violated the Judiciary Act of 1789.<sup>326</sup> The libellant argued that the statute was inapplicable because an admiralty process was not a civil suit and the admiralty court had an inherent right to attach the property of absconding, absent, or non-resident debtors. In this regard the libellant cited Browne's text to the effect that a proceeding by foreign attachment under the charters of the cities of London and Dublin were commonly used, by analogy, in admiralty where the respondent could not be found or lived in a foreign country.<sup>327</sup>

The respondent sought to distinguish Browne's language by suggesting that it applied to aliens to the United States, not to artificial persons at home in an adjoining judicial district.<sup>328</sup> The District Court, however, agreed with the libellant that the cause was not a civil suit in the sense of the Judiciary Act and that an admiralty court had inherent power to attach the property. When the Circuit Court reversed the District Court, an appeal was taken to the Supreme Court. There, the issues were the inapplicability of the Judiciary Act and the inherent power of admiralty courts.

Justice Swayne, adopting some of the reasoning of the libellant's counsel, Erastus C. Benedict, agreed with the District Court that the 1789 Judiciary Act was inapplicable. He interpreted the phrase "civil suit" not merely in its immediate context but in accordance with its usage in preceding and subsequent sections of the Judiciary Act. Thus, the phrase civil suit referred to suits at common law or in equity, as opposed to admiralty causes.<sup>329</sup> The opinion pointed to the acceptance of the practice of acquiring jurisdiction *in personam* by foreign attachment in an earlier Supreme Court case.<sup>330</sup> Lastly, the Court quoted Arthur Browne, as the trial judge had done, to the effect

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<sup>325</sup>*Id.* at 276.

<sup>326</sup>"And no Civil Suit shall be brought before either of said courts [Circuit and District] against an inhabitant of the United States, by any original process, in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ." Act of Sept. 24, 1789, ch. 20, § 11, 1 Stat. 76.

<sup>327</sup>85 U.S. at 275 (citing 2 Browne at 434, 333, 433). The Court also cited the Elizabethan text Clerke's *Praxis Supremae Curiae Admiraltatis*.

<sup>328</sup>85 U.S. at 275-76.

<sup>329</sup>*Id.* at 301-03.

<sup>330</sup>See *Manro v. Almeida*, 23 U.S. (10 Wheat.) 473 (1825). Counsels' arguments cited 2 Browne at 113, 333, 426, but the Court did not refer to Browne in reversing the district court.

that when an admiralty respondent cannot be found in the district its goods can be attached to compel its appearance.<sup>331</sup>

Respecting the now discarded doctrine that an appeal in admiralty can be a trial *de novo* of the merits, Browne's text was used to buttress the growing practice in an opinion by Chief Justice Marshall in a case involving violation of the embargo,<sup>332</sup> and again in another involving a civil appeal.<sup>333</sup> The practice of introducing new evidence during appeal was gradually disappearing until the Supreme Court clearly abolished it in *McAllister v. United States*.<sup>334</sup> Today, under Rule 52(a) of the Federal Rules of Civil Procedure, the findings of fact are not to be altered on appeal unless "clearly erroneous."

Petitory and possessory proceedings as methods of determining the ownership of vessels were approved by the Supreme Court in *Ward v. Peck*,<sup>335</sup> citing Browne's text and approving Justice Story's decision on circuit in *The Tilton*.<sup>336</sup> The second great dissenter, Justice Daniel, denounced any expansion of federal admiralty jurisdiction by the use of Browne's treatise.<sup>337</sup>

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<sup>331</sup>85 U.S. at 303 (citing 2 Browne at 434). Respecting modern maritime attachment under Supplemental Rule B, see Jarvis, *An Introduction to Maritime Attachment Under Rule B*, 20 J. Mar. L. & Com. 521 (1989).

<sup>332</sup>See *The General Pinkney*, supra note 268. Chief Justice Marshall wrote, "The cause in the appellate court is to be heard *de novo*, as if no sentence had been passed. This has been the uniform practice not only in cases of appeal from the district to the circuit courts of the United States, but in this court also." 9 U.S. at 285.

<sup>333</sup>See *In re Hawkins*, 147 U.S. 486 (1893) (citing 1 Browne at 449 and 2 Browne at 436).

