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EARLY PRIZE COURT PROCEDURE

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PART ONE

Introduction

“ . . . the practice and procedure adopted in prize courts are not settled or regulated by international law, but they are determined by each nation for itself. The procedure . . . was gradually evolved in the British courts, and, though it was adopted by the United States, it has never been followed in the prize courts of France or of any other continental nation. . . . Moreover, it must be remembered that the conditions under which goods are conveyed by sea from one country to another have completely changed. In the days when the old rules were developed the ship's papers were a safe and satisfactory guide as to the nature and destination of the cargo. If the ship's papers had not indicated the true object and purpose of the consignment, the consignee would have been uncertain what to do with the goods when they arrived, and the commercial transaction would have been hampered, for there were in those days no fast mails or telegraph cables by which supplementary information could be conveyed. If there were no ship's papers, or if they obviously were not genuine, it was a ground for condemnation. When there was no reason to doubt them, the court could safely take the papers as indicating the real transaction. Nowadays, the conditions have changed; the papers may outwardly be perfectly genuine and complete, yet they may have been prepared with the express purpose of concealing the real nature of the transaction. . . . Consequently the old rule that the papers on board alone be taken into consideration, and evidence from other sources excluded, is no longer practicable. . . .”

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It has seemed fitting to set out above *ipsis verbis* the position the British Government took during the World War when replying to a protest from the Government of the United States,¹ because a better exposition of this article's *raison d'être* could scarcely be found. The private law practitioner and student are well aware that substantive rights are frequently seriously affected by adjective rules and that the line between substance and procedure is often hard to draw.² If the belligerent is free, as was contended by the British Government, to change at will the procedure in his prize courts, the substantive rights of neutrals may be considerably affected and even virtually destroyed.

The purpose of this article is to examine the procedural aspects of prize law as it was administered during what may be regarded as its formative period, namely during the seventeenth and eighteenth centuries.³ Such an examination may throw light on the British contentions. It will perhaps appear that prize rules of evidence and procedure were not considered to lie wholly within national control and the experiences of judges sitting in prize cases—particularly of British judges—two or three centuries ago may suggest that there has been less "change in conditions" than the British Government sought to prove.

In order to carry out this purpose more effectually, it is necessary to impose limitations on the scope of this study.

First, we are not concerned here with expounding legal rules such as those on contraband, blockade, *etc.*, which governed the rights of belligerent and neutral; the existence of such a body of law is assumed.⁴ Second, our study is limited to those stages of proceedings which lie between the moment when the captured vessel is brought into port and the time of final judgment by the prize court. It is assumed that the capture on the high seas has been made and that the ship has been brought before the court.⁵ Third, the authors rely chiefly on English and French source materials. Some information on Spain and other countries is also included. The

¹ Memorandum enclosed with the note of the British Ambassador, dated April 24, 1916, to the Secretary of State, U. S. FOR. REL. (Supp. 1916) 368, 371; 110 BRITISH AND FOREIGN STATE PAPERS 660, 664.

² For an interesting illustration in the field of conflict of laws, see Cook, "*Substance*" and "*Procedure*" in the Conflict of Laws (1933) 42 YALE L. J. 333.

³ The latter part of the eighteenth century, during the Armed Neutrality and the French revolutionary wars, and the first fifteen years of the nineteenth century, comprising the Napoleonic wars, of course afford a great store of materials on this subject. This period, however, is better explored than that which preceded it, and it is drawn on here only for occasional illustrations.

⁴ The present writers have published several studies on various topics in these laws of neutral and belligerent rights. Wherever for the understanding of a procedural question the knowledge of substantive law is necessary, reference will be made to these studies. See Jessup and Deák, *The Early Development of the Law of Neutral Rights* (1931) 46 POL. SCI. Q. 481; Jessup and Deák, *The Early Development of the Law of Contraband of War* (1932) 47 POL. SCI. Q. 526; (1933) 48 *id.* at 62, 333.

⁵ As to the elaborate rules governing visit, search and capture at sea, see Deák and Jessup, *Prize Law Procedure at Sea—Its Early Development* (1933) 7 TULANE L. REV. 488.

treaties to be referred to below and diplomatic correspondence indicate that in general many of the fundamentals of prize procedure were common to the European maritime countries.

Prize Courts

The organization of prize courts in the principal maritime countries has been adequately treated in several competently written historical studies.⁶ For our purpose, it is sufficient to note that the existence of machinery for the adjudication of prizes is traceable to the fourteenth century, although these courts originally were not created solely for this purpose, nor was their jurisdiction exclusively limited to prize. It seems rather that the antecedents of prize courts properly so named were, both in England and on the Continent, whether consular or other, essentially commercial courts established in the principal maritime ports.⁷ In fact, the business of these courts seems to have comprehended few prize cases prior to the sixteenth century.⁸ The increase of maritime commerce during the sixteenth century, following colonial expansion, materially lengthened the calendar of these courts and doubtless was a contributing factor in the establishment of separate prize jurisdictions. The other and, probably, the more decisive factor was the clarification of the law of neutrality, enabling neutrals more emphatically to assert their rights and the consequent necessity thus imposed on belligerents to support their interests by judicial determination of their claims.

The process of separation of admiralty jurisdiction in general, and jurisdiction over prize cases in particular, from the ordinary law courts was not accomplished in England without difficulties. For a while the common law courts had apparently concurrent jurisdiction with admiralty courts. There were conflicts of jurisdiction between the admiralty and common law courts as late as the end of the seventeenth century. The jealousy with which the admiralty judges watched over their competence is well illustrated by the case of *The St. Joseph*. This was originally an English vessel captured by the Algerians who sold it to a Frenchman. Subsequently, the Dutch captured her and she was acquired by a Dutch merchant. When she put in at Dover, she was libelled by the original

⁶ See, especially, ROSCOE, A HISTORY OF THE ENGLISH PRIZE COURT (1924); DUMAS, ETUDE SUR LE JUGEMENT DES PRISES MARITIMES EN FRANCE JUSQU'À LA SUPPRESSION DE L'OFFICE D'AMIRAL (1627) (Thesis, Paris, 1908); FERON, DES TRIBUNAUX DE PRISES (Thesis, Paris, 1896); 2 PISTOYE AND DUVERDY, TRAITÉ DES PRISES MARITIMES (1859) 140-193. Elias, *Schetsen uit de geschiedenis van ons Zeewezen*, 3 BIJDRAGEN VOOR VADERLANDSCHE GESCHIEDENIS EN OUDHEIDKUNDE (Fifth Series, 1915-16) 209.