<sup>334</sup>348 U.S. 19, 1954 AMC 1999 (1954).

<sup>335</sup>59 U.S. (18 How.) 267 (1855).

<sup>336</sup>See supra note 256.

<sup>337</sup>59 U.S. at 270. Peter V. Daniel (1784–1860), a rabid Jeffersonian from Virginia, was appointed by President Van Buren and confirmed by the Senate on March 3, 1841, Van Buren's last day in office. He was noted for lengthy and acerbic dissents critical of Whig colleagues. See J. Frank, *Justice Daniel Dissenting* (1964). Daniel wrote:

For the jurisdiction here claimed for the admiralty, we are referred to the treatise of Mr. Arthur Brown (sic), professor of civil law in Ireland. I have no recollection of having before seen or heard the doctrines of this professor recognized as authority, and with respect to his theories, it may justly be remarked, that if these are to be adopted as law, there is no excess of extravagance to be found in the exploded notions of Sir Leoline Jenkins, or anywhere else, which will not find an apology, nay a full justification, in the book of this civil law doctor. If the theories of this professor are to be regarded as binding, his disciples may look forward at no distant day to an announcement from this bench, as there has been formerly from that of one of the circuits of the doctrine, that a policy of insurance (a mere wager laid upon the safety of a vessel) is strictly and essentially a maritime contract, because, forsooth, the vessel had to navigate the ocean. [describing Story's opinion in *De Lovio*, supra note 140, and predicting the opinion of Justice Bradley in *Dunham*, infra note 356]

It seems somewhat singular, however, that Mr. Brown should be appealed to in support of the authority now claimed for the admiralty, when in truth his book again and again admits, that such jurisdiction had been utterly repudiated in England as a sheer usurpation, and may appropriately be styled a jeremiad over the lost authority and splendor of a system which he would exalt to the

### D. Maritime Liens

*Ramsay v. Allegre*,<sup>338</sup> an action for repairs and supplies to a vessel in her homeport, was quickly resolved without analyzing admiralty jurisdiction because the shipowners had given a negotiable promissory note to pay the debt that had been the subject of the repairer's admiralty action. Greatly angered by the majority's theoretical expansion of admiralty jurisdiction in dictum, Justice William Johnson, the first great dissenter, used Browne's text to narrow the admiralty jurisdiction that the majority seemed to be enlarging as part of the federal power.<sup>339</sup>

Enforcing maritime liens for repairs and supplies at the homeport was one of the most controversial aspects of admiralty law in the nineteenth century. Justice Story denied the existence of the homeport maritime lien for repairs and supplies in *The General Smith*,<sup>340</sup> but this was not the end of the struggle: state legislators enacted maritime lien statutes to protect local repairers and suppliers and these state-created liens became the subject of *in rem* proceedings in the federal admiralty courts.<sup>341</sup> Although Congress would not act until 1910 to suppress these state statutes in favor of a federal maritime lien for repairs and supplies, the Supreme Court in the Admiralty Rules of 1844<sup>342</sup> sought to introduce some elements of uniformity into the chaos of widely different state maritime lien laws. Browne's text was used to deny lien status for various materialmen's claims.<sup>343</sup>

control of every other branch of jurisprudence. . . . It is that tendency of error once countenanced or tolerated to grow into precedent, which has ever enjoined it upon me as a sacred duty to resist its approaches before they have been matured into power. . . .

<sup>338</sup>25 U.S. (12 Wheat.) 611 (1827).

<sup>339</sup>*Id.* at 621, 628, 630, 632–35 (citing 2 Browne at 80–81, 100, 196–97). William Johnson (1771–1834), a South Carolinian, was the speaker of his state's legislature and became Thomas Jefferson's first appointee to the Court. He would be in a Democratic-Republican minority, opposed by a Federalist majority, for twenty years under five terms of Democratic-Republican presidents. He served for thirty years (1804–34) and wrote thirty-four dissents, 112 majority opinions, and twenty-one concurrences. Johnson's position as dissenter was taken by the Jackson Democrat Peter V. Daniel, who in nineteen years wrote fifty dissents and 74 majority opinions. See *supra* note 337.

<sup>340</sup>See *supra* note 162.

<sup>341</sup>See *The Planter*, *supra* note 289, and *The Orleans*, *supra* note 290, and, after the 1844 Rule discussed *infra* note 342, *The Lottawanna*, 88 U.S. (21 Wall.) 558 (1874).

<sup>342</sup>See 44 U.S. (3 How.) v (1844) (Rule IX). The Supreme Court's authority to make this first set of practice rules was provided by the Act of Aug. 23, 1842, ch. 188, § 6, 5 Stat. 518. Prior to the 1910 Federal Maritime Lien Act, see *supra* note 163, Rule 12 was amended in 1858 and 1872. By the latter amendment all suits by materialmen for repairs or supplies could proceed against ship and freight *in rem* or against the master or owner *in personam*.

<sup>343</sup>See *The Steamboat Magnolia*, *supra* note 302 (in dissent); *The People's Ferry Co. v. Beers*, 61 U.S. (20 How.) 393 (1857) (contract to build a vessel not maritime); *The Steamer St. Lawrence*, 66 U.S. (1 Black) 522 (1861); *The Lottawanna*, *supra* note 341 (materialmen's liens not perfected as required by Louisiana statute treated as a non-lien ship mortgage); and *Ex Parte Easton*, 95 U.S. 68 (1877) (no maritime lien for wharfage charge on canal boat).

*E. Collisions and Maritime Torts*

A high seas collision between two sailing vessels, both close-hauled on the wind at about 3:00 a.m. on December 11, 1847, was held to be an inevitable accident because each vessel must have seen the other at the same instant without time to avoid the collision.<sup>344</sup> Browne's text was cited for the proposition that in cases of collision by inevitable accident, where no fault can be proved, each vessel must bear her own losses,<sup>345</sup> declared by Justice Nelson to be "more just and equitable."<sup>346</sup> Browne was also used to establish the tort liability of defendants who caused damage to two vessels running upon obstructions in navigable water where none was expectable. The locality rule provided the basis for admiralty jurisdiction.<sup>347</sup>

While the Supreme Court early in this century established that a damaged vessel could sue a shore establishment for maritime tort, the reverse would *not* be permitted until Congress in 1948 enlarged admiralty jurisdiction to permit the shore establishment to sue the vessel causing the damage.<sup>348</sup> This anomaly, now removed, was caused by *The Plymouth*.<sup>349</sup> That case involved the steamship *Falcon*, a vessel that caught on fire while berthed at the plaintiff's wharf on the Chicago River. The fire spread from the ship to warehouses located on the wharf, destroying them. The plaintiff began a maritime tort action by attaching the *Falcon*'s sistership *Plymouth*.

Justice Nelson could not find precedent in tort law in which admiralty exercised jurisdiction over torts occurring partly on water and partly on land, and he refused to accept the analogy from contract cases because locality is not essential in contract cases. Nelson formulated the rule for maritime torts that the substance (or commission) as well as the consummation of the

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<sup>344</sup>See *Stainback v. Rae*, 55 U.S. (14 How.) 532 (1852).

<sup>345</sup>*Id.* at 538 (citing 2 Browne at 204-07).

<sup>346</sup>*Id.* As has been pointed out elsewhere, however, lower court decisions had divided damages before this opinion. See *Sprague, Divided Damages*, 6 N.Y.U. L. Rev. 15 (1928).

<sup>347</sup>See *Philadelphia, Wilmington & Baltimore R.R. Co. v. Philadelphia & Havre de Grace Steam Towboat Co.*, 64 U.S. (23 How.) 209 (1859) (citing 2 Browne at 110 and 203) (liability for abandoning the piles from a railroad bridge no longer in use over the Susquehanna River), and *Panama R.R. Co. v. Napier Shipping Co.*, 166 U.S. 280 (1897) (citing 2 Browne at 203) (for allowing plaintiff's vessel to be berthed in a slip where a dredge had previously foundered and sank in the harbor of Colon, Panama).

<sup>348</sup>See *The Extension of Admiralty Jurisdiction Act*, 46 U.S.C. app. § 740 (1988), which provides, "The admiralty and maritime jurisdiction of the United States shall extend to and include all cases of damage or injury, to person or property, caused by a vessel on navigable water, notwithstanding that such damage or injury be done or consummated on land."