⁷ See the well-documented study, SANBORN, ORIGINS OF THE EARLY ENGLISH MARITIME AND COMMERCIAL LAW (1930) 42 ff. Cf. 2 HÜBNER, LA SAISIE DES BATIMENS NEUTRES (1759) 12-14.

⁸ The relative scarcity of prize cases prior to the middle of the seventeenth century seems to be indicated by the fact that not until then did the British Admiralty Court hold separate sessions for prize. See II SELDEN SOC. (MARSDEN, SELECT PLEAS IN THE COURT OF ADMIRALTY 1897) lx.

owners but the suit was dismissed by the Admiralty Court. Thereupon the owners brought an action in trover and conversion in the common law court against which Jenkins protested as follows:

“ . . . Your Majesty may be pleased to consider, that this Trover (if any such there were) was upon the high and open Seas, and that the Mayor of *Dover* cannot draw the Cognisance of it before himself, but by a Fiction at Law, which Kind of Fiction, if us'd and allowed, may remove all Matters cognisable before the Admiralty, to the Courts of Common Law, sitting in the several Ports of this Kingdom; and consequently make the Officers of small Corporations Judges upon the Law of Nations, and your Majesty's Treaties with Foreign Princes and States; . . . ”⁹

In France, according to Dumas,¹⁰ the Admiral's exclusive jurisdiction over maritime matters and particularly over prize cases, was established by 1500. Indications that conflicts existed even after this time can be found in the Marine Ordinances of 1543 and 1584, enjoining the officers of ordinary law courts from assuming jurisdiction over certain maritime affairs.¹¹

In Spain, under article 2 of the Prize Ordinance of 1718, prize cases in first instance were heard by royal officers in the ports, called Intendants.¹² By article ii of the Ordinance of July 1, 1779, this duty was intrusted to the ministers of the Marine.¹³ On appeal, the case went to the Council of War, at least after 1675.¹⁴

When we enter on the period of our investigation, we find the special jurisdiction over prizes more or less recognized. Thus, around the middle of the seventeenth century, the States General of the Netherlands, in answer to a memorandum of the English resident, Downing, suggesting that English subjects be awarded damages for illegal sales of their vessels by

⁹ Jenkins' report to the king, May 12, 1675, 2 WYNNE, *THE LIFE OF SIR LEOLINE JENKINS* (1724) 776. An example of this attitude of superiority over the common law courts can, perhaps, be found in the fact that prize courts boasted that they administered international law, independently from national law. See the report of Hedges to Nottingham, *infra* p. 685. On the whole controversy, especially Coke's famous attack, see 1 HOLDSWORTH, *A HISTORY OF ENGLISH LAW* (3d ed. 1922) 553-8; 5 *id.* at 143-8, 153-4; Mears, *The History of the Admiralty Jurisdiction* (1908) 2 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 312.

¹⁰ *Op. cit. supra* note 6, at 133 ff.

¹¹ See art. 46 of the Ordinance of 1543, 12 ISAMBERT, *RECUEIL GÉNÉRAL DES ANCIENNES LOIS FRANÇAISES* 854, 866; art. 73 of the Ordinance of 1584, 14 *id.* at 556, 581.

¹² ABREAU, *TRAITÉ JURIDICO-POLITIQUE SUR LES PRISES MARITIMES* (1758) pt. 2, 26.

¹³ 2 HENNINGES, *SAMMLUNG VON STAATSSCHRIFTEN* (1792) 299, 300; *cf.* art. 13 of the Ordinance of June 20, 1801, 3 NOVISIMA RECOPIACIÓN DE LAS LEYES DE ESPAÑA (1805) lib. vi, tit. 8, pp. 123, 125.

¹⁴ ABREAU, *op. cit. supra* note 12, at 26-28; see art. iv of the Ordinance of 1779, *supra* note 13. In most countries prize courts are still *ad hoc* tribunals composed, chiefly or in part, of administrative officials. In such countries, appeals sometimes lie to one of the regular law courts. In England, the United States and Portugal, prize jurisdiction is conferred upon some of the regular law courts. See VERZIJL, *LE DROIT DES PRISES DE LA GRANDE GUERRE* (1924) 12-17. For a good summary statement of the courts empowered to determine prize cases in the various countries in Europe during the eighteenth century see 2 AZUNI, *THE MARITIME LAW OF EUROPE* (transl. 1806) 262-71.

addressing the States General and without instituting proceedings, resolved that,

“ . . . all the affairs touching prizes and merchandizes, which are brought into the ports of this state, and demanded by their owners, acknowledge no other judicature and jurisdiction, than those of the respective admiralties privately, and it is before them, that, according to the placarts, affairs of this kind, with all circumstances concerning the same, must be discussed and decided, as is usual in all other countries in Europe.”¹⁵

About a century later an even more emphatic statement appears from an English source of high authority. In 1753 a report was made to the king on the method of conducting prize proceedings.¹⁶ In this Report it is said of the prize procedure there described:

“In this method, all captures at sea were tried, during the last war, by Great Britain, France, and Spain, and submitted to by the neutral Powers; in this method, by courts of admiralty, acting according to the law of nations, and particular treaties, all captures at sea have immemorially been judged of in every country of Europe.”¹⁷

Obviously the English did not, at that period, regard prize law procedure as purely a domestic matter, unregulated by international law. Indeed, the Report explicitly says in another place: “By the maritime law of nations, universally and immemorially received, there is an established method of determination whether the capture be, or be not, legal prize.”¹⁸

There can be no question that the learned lawyers preparing the Report of 1753 trod on safer ground than the gentleman who drafted the British Memorandum of 1916. It is perfectly true that the set-up and working of prize courts—whether they were separate sittings in admiralty as in England and in the United Netherlands, or *ad hoc* tribunals as in France and Spain—were chiefly a concern of national legislation. It seems, however, that the British position taken in 1916 cannot be supported by au-

¹⁵ 7 THURLOE, A COLLECTION OF STATE PAPERS (1742) 458. November 2, 1658. (Italics ours.)

¹⁶ The reporters were, “Sir George Lee, then Judge of the Prerogative Court, Dr. Paul, His Majesty’s Advocate-General, Sir Dudley Ryder, His Majesty’s Attorney-General and Mr. Murray (afterwards Lord Mansfield), His Majesty’s Solicitor-General”. This Report of 1753 was quoted at length by Sir William Scott and Dr. John Nicholl when acting as counsel for the United States in the settlement of neutral claims; their statement on prize procedure was prepared at the request of John Jay on September 10, 1794. It is printed in 4 MOORE, INTERNATIONAL ADJUDICATIONS (Modern Series, 1931) 43, and in STORY, PRIZE COURTS (Pratt’s ed. 1854) 2. The occasion for the preparation of the Report of 1753 was the famous controversy with Frederick the Great concerning the Silesian Loan. See SATOW, THE SILESIA LOAN AND FREDERICK THE GREAT (1915) *passim*.