The Ninth Circuit applied the Act to an allision with a dike that had occurred before the statute became effective in *United States v. Matson Navigation Co.*, 201 F.2d 610, 1953 AMC 272 (1953). The court did not take a position on whether the source of Congress' constitutional authority was its power to regulate commerce (Article I) or the admiralty jurisdiction grant (Article III).

<sup>349</sup>See *supra* note 200.

wrong must be on navigable waters.<sup>350</sup> Because the Court was unwilling to separate in theory the consummation on navigable waters from the commission on navigable waters, the commission of the tort on navigable waters prevented the Court from bringing along the consummation as pendent or supplemental to the commission.<sup>351</sup>

### F. General Average

*Columbian Insurance Co. of Alexandria v. Ashby & Stirling*<sup>352</sup> is a major case on the law of general average. The decision makes it clear that cargo is obligated to contribute where there is a stranding and total loss of a ship in order to preserve the lives of the crew and the cargo. Justice Story's opinion cited Browne<sup>353</sup> at the end of a list of authors whose opinion differed from that of the eminent French authority, Emerigon,<sup>354</sup> who held that the ship must be refloated after a voluntary stranding in order to have a general average act.<sup>355</sup> Browne's opinion in favor of the existence of a general average act without return to normal service of the imperilled ship concurred with the *Consolato del Mar* and a number of classical authors as well as the then-current practices of Lloyd's underwriters.

### G. Maritime Contracts and Cargo Damage

The major Supreme Court decision on the question of whether marine insurance is within admiralty contract jurisdiction is *New England Mutual Marine Insurance Co. v. Dunham*.<sup>356</sup> The case came to the Supreme Court because of a split of opinion among the two judges in the Circuit Court in Massachusetts on a libel *in personam* by an insured vessel owner against his insurer for failure to pay a claim under a hull policy. At issue was the amount that the insured had spent to repair his vessel after a collision. The

<sup>350</sup>70 U.S. at 34. Counsel cited 2 Browne at 208: "Every species of tort, however occurring, and whether on board a vessel or not, if upon the high seas or navigable waters, is of admiralty cognizance." See 70 U.S. at 36.

<sup>351</sup>*Id.* at 34.

<sup>352</sup>38 U.S. (13 Pet.) 331 (1839). A later case would rely on Browne's text in support of a maritime lien for general average contribution based on maritime contract. See *Du Pont v. Vance*, 60 U.S. (19 How.) 162 (1856) (citing 2 Browne at 122). In that case a cargo of gunpowder was jettisoned and the cargo owner was permitted to arrest the vessel despite the earlier suggestion, in *Cutler v. Rae*, 48 U.S. (7 How.) 729 (1849), that there was no jurisdiction in admiralty for general average claims.

<sup>353</sup>38 U.S. at 342 (citing 2 Browne at 119).

<sup>354</sup>Balthazar Emerigon (1725–1789), an admiralty judge at Marseilles, is today chiefly remembered for his work *Traité des assurances et des Contrats à la grosse* (1784).

<sup>355</sup>38 U.S. at 341.

<sup>356</sup>See *supra* note 280.

respondent insurer challenged the existence of admiralty jurisdiction in the District Court but lost. On appeal, the Circuit Court divided.

The libellant relied on Justice Story's opinion in *DeLovio v. Boit*,<sup>357</sup> which in turn relied on Browne's text, speculating that a majority of Story's colleagues would approve Story's result.<sup>358</sup> Noting the absence of authority against admiralty jurisdiction over marine insurance contracts, the libellant argued, based on the commerce clause,<sup>359</sup> that because Congress has exercised its right to legislate on all commercial matters involving the limitation of shipowners' liability, registration of ships, carriage of passengers, and navigational rules, the jurisdiction of American admiralty courts was coextensive with all matters that Congress could regulate.<sup>360</sup> The libellant also surveyed the jurisdiction of the vice admiralty courts in the American colonies, concluding that marine insurance was included in the category of marine causes committed to the royal judges.<sup>361</sup>

The respondent countered with the argument that marine insurance could not be a maritime contract, reasoning that the constitutional grant of jurisdiction in "all cases of admiralty and maritime" had to be interpreted according to the restricted jurisdiction of the English admiralty, which had never claimed jurisdiction over insurance policies contracted on land.<sup>362</sup>

The respondent's argument required the libellant to refute the narrow view of contract jurisdiction by the arguments of Arthur Browne's treatise, including the historical commission to the Lord High Admiral, the prohibitions of Lord Coke, and the policy basis for including marine insurance within admiralty jurisdiction.<sup>363</sup>

In reviewing these arguments, Justice Bradley examined the treatment of marine insurance in the laws of Barcelona, Venice, Florence, and Antwerp, followed by an extensive discussion of French and Scottish law,<sup>364</sup> finally concluding that Story's broad decision in *DeLovio* had been correct.

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<sup>357</sup>See *supra* note 140. It is thought that Story had prepared an historical essay on admiralty contract jurisdiction and was simply awaiting the opportunity to insert it into any suitable opinion. See the note authored by Professor David J. Sharpe in N. Healy & D. Sharpe, *Cases and Materials on Admiralty* 12-13 (2d ed. 1986).

<sup>358</sup>78 U.S. at 5.

<sup>359</sup>U.S. Const., art. I, § 8.

<sup>360</sup>78 U.S. at 7.

<sup>361</sup>*Id.* at 8-13.

<sup>362</sup>*Id.* at 15-19.

<sup>363</sup>*Id.* at 34-35 (quoting 2 Browne at 88, "All contracts which relate purely to maritime affairs, the natural, short, and easy method of enforcing which is found in the admiralty proceedings.').

<sup>364</sup>*Id.* at 33-34.

*The Lexington*<sup>365</sup> was the most important cargo damage action heard by the Supreme Court prior to the passage of the Harter Act in 1893.<sup>366</sup> As is well-known, in the Harter Act Congress imposed a statutory allocation of risks between the carrier interest and the cargo-owning interest. In *The Lexington*, six justices (two merely concurring in the result)<sup>367</sup> held the owner of a steamboat fully liable for the loss of a chest said to contain gold and silver coins when its unseaworthy vessel sank following a fire.<sup>368</sup>

The shipper, claiming \$25,000 in damages, had alleged that gold and silver coins had been delivered on board the steamboat *Lexington*. The shipper further alleged that the *Lexington* was a common carrier, that the chest had been carelessly stowed, that the machinery of the steamboat was imperfect and insufficient, and that the careless, improper, and negligent management and conduct of employees, servants, and agents of the respondent had contributed to the loss of the cargo.<sup>369</sup> The shipper attached a sister ship of the *Lexington in personam*.

The shipowner denied these allegations and maintained that an implied condition of the underlying contract made it responsible only for ordinary care and diligence and that notice of its non-liability was posted on the wharf, onboard the steamboat, and in its sales office.<sup>370</sup> Although the District Court dismissed the libel, the Circuit Court took testimony and gave judgment for the shipper.<sup>371</sup>

In the Supreme Court, the shipowner contended that there was no admiralty jurisdiction since the contract was made in New York City and the voyage through Long Island Sound was land-locked, citing Browne for the

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<sup>365</sup>See supra note 193.

<sup>366</sup>46 U.S.C. app. §§ 190–96 (1988). See generally Sweeney, Happy Birthday, Harter: A Reappraisal of the Harter Act on its 100th Anniversary, 24 J. Mar. L. & Com. 1 (1993).

<sup>367</sup>Justice Nelson's opinion was concurred in by Chief Justice Taney and Justices McLean and Wayne. Justices Catron and Woodbury separately concurred in the result. Justice Grier concurred in Justice Daniel's dissent. Justice McKinley did not participate.

<sup>368</sup>The *Lexington*, a paddle-wheel steamboat (207' long x 21' beam) was part of a multimodal service from New York to Boston. The vessel normally proceeded from New York to Stonington, Connecticut, where cargo and passengers transferred to the new Shore Line Railroad to Providence and Boston. On January 13, 1840, the *Lexington*, previously wood-burning, having just been converted to the hotter medium of coal without change in the fan blowers for cooling, had sailed from New York at 4:00 p.m. with 150 passengers and 150 bales of cotton as cargo. The red-hot smoke stack ignited the woodwork and the fire spread to the cargo of cotton bales stowed close to the smoke stack. The fire broke out at 7:30 p.m. in Long Island Sound, only four miles from land. Despite the pilot's efforts to bring the ship to land, she sank, a total loss from which only four of the 150 passengers were saved.