¹⁷ 4 MOORE, *op. cit. supra* note 16, at 45.

¹⁸ Cf. I STAIR, INSTITUTIONS OF THE LAW OF SCOTLAND (new ed. 1832) 188, citing the decision of the Lords in *Hans Jurgan v. Logan* (1667), also found in 15 MORISON, DICTIONARY OF DECISIONS OF THE COURT OF SESSION (1804) 12222

thority.¹⁹ Procedure, and the administration of prize law through the organs of the belligerent, were neither exclusively within the latter's "domestic jurisdiction", nor devoid of an international standard. There were at least some aspects of prize procedure which were the subject of treaty regulations.²⁰ Although these treaty provisions were less detailed than those relating to substantive rules of prize law, such as contraband, for instance, they nevertheless related to fundamental issues involved in procedure and were, to some extent at least, influential in determining the judicial character of prize law administration.

The first and foremost of treaty provisions relating to procedure was the obligation to have the fate of the captured ship determined by orderly legal process. Most of the treaties of the seventeenth and eighteenth centuries were explicit in defining the nature of such orderly legal process; they provided that prize cases should be determined by "impartial" judges who were "above suspicion";²¹ they also provided that decisions should be rendered "according to law, justice and equity" or in conformity "with the law of nations and treaties".²²

¹⁹ Twiss, in his criticism of the United States Supreme Court's decision in *The Springbok*, 72 U. S. 1 (1886), stressed the Court's departure from the regular procedural rules and cites Wm. M. Evarts' brief. Evarts made the point that procedural rules were part of the fundamental conditions upon which neutrals consented to prize court procedure. These views are collected by Baty in *PRIZE LAW AND CONTINUOUS VOYAGE* (1915) 17, 46.

²⁰ This was true as early as 1497 when France and England made a treaty on the subject. See Robinson's note to the treaty text, in his *COLLECTANEA MARITIMA* (1801) 83.

²¹ Lack of space does not permit the full enumeration of all the treaties containing provisions relating to the matters discussed here and below. As examples may be cited: the treaty between England and Denmark, concluded at Copenhagen July 11, 1670, art. xxiii, 1 CHALMERS, *A COLLECTION OF TREATIES BETWEEN GREAT BRITAIN AND OTHER POWERS* (1790) 78, 90: "no ships whatsoever, vessels or merchandize laden on ships of whatsoever nature, kind, or quality, howsoever taken, belonging to any the subjects of either of the aforesaid Kings, under any colour or pretence whatsoever, be adjudged prize, unless by a judicial examination and process in form of law, in a court of admiralty for prizes taken at sea, in that behalf lawfully constituted." For French text of this treaty see 7 DUMONT, *CORPS DIPLOMATIQUE* (1726-31) pt. I, 132, 135. In the treaty between France and England, concluded at St. Germain, February 24, 1677, art. xi, 7 *id.* at pt. I, 327, 329, the parties undertook to take the necessary steps, "pour faire rendre bonne justice, par des Juges non suspects, & non interessez, sur les prises qui seront faites". Cf. the following treaties: France-United Netherlands, April 27, 1662, art. xl, 6 *id.* at pt. II, 412, 415; same parties, Utrecht, April 11, 1713, art. xxxi, 8 *id.* at pt. I, 377, 380; England-France, Utrecht, April 11, 1713, art. xxx, 8 *id.* at pt. I, 345, 349; same parties, Versailles, September 26, 1786, art. xxxii, 1 CHALMERS, *supra* at 517, 536, French text in 2 MARTENS, *RECUEIL DES TRAITÉS* (1791-1835) 680, 699; England-United Netherlands, The Hague, February 7/17, 1667/8, art. xv, 1 CHALMERS, *supra* at 161, 167.

²² See, e. g., the following treaties: France-United Netherlands, April 27, 1662, art. xl, 6 DUMONT, *op. cit. supra* note 21, at pt. II, 412, 415; England-Denmark, Copenhagen, July 11, 1670, art. xxxvi, 1 CHALMERS, *op. cit. supra* note 21, at 78, 95; England-United Netherlands, London, December 1, 1674, art. xi, 1 *id.* at 177, 184; France-United Netherlands, Utrecht, April 11, 1713, art. xxxi, 8 DUMONT, *supra* at pt. I, 377, 380. According to art. xxx of the Anglo-French treaty concluded on the same date, 8 *id.* at pt. I, 345, 349, the parties agreed that prize decisions shall be rendered "selon les régles de la Justice & de l'équité, & conformement à ce qui est prescrit par ce Traité".

A particularly clear phrasing of the principles contained in the Report of 1753 can be found in the Anglo-Spanish treaty concluded at Paris, February 10, 1763, art. xvi, 1 CHALMERS, *supra* at 467, 477, which provided: "The decision of the prizes made, . . . by the subjects of Great Britain, on the Spaniards, shall be referred to the courts of justice of the

A corollary to the obligation to determine prize cases by orderly legal process was the frequently reiterated prohibition, both in treaties and in national prize regulations, to unload, buy, exchange, receive, hide or alienate in any manner goods laden on a captured vessel before it was condemned as good prize by a prize court.²³ As early as 1602, in the case of the Dutch ship, *The White Dove*, Sir Julius Caesar ordered the restitution of the illegally captured ship and imposed a £100 penalty on the captors who disposed of the goods, "without lawful authority, and without adjudication of their being lawful prize having been made in accordance with the course of the high court of Admiralty".²⁴

The prohibitions against disposing of ship or cargo before judgment were accompanied by an exception in the case of perishable goods; these might be unloaded and sold with the consent of the parties. The proceeds of sale in such cases were to be given in custody of the court, pending the final determination of the issue.²⁵

The necessity for orderly legal process by impartial judges was thus firmly established both by treaties and by national prize-regulations. The Report of 1753 seems to be amply supported by authority when it states:

admiralty of Great Britain, conformably to the rules established among all nations, so that the validity of the said prizes, between the British and Spanish nations, shall be decided and judged, according to treaties, in the courts of justice of the nation who shall have made the capture." Cf. ABREAU, *op. cit. supra* note 12, at 100.