The subject cargo consisted of approximately \$18,000 in silver and gold coins contained in a wooden chest, 5' x 5' x 6', owned by a freight forwarder. The coins may have been thrown overboard in fighting the fire.

<sup>369</sup>47 U.S. at 350–52.

<sup>370</sup>Id. at 352.

<sup>371</sup>Id. at 353.



proposition that the statute of Richard II excluded admiralty jurisdiction from ports, creeks, and havens, and implying the same restraint on the land-locked waters in question.<sup>372</sup> In the respondent's view, admiralty jurisdiction was only available for possessory or petitory suits and mariners' wages (for which Browne is cited), but not for contracts made on land. The respondent also argued that even if there was a contract, there was no contract between the carrier and the shipper (although separate contracts did exist between the carrier and the freight forwarder and the freight forwarder and the shipper).<sup>373</sup>

At the oral argument the cargo owner's first advocate, R. W. Greene, made a policy-based argument, followed by Daniel Webster, who argued that Congress, by enacting the Judiciary Act of 1789 and the Great Lakes Act of 1845, had made American admiralty jurisdiction coextensive with the constitutional grant.<sup>374</sup>

The "majority" opinion was written by Justice Samuel Nelson, an experienced New York commercial lawyer and former Chief Justice of New York.<sup>375</sup> Nelson first held that there was a single contract of transportation between the shipper and the carrier (citing New York and Pennsylvania cases).<sup>376</sup> Were it not for the "special agreement," respondent as a common carrier would be chargeable as an insurer of the goods and accountable for any damage or loss that happened to them in the course of the conveyance, unless the same arose from an inevitable accident such as an act of God or the public enemy. After considering the evidence as to improper stowage and negligent firefighting, Nelson concluded that the carrier was liable notwithstanding the special agreement.<sup>377</sup> Turning to the jurisdictional objection, he found that Congress had invested the district courts with the entire admiralty power without the English limitations.<sup>378</sup>

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<sup>372</sup>Id. at 359–62.

<sup>373</sup>Id. at 363–68.

<sup>374</sup>Id. at 371–77.

<sup>375</sup>Samuel Nelson (1792–1873) was admitted to the New York bar in 1817. Following a successful commercial practice in New York City, he became an associate judge (1831) and, later, the Chief Justice (1836) of the New York State Supreme Court. President Tyler appointed Nelson, a Jackson Democrat, to the Supreme Court in 1845, five days before the inauguration of President Polk, also a Democrat. Nelson also wrote *The Plymouth*, supra note 200, and the dissent in *The Prize Cases*, 67 U.S. (2 Black) 635 (1863).

<sup>376</sup>47 U.S. at 380.

<sup>377</sup>Id. at 383–85. The bill of lading provided, after spaces for the names of the shipper, consignee, and vessel, "... danger of fire, water, breakage, leakage, and all other accidents excepted; and no package whatever, if lost, injured or stolen, to be deemed of greater value than two hundred dollars. . . ." At the wharf, a sign with the following warning was posted: "Notice to Shippers and Consignees[:] All goods, freight, baggage, bank-bills, specie, or any other kind of property, taken, shipped, or put on board the steamers . . . must be at the risk of the owners of such goods. . . ."

<sup>378</sup>Id. at 390.