²³ See the following treaties: France-England, Boulogne, 1497, ROBINSON, *op. cit. supra* note 20, at 83, 96, 98; France-Hansa Towns, Paris, May 10, 1655, art. v, 6 DUMONT, *op. cit. supra* note 21, at pt. II, 103, 104; France-United Netherlands, Paris, April 27, 1662, art. xxxix, 6 *id.* at pt. II, 412, 415; England-France, St. Germain, February 24, 1677, art. vii, 7 *id.* at pt. I, 327, 328; same parties, Utrecht, April 11, 1713, art. xxvi, 8 *id.* at pt. I, 345, 349; same parties, Versailles, September 26, 1786, art. xxviii, 1 CHALMERS, *op. cit. supra* note 21, at 517, 534; 2 MARTENS, *op. cit. supra* note 21, at 680, 697; United States-Sweden, Paris, April 3, 1783, art. xiii, 2 SEN. DOC. NO. 357, 61st Cong. 2d Sess. (MALLOY, TREATIES AND CONVENTIONS) 1725, 1729.

For the expression of this rule in national prize regulations see the French Marine Ordinances of February, 1543, art. 32, in 12 ISAMBERT, *op. cit. supra* note 11, at 854, 861; March, 1584, art. 48, 14 *id.* at 556, 569; also in 1 LEBEAU, NOUVEAU CODE DES PRISES (1783) 23; February 1, 1650, art. 13, 17 ISAMBERT, *supra* at 194, 201, 1 LEBEAU, *supra* at 30, 40; August, 1681, *Titre des prises*, art. 20, 19 ISAMBERT, *supra* at 282, 336. For like provisions in English prize regulations see Elizabeth's Proclamation of 1602, art. 6, ROBINSON, *op. cit. supra* note 20, at 21, 27; the Act of April 17, 1649, 2 ACTS AND ORDINANCES OF THE INTERREGNUM 66, 70; the Act of November 8, 1650, *id.* at 449-450.

²⁴ 1 MARSDEN, LAW AND CUSTOM OF THE SEA 322, published by the Navy Record Society as vols. 49, 50 (1915-1916).

²⁵ See, *e. g.*, the following treaties: France-United Netherlands, Paris, April 27, 1662, art. xli, 6 DUMONT, *op. cit. supra* note 21, at pt. II, 412, 415; England-United Netherlands, The Hague, February 7/17, 1667/8, art. xvi, 1 CHALMERS, *op. cit. supra* note 21, at 161, 167; England-Denmark, Copenhagen, July 11, 1670, art. xxxvii, 1 *id.* at 78, 95; 7 DUMONT, *supra* at pt. I, 132, 136; England-United Netherlands, London, December 1, 1674, art. xii, 1 CHALMERS, *supra* at 177, 184.

The sale of perishable goods was made, according to art. 10 of the French Ordinance of June 6, 1672, at the *procureur's* request; the consent of the parties was not a requisite. 1 LEBEAU, *op. cit. supra* note 23, at 47, 50; 19 ISAMBERT, *op. cit. supra* note 11, at 21, 22. But art. 28 of the Ordinance of August, 1681, *Titre des prises*, provided for the consent of the parties, while the proceeds of the sale were to be given, according to art. 29, in the custody of a "citoyen solvable". 19 *id.* at 282, 337. See 1 VALIN, TRAITÉ DES PRISES (1763) c. xiii, § 17, 208-15. Cf. arts. 36 and 37 of the Spanish Ordinance of 1779, HENNING, *op. cit. supra* note 13, at 309.

"Before the ship or goods can be disposed of by the captor, there must be a regular judicial proceeding, wherein both parties may be heard, and condemnation thereupon as prize, in a court of admiralty, judging by the law of nations and treaties."²⁶

For the insistence on orderly adjudication there was, apart from any theoretical consideration, a very practical reason. From at least the seventeenth century it was generally conceded that a prize judgment followed by a prize court sale²⁷ gave good title against the world.²⁸ Impeachment of the proceedings by neutrals on the ground of irregularities was by no means unknown.²⁹ Also, the failure to observe the formalities prescribed for the captor and the court in the preliminary stage of the proceedings—such as inventory of cargo, sealing of goods, examination of the crew upon reaching port—was always an argument strongly relied upon by the claimant.³⁰ Belligerents were compelled to listen to such protests because the refusal of other governments to recognize title conveyed by a prize court would naturally hamper the sale of future prizes.³¹

Hence, the obligation assumed in treaties to have prizes judged by legal process and the detailed rules contained in national statutes governing prize procedure and intended to insure its orderliness, served the interests of the belligerent just as much as those of the neutral. The prize regulations served the end, according to British statutes, "that there may be a fair,

²⁶ 4 MOORE, *op. cit. supra* note 16, at 44.

²⁷ The English practice in the seventeenth century was to auction the ship "by inch of candle"; see CRUMP, COLONIAL ADMIRALTY JURISDICTION IN THE SEVENTEENTH CENTURY (1931) 99, and the Act of April 17, 1649, 2 ACTS AND ORDINANCES OF THE INTERREGNUM 66, 70.

²⁸ See The Resolution, 2 Dall. 1, 4-5 (Fed. C. A. 1781).

²⁹ See, *e. g.*, the protest of Nieupoort, the Dutch ambassador in England, to the Lords of the Council, dated April 15/25, 1656 (N. S.), in the case of the ship Daniel, against an order of sale of goods by one of the admiralty judges. The order was challenged, ". . . by reason of the notorious nullities of the said pretended decree of a judge alone, without hearing the parties interested by counsel, or admitting their proofs and defence, according to the rules of reason and justice . . ." 4 THEURLOE, *op. cit. supra* note 15, at 701, 702. Cf. The Helena, 4 C. Rob. 3 (1801).

See also the arguments of Prussia and France regarding ultimate diplomatic protests against prize decisions in SATOW, *op. cit. supra* note 16, *passim* and, especially, the French jurists' *Mémoire* of April 20, 1753, analyzing the English Report of 1753, at 342 ff.

³⁰ See, *e. g.*, the brief filed in the French Prize Council by the master of the Genoese ship Nostre Dame des Carmes in 1705. ARCH. NAT., *Fonds de la Marine*, mss. G 5-214.

³¹ Cf. the discussion of art. 10 of French *Règlement* of 1744 in 2 PISTOYE AND DUVERDY, *op. cit. supra* note 6, at 18. Although it was apparently the practice to bring every ship in for prize proceedings, it was generally held that title to enemy property passed either upon capture or after it was brought *infra praesidia*. Many possible questions of divided ownership and the like made a prize judgment desirable and it was almost invariably sought. See the discussions of the point in the opinions of the doctors in 1568, MARSDEN, *op. cit. supra* note 24, at 181. See also, opinions rendered in November, 1757, on the question whether condemnation of prizes taken by the ships of the East India Company by a Court of Admiralty is necessary, BURRELL, ADMIRALTY CASES (Marsden's ed. 1885) 392. Cf. Stuart v. Collier (1713) 14 MORISON, *op. cit. supra* note 18, at 11940; Benton v. Brink (1761) *id.* at 11949; Wake v. Hillary Bauerman & Son (1801) *id.* App. pt. I, Case No. 1; and cf. Sir William Scott in The Flad Oyen, 1 C. Rob. 135 (1799).

legal and just proceeding" in the court.³² The character of the proceeding would naturally be determined by the character of the organ in which the proceeding took place. It is necessary, therefore, to ascertain the position of prize courts in the hierarchy of judicial machinery.

It was generally conceded that prize courts were courts of law; although from the point of view of the national judicial system these courts were *sui generis* in that they were supposed to apply international (customary or conventional) rather than national law. This is only partly true; but English prize judges especially gloried in the claim long before Lord Stowell's famous *dicta* on the subject.³³ On October 22, 1689, Judge Hedges wrote to Nottingham in regard to an Order in Council, which commanded the confiscation by the admiralty of some neutral Hamburg ships and their cargoes on account of trading with France, then at war with England:

"The court of Admiralty is a court of justice, and the judge sworn to administer it to the best of his judgment, and is as much obliged to observe the laws of nations, with respect to the municipall laws of the realm as the judges of the courts at Westminster are bound to proceed according to statutes and the common law; and if the method prescribed for condemnation be not consonant to the laws of nations, as there is reason to doubt, they being the goods of subjects of allies, I humbly beg your Lordship will be pleased to consider the difficulty that I shall subject myself unto by such proceeding, . . . " ³⁴

Procedure in Prize Courts

Prize courts being courts of law, their procedure naturally followed the pattern of the procedure in the ordinary law courts. Prize proceedings being legal proceedings, they were characterized by many of the features of other law suits—namely, they were contentious proceedings, involving a full hearing of the parties on the one hand,³⁵ and the determination of the litigated issue on the basis of certain established rules as to proper parties, method of pleading, admission of evidence and the right of appeal—rules

³² Act of April 17, 1649, 2 ACTS AND ORDINANCES OF THE INTERREGNUM 66, 70.

³³ *E. g.*, in *The Maria*, 1 C. Rob. 340, 350 (1799), and *The Walsingham Packet*, 2 C. Rob. 77 (1799).

³⁴ 2 MARSDEN, *op. cit. supra* note 24, at 131. Cf. the extract from the Report of 1753, MOORE, *loc. cit. supra* note 17, and the English reply of April 23, 1780, to the Russian Declaration which was the beginning of the Armed Neutrality. ANNUAL REGISTER, 1780 (1809) 349.

³⁵ But see the qualification of this practice so far as enemy claimants were concerned in *Wake v. Hillary Bauerman & Son*, *supra* note 31: "All parties interested are called as parties in the process for condemning the vessel; but there is no instance of an enemy appearing; and his appearance in that character would, of itself, be sufficient to condemn the vessel. The ship may be proved to be neutral, or it may be proved that there was no war between the alleged enemies at the date of the capture; but there is no instance of restitution to an enemy." In general, it was probably true that enemy owners were not represented since the admission of enemy ownership would usually involve condemnation except where the court applied the rule "free ship, free goods". Even in such cases, however, the neutral shipowner would probably represent the interests of the cargo.

which were not wholly arbitrary and on the basis of which the results were, to some extent at least, predictable.

The hearing of the parties as a condition precedent to the validity of a prize decision was nowhere more cogently expressed than by Jenkins. It seems that he received instructions to condemn neutral goods on board Dutch ships taken in the attack of the Dutch Smyrna fleet. In a letter to Sir Joseph Williamson, dated May 8, 1672, Jenkins gave the following reason against passing sentence:

"Give me Leave therefore, I pray Sir, to suppose the Claims of the King's Subjects and Friends not admitted, but all Plea precluded them in the Admiralty; in this Case they cannot be denied the Liberty of Appealing, *first* to my Lords the Commissioners, then (if not relieved) to the King. They will insist, that by Course of Admiralty they were never called to shew Cause, why their Goods should not be judg'd Prize, and being come, they were refused a Hearing. It will be urged, that it is against the Law of all Courts, and the Rights of all Nations, not to hear the Party in Judgment before Sentence pass against them. A Court may overrule a Plea, but cannot refuse to hear it, come in Time; . . ."³⁶

As to the parties, proceedings were instituted by the captors who filed claims for the condemnation of the captured ship and her cargo. Claims for the release of the ship and cargo were allowed to be made only by the owners or on their authority.³⁷ Here we are encountering the first appearance of presumptions which, in later stages of the proceeding, namely, in evaluating the evidence, will be shown to have such a decisive influence. Where the court felt that there was a strong presumption, that the claim for release was fraudulent, it proceeded to condemnation, unless the claimant gave security.³⁸ The right of the claimants as well as the captors to be represented by counsel before prize courts seems to have been generally recognized.³⁹ This right was, however, subject at times to the discretion

³⁶ 2 WYNNE, *op. cit. supra* note 9, at 701; see *id.* at 743. See also the Report of 1753, MOORE, *loc. cit. supra* note 26, and the Dutch protest of 1656, *supra* note 29. *Cf.* arts. 13 and 16 of the Spanish Prize Ordinance of 1801, *supra* note 13. *Cf. infra* note 40.

³⁷ See the French Ordinances of January 30, 1692, 1 LEBEAU, *op. cit. supra* note 23, at 145; April 18, 1708, *id.* at 330; April 23, 1745, *id.* at 498, providing that no person can claim a captured ship or her cargo except on the strength of a power of attorney (procuracion) in proper form. *Cf.* ABREAU, *op. cit. supra* note 12, at 100-101; VALIN, *op. cit. supra* note 25, at 238-39.

³⁸ Rules and Directions appointed by H. M. in Council to be observed by the H. C. A. in the adjudication of prizes. February 22, 1664. BRIT. REC. OFF., mss. P. C. 1/58; Pratt, *op. cit. supra* note 45, at 250. *Cf.* MOORE, *op. cit. supra* note 16, at 44 (Report of 1753): "[In every case a] claim of ship or goods must be supported by the oath of somebody, at least as to belief."