Justice Catron's concurrence relied on maritime tort theory for carrier liability, for which Browne was the authority.<sup>379</sup> Justice Daniel, the dissenter, wrote a twenty-four page opinion that was joined in by Justice Grier. Given his opposition to expanding federalism, Daniel returned to the statutes of Richard II, noting in his historical review that "the common law of England is the one uniform rule to determine the jurisdiction of our courts. . . ."<sup>380</sup> Arthur Browne is set up as authority because "scarcely any assertion of power ever made by the Admiralty courts, however reprobated and denied by the common law tribunals, is not commended, if not justified" by Browne.<sup>381</sup> Thus, he endorsed Browne's conclusion that contracts made on land for execution on the sea are not within admiralty jurisdiction, excepting seamen's wages and hypothecations.<sup>382</sup> Respecting Catron's tort theory, Daniel again quoted Browne: "we have the explicit declaration of Professor Browne himself, amidst all his partiality, that in matters of tort the jurisdiction of the admiralty is limited to actions for assault, collision and spoil. . . ."<sup>383</sup>

Justice Woodbury concurred in the result but chose Catron's tort theory.<sup>384</sup> Distinguishing Daniel's objections, Woodbury found that by 1789 even in England the place of performance of the contract, rather than the place of contracting, was being used to determine admiralty jurisdiction so long as the subject matter was maritime.<sup>385</sup>

Despite the foregoing, however, the lasting importance of *The Lexington* is its holding that carriers can be held liable for negligent damage to cargo. As such, it takes its place with *Waring v. Clarke*<sup>386</sup> in expanding admiralty jurisdiction under a Jacksonian rather than a federalist rationale. That rationale was the absolute necessity to serve the thriving industrial economy of the heartland of America while shipping on rivers, lakes, and oceans was still vital for our nation's economy.

## V CONCLUSION

Arthur Browne lived against a backdrop of convulsive historic struggles, one of which remains unresolved to this day. Born in the American colonies,

<sup>379</sup>Id. at 394 (citing 2 Browne at 144).

<sup>380</sup>Id. at 400.

<sup>381</sup>Id.

<sup>382</sup>Id. at 401.

<sup>383</sup>Id. at 413 (citing 2 Browne at 122).

<sup>384</sup>Id. at 436.

<sup>385</sup>Id. at 420.

<sup>386</sup>See supra note 288. Somewhat out of character, Justice Daniel concurred in the opinion and Justice Grier concurred as to admiralty jurisdiction and agreed as to the result.

he was an orphan when he went to Ireland to pursue his university and legal education. Through his eyes we have seen the haphazard preparation of barristers for the law courts contrasted with the rigorous classical studies required for civilians as admiralty proctors and advocates. This may possibly explain why the learned admiralty court could risk being non-technical<sup>387</sup> and even “free-wheeling” while the law courts were famous for the rigor of the law, recognizing no exceptions to its rules in favor of loquacious but ill-prepared attorneys.

Arthur Browne was an academic, an advocate, and a politician with an active practice in the Irish courts. Appointed to two professorships at Trinity College, he achieved one of the College’s highest honors by being elected a Senior Fellow. He also represented Trinity College in the Irish parliament. An enlightenment Whig, he was devoted to the pursuit of civil liberties.

Accounting for the use made of Arthur Browne’s treatise in early nineteenth century America is difficult to explain. Chauvinism is unlikely, since it is doubtful that American admiralty lawyers knew that he was in fact an American; references to him are usually to his position as professor in Dublin. His work usually is cited to its London edition and it may be that the Anglophile admiralty bar in port cities readily accepted it as congenial English authority. Another possibility is that his London edition was the only available source for practitioners and judges at a distance from metropolitan centers.

Arthur Browne’s legacy to us in America is his treatise *A Compendious View of the Civil Law and of the Law of the Admiralty*. His reputation as the admiralty authority for the early republic rests on his classical learning, his investigation of the historical antecedents of doctrine, his systematic analysis, and his clear exposition. Of course, he was the champion of admiralty in its contests with the common law courts, but his partisanship did not lead him to obscure the victories of the common law. The systematic structure and indices of his text made his treatise a valuable and very useful resource for students and practitioners before the advent of contemporary sources.

Upon completing my studies of Arthur Browne’s life and work, I reflected upon his 1771 letter to the warden of Trinity Church (Newport) in which he asked the vestry to write to the SPG. He requested that he be portrayed to the SPG as “a lad of some merit, who, if properly encouraged, might turn out something.”<sup>388</sup> How fortunate we are that the SPG saw fit to send his passage money.

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<sup>387</sup>See, e.g., *Levinson v. Deupree*, 345 U.S. 648, 1953 AMC 972 (1953).

<sup>388</sup>See supra note 22.