³⁹ French prize decisions usually state specifically that claims for release have been presented by counsel having power of attorney from the owners. See, *e. g.*, the judgments of release in the case of the ships *La Fortune*, July 3, 1695, and the *Notre Dame de la Conception*, July 21, 1695. ARCH. NAT., *Fonds de la Marine*, mss. G5-214. *Cf.*, for the same rule in Spain, ABREAU, *op. cit. supra* note 12, at 119-120.

of the court (or of the executive) to recognize the representation as valid only if the power emanated from the claimants directly.⁴⁰ It may be noted that the owners of the cargo on a captured ship, distinct from the owners of the vessel, were permitted to assert their claims as intervening parties.⁴¹ Scott and Nicholl in their memorandum prepared in 1794 for Jay,⁴² give a detailed statement of the steps to be taken by the owners or master. The procedure they describe is substantially the same as that which had been used in English prize courts for over a century.

As to the form of pleading, the proceedings were both written and oral. It seems that the French laid greater emphasis on written pleadings. As the French prize decisions always enumerate every step of the procedure by either party, it is easy to see the sometimes unwieldy amount of written pleadings presented to the court.⁴³ In addition to the original briefs—or *mémoires*—of the captor, claimant and eventual intervening parties, it was apparently quite common that they were followed up by written replies, rejoinders and replications.⁴⁴ The extent to which written pleading was carried in France, is well illustrated by the final decision in the case of the Dutch ship, *Le Smack*, in 1779. In that case an appeal was taken from the decision of the *Conseil des prises* to the *Conseil royal des finances* and thence to the *Conseil d'état*. The simple enumeration of the pleadings, briefs of the captor, the claimants, several intervening parties, interlocutory decrees, the decisions of the lower courts, and the report of the *procureur général* take up eight and a half closely written pages of the nine page decision.⁴⁵

Finally, as to the right of appeal, it is interesting to observe that this aspect of prize law procedure was also the subject of treaty provisions. Several treaties impose the obligation of the parties to permit appeals by

⁴⁰ See a letter from Boreel, the Dutch ambassador in France, to Ruysch, dated February 21, 1657 (N. S.), in 6 THURLOE, *op. cit. supra* note 15, at 16. He complains that the French do not recognize counsel for Dutch claimants authorized by him, although this "hath been always practised, and is expressly agreed, as doth appear in the sixth and seventh articles of the treaty made in the year 1624, . . . ; but they will admit only of such as are authorized by letters of attorney from the true owners and proprietors of such ships and goods, as are brought in. This yet were something, if they would allot any time, that a procuracy can be had out of Holland; but this they will not admit of, but proceed to trial and condemnation without so much as hearing of anybody; . . ."

⁴¹ In the case of the ship *La Victoire* before the French Conseil royal, the "Syndic des Etats & Pays du Duché de Bretagne" and the "habitans & Communautéz des villes de Rennes & S. Malo" were permitted to appear in the suit as intervening parties in support of claims for release of the cargo made by merchants who were inhabitants of these communities. Judgment of July 8, 1656, BIB. NAT., mss. Fr. 07329, 384 ff.

⁴² MOORE, *op. cit. supra* note 16, at 45.

⁴³ See, *e. g.*, the judgments in the cases of the ships *La Fortune* and of the *Notre Dame de la Conception*, *supra* note 39.

⁴⁴ See, *e. g.*, the pleadings in the case of the *Deux Lyons Dorez* in 1704. ARCH. NAT., *Fonds de la Marine*, mss. G5-211.

⁴⁵ ARCH. NAT., *Fonds de la Marine*, mss. F2-1, 2me pet. doss. A glance at almost any of the cases reported in PRATT, *LAW OF CONTRABAND OF WAR* (1856), will reveal the wide range of the oral pleadings in the English Prize Courts.

claimants dissatisfied with the decision of a prize court. Such appeals must be passed upon within a limited time (usually three months); frequently, such appeals were allowed upon the complaint of the ambassadors of the claimant's country.⁴⁶ Most of these treaties further provide that pending appeal, a ship or cargo may be delivered to the claimant successful in the lower court against sufficient security, while the captor, though decision below was rendered in his favor, cannot obtain delivery until final determination of the case.⁴⁷

Evidence

We shall now consider the procedure followed by prize courts, first in obtaining and then in evaluating the evidence determining the fate of the captured vessel.

Prize court procedure was obviously designed to elucidate certain facts which were necessary to the decision of prize cases. In order of importance, perhaps, the first objectives were to establish the ownership of the vessel and cargo. The effect of proof of enemy ownership depended upon varying viewpoints regarding the rules "free ship, free goods", and "enemy ship, enemy goods". An enemy ship would always be condemned, but neutral goods on board might or might not share her fate. Enemy goods on a neutral ship might or might not be free.⁴⁸ If neutral ownership were

⁴⁶ See, *e. g.*, the following treaties: France-United Netherlands, Paris, April 27, 1662, art. xli, 6 DUMONT, *op. cit. supra* note 21, at pt. II, 412, 415; England-Denmark, Copenhagen, July 11, 1670, art. xxxvii, 1 CHALMERS, *op. cit. supra* note 21, at 78, 95, 7 DUMONT, *supra* at pt. I, 132, 136; England-United Netherlands, The Hague, Feb. 7/17, 1667/8, art. xvi, 1 CHALMERS, *supra* at 161, 167; same parties, London, December 1, 1674, art. xii, 1 *id.* at 177, 184; France-United Netherlands, Utrecht, April 11, 1713, art. xxxii, 8 DUMONT, *supra* at pt. I, 377, 380; England-France, Utrecht, April 11, 1713, art. xxxi, 8 *id.* at pt. I, 345, 349; same parties, Versailles, September 26, 1786, art. xxxv, 1 CHALMERS, *supra* at 517, 538, 2 MARTENS, *op. cit. supra* note 21, at 680, 701. In the treaty between France and England concluded at St. Germain, February 24, 1677, art. xii, 7 DUMONT, *supra* at pt. I, 327, 329, it is agreed that in case of a complaint based on the alleged injustice of a prize decision, by the ambassador of the respective parties, the King of England appoints nine commissioners to meet within a month to review such decision and to render judgment within three months, while the King of France on receipt of such complaint will review the case in his *Conseil* within four months. But see SAROW, *op. cit. supra* note 16, at 342 ff.

⁴⁷ See, *e. g.*, the treaty between France and England, St. Germain, February 24, 1667, art. xiii, 7 DUMONT, *op. cit. supra* note 21, at pt. I, 327, 329: "Y ayant Procez entre ceux qui auront fait la prise d'une part, & les reclamateurs de l'autre; si la Sentence est renduë pour la Partie qui reclame, elle sera executée en donnant caution nonobstant l'apel; ce qui n'aura pas lieu lors que la Sentence aura été renduë contre les réclamateurs."

Cf. the following treaties: France-United Netherlands, Paris, April 27, 1662, art. xlii, 6 *id.* at pt. II, 412, 415; England-United Netherlands, The Hague, February 7/17, 1667/8, art. xvii, 1 CHALMERS, *op. cit. supra* note 21, at 161, 168; same parties, London, December 1, 1674, art. xiii, 1 *id.* at 177, 185; France-United Netherlands, Utrecht, April 11, 1713, art. xxxiii, 8 DUMONT, *supra* at pt. I, 377, 380; England-France, Utrecht, April 11, 1713, art. xxxii, 8 *id.* at pt. I, 345, 349; same parties, Versailles, September 26, 1786, art. xxxvi, 1 CHALMERS, *supra* at 517, 538, 2 MARTENS, *op. cit. supra* note 21, at 680, 701. But see the contrary rule in the English Prize Regulations of 1672, art. 6, in PRATT, *op. cit. supra* note 45, at 251, 253.

Provisions concerning parties, method of pleading, evidence and the right of appeal are contained in the national prize regulations, naturally with much more precision and detail.

⁴⁸ See Jessup and Deák, *The Early Development of the Law of Neutral Rights*, *supra* note 4, *passim*.

proved, it was then necessary to determine first the destination of ship and cargo. If such destination were innocent (*i. e.*, to a neutral country), release of the ship followed, except in rare early applications of the doctrine of continuous voyage or in cases where the neutral was to be penalized for some form of unneutral service. If the destination were shown to be belligerent, the existence of a blockade had to be considered. If there were no blockade, it was necessary to go further and ascertain the nature of the cargo in order to determine whether it was contraband of war.⁴⁹

As a matter of practice, information on all these facts—nationality, ownership, destination and character of ship and cargo—was sought *in limine* while the ship's papers were intact and before the crew had scattered. Primary evidence was sought from on board the ship: the ship's papers, letters, and other documents on the one hand, and the testimony of officers, crew and passengers on the other. When papers were lacking, or incomplete, or the testimony was at variance with the data contained in the documentary evidence, the testimony of the crew assumed paramount importance in determining the ship's fate.⁵⁰

In order to secure the documentary evidence, the arm of the law reached out for the ship at the moment of capture. Every prize ordinance, from the earliest times, exhorted the captor to bring the captured vessel without spoliation into port—the purpose being, *inter alia*, to secure intrinsic evidence concerning ship and cargo.⁵¹ When the ship was brought into port, within the court's effective jurisdiction, the devices to secure intrinsic evidence were more elaborate.

⁴⁹ See Jessup and Deák, *The Early Development of the Law of Contraband of War*, *supra* note 4, *passim*.

⁵⁰ See 4 MOORE, *op. cit. supra* note 16, at 44 (Report of 1753): "The evidence to acquit or condemn, with, or without, costs and damages, must, in the first instance, come merely from the ship taken, *viz.*, the papers on board, and the examination, *on oath*, of the master, and other principal officers; for which purpose, there are officers of admiralty in all the considerable sea ports of every maritime Power at war, to examine the captains, and other principal officers, of every ship, brought in as a prize, upon general and impartial interrogatories: if there do not appear from thence ground to condemn, as enemy's property or contraband, goods going to the enemy, there must be an acquittal, unless, from the aforesaid evidence, the property shall appear so doubtful, that it is reasonable to go into further proof thereof." See the decision of the *Conseil d'Etat* of Jan. 21, 1693, in the case of the *Rédempteur du Monde*; part of the cargo, claimed by a Ligourne merchant, was released on evidence obtained from the ship's register (*livre de sous-bord*) although no other papers relating to the cargo were found aboard. Reversed, the *Conseil* holding that the register cannot supplant charter party and bill of lading; moreover, crews testified that register is false and, "la déposition des équipages prevaudroit aux pieces trouvées à bord". 2 VALIN, *op. cit. supra* note 25, at 36.

⁵¹ See Deák and Jessup, *supra* note 5, at 492-500. Attention should be called to the fact there indicated that the rules protecting the would-be prize against spoliation were not intended chiefly for the protection of possible neutral interest but rather for safeguarding belligerent interests such as the Crown's or the Admiralty's share in the prize. It may be reasonably assumed that when, with the evolution and gradual clarification of the law of neutrality, neutral protests against depredation grew more numerous as well as more emphatic, the protection of neutral interests might have acquired proportionately more weighty consideration in the maintenance and enforcement of these rules. *Cf.* arts. v and vi of the Anglo-French treaty of March 29, 1632, 6 DUMONT, *op. cit. supra* note 21, at pt. I, 33. See also the Danish Rules of April 5, 1710, quoted in 1 PISTOVÉ AND DUVERDY, *op. cit. supra* note 6, at 307.

British statutes provided that within five days from filing a claim, the admiralty judges were to complete the "usual preparatory examination of persons commonly examined in such cases". Standing interrogatories were administered under oath. In case no claim was made for release within a reasonable time after proper notice, the court proceeded to condemn the ship.⁵² But if claims were filed, then adjudication was to proceed upon the basis of the examination and of "all papers and writings which shall have been found, taken in or with such capture". Only if such evidence left doubt in the court's mind, might it resort "for the clearing and determining such doubts" to hearing witnesses "that are remote from such court" or to permit the introduction of extrinsic evidence—*i. e.*, documents not on shipboard.⁵³

Equally elaborate rules prevailed in France. On arrival of a captured ship in port admiralty officers, accompanied by the *procureur* or some other representative of the king were at once to board the vessel in order to ascertain her condition and the condition of the crew, take an inventory and take charge of all documents (*pièces justificatives*) found therein. This had to be done in the presence of the master or members of the crew of the captured ship and also in the presence of the claimants, if there were any. The members of the crew were to be examined at once; if necessary, with the assistance of qualified interpreters. All documents found on the captured ship were to be sent in the original, together with translations, to the *Conseil des prises* or whatever authority for the time being was exercising jurisdiction over prizes.⁵⁴

The Spanish prize rules emphasize the necessity for conducting the proceedings with all possible speed. The papers were first to be examined and verified. The parties were then to be heard in summary procedure and within twenty-four hours an opinion was to be rendered whether or not the ship was good prize. In case of "doubt or defect" the decision might be delayed "only so much as necessary". If the ship was declared good prize, then the parties were to be heard in contentious procedure. No new papers or documents could be introduced in evidence, though the Ordinance of

⁵² The absence of claim was one of the grounds on which presumptions were raised against the ship. For the discussion of this question, see *infra* part two.

⁵³ See, *e. g.*, Act of April 17, 1649, 2 ACTS AND ORDINANCES OF THE INTERREGNUM 66, 70; 6 ANNE, c. 37, § 4 (1707); 13 GEO. II, c. 4, § 3 (1740); 17 GEO. II, c. 34, § 3 (1744); 29 GEO. II, c. 34, § 3 (1746); 19 GEO. III, c. 67, § 17 (1779); 33 GEO. III, c. 66, § 23 (1793); 43 GEO. III, c. 160, § 18 (1803).

⁵⁴ See the following French ordinances and regulations relating to prize procedure: March, 1584, art. 33, 1 LEBEAU, *op. cit. supra* note 23, at 19; 14 ISAMBERT, *op. cit. supra* note 11, at 556, 563; February 1, 1650, art. 9, 1 LEBEAU, *supra* at 30, 38; 17 ISAMBERT, *supra* at 194, 200; June 6, 1672, 1 LEBEAU, *supra* at 47; 19 ISAMBERT, *supra* at 21; August, 1681, *Titre des Prises*, arts. 22-25, 1 LEBEAU, *supra* at 80, 92-94; 19 ISAMBERT, *supra* at 282, 336-37; August 16, 1692, arts. 12-15, 1 LEBEAU, *supra* at 151, 154-57; March 9, 1695, *id.* at 196; February 12, 1719, *id.* at 392; November 3, 1733, *id.* at 420; April 22, 1744, *id.* at 448; July 19, 1778, 2 *id.* at 50; July 26, 1778, *id.* at 58. Cf. VALIN, *op. cit. supra* note 18, at 177-204.

1801 says that this had been allowed in the past under the heading of "collateral proofs" (*comprobantes*). These proceedings had to be completed within five days.⁵⁵

The examination of the members of the crew was conducted on the basis of standing interrogatories and under oath. The standing interrogatories used in England were rather extensive. Detailed information was sought as to the nationality, ownership and destination of vessel and cargo; the status of the master and the crew; the knowledge of the witness as to the existence and credibility of the various ship's papers, the time and place of lading various parts of the cargo, the circumstances of the capture and, particularly, endeavor was made to ascertain whether ownership and destination as appearing from the papers were true or concealed and whether there was any "coloring" of goods.⁵⁶ The examination usually took place before the judges of the admiralty,⁵⁷ but occasionally common law magistrates or other officials performed this preliminary function.⁵⁸

Similar interrogatories were used in France. The regulations issued July 22, 1676, instructed the admiralty officers to examine the master and principal members of the crew of a captured ship as to the number of persons composing the crew, their names and nationality, whether or not they were married, where their families lived. The examiners were particularly to ascertain whether the witnesses were conversant with the language of the country which they claimed as their own. The French practice was to hold two interrogatories on two different days.⁵⁹

⁵⁵ 3 NOVÍSIMA RECOPIACIÓN DE LAS LEYES DE ESPAÑA (1805) lib. vi, tit. 8, pp. 125-26.

⁵⁶ See the standing interrogatories used around 1664-1667, BRIT. REC. OFF., H. C. A. 427, in which the witness is to testify as to his knowledge or belief whether or not the Flandrian (neutral) claimant has within the space of two years, "colored goods from Holland (enemy), or other part of the said States dominions consigned unto them at Ostend and other ports of Flanders to be shipped off thence for other ports, in the names of such Flandrians, whereas in truth such goods have in reality belonged to Dutchmen. . . ." Cf. with the much more extensive interrogatory a century later enclosed in a letter of Dec. 3, 1773, from Nath. Bishop to Doctor's Commons to Philip Stephen, Esq., BRIT. REC. OFF., Ad. 1/3885.

⁵⁷ Cf. Report of 1753 in MOORE, *loc. cit. supra* note 26. For an example see an examination held on April 29, 1654, in 4 THURLOE, *op. cit. supra* note 15, at 745.

⁵⁸ Thus, the crew of the Dutch ship *St. John* was examined, on August 7, 1654, during the first Anglo-Dutch war, before "the right worshipful Richard Spurwell, merchant, mayor of the borough of Plymouth, and justice of peace there, upon oath of the said examinee, by the interpretation of Joachim Gevers, his sworn interpreter". 2 THURLOE, *op. cit. supra* note 15, at 529. In the case of the *Anna Galley* the Court refused, in 1741, to accept as evidence answers to private interrogatories administered by the captors. PRATT, *op. cit. supra* note 45, at 1, 5, 16. A similar decision was reached by the Lords in *The Vorsigtigkeit* (1766) BURRELL, *op. cit. supra* note 31, at 192. The same rule was followed in Scotland. See STAIR, *op. cit. supra* note 18, at 190.

⁵⁹ 1 LEBEAU, *op. cit. supra* note 23, at 68. For a more elaborate set of questions see the Instructions of August 16, 1692, art. 13, *id.* at 151, 155, and the subsequent prize regulations cited *supra* note 54. See *Mémoire* of July 6, 1702 ("Extrait de tous les Réglemens & Ordonnances faites durant la Guerre de 1688, pour l'instruction de la procédure d'une prise". 2 VALIN, *op. cit. supra* note 25, at 75). The Spanish practice seems to have been less formalistic in this respect; apparently no standard forms of interrogatory were used.

Determination of the Ship's Fate "Out of Her Own Mouth"

From this practice of endeavoring to secure all evidence from the ship itself developed the widely-heralded doctrine that the ship's fate must be determined "out of her own mouth".⁶⁰ In other words, the ship could rest on the evidence which it could itself supply. The British Government sought to discard this rule in 1916 by invoking "changed conditions".⁶¹ It would have been more correct to say that the English, contrary to the Continental practice, adopted a less rigid attitude, both in principle and practice, toward this rule long before conditions changed. It is true that the English sought evidence primarily from the ship itself and the ship's papers were of paramount importance, as shown by the fact that they came first under scrutiny.⁶² Nevertheless, from an early time, when the papers were defective or when the captor could impeach the papers or testimony, the court could make an order for further proof. Under such an order extrinsic evidence could be introduced and the credibility of the intrinsic evidence could be weighed against other facts or against presumptions raised by such facts whether specific or general.⁶³ It is evident that an order for further proof shifts at least the burden of going forward with the evidence and might

⁶⁰ The precise origin of this phrase is not certain. Sir James Marriott used the phrase in *THE CASE OF THE DUTCH SHIPS CONSIDERED* (4th ed. 1759)¹ 42, where he said: "That they [the sentences of the English Admiralty Courts] are unjust and arbitrary, is not true: For they decide by Evidence out of the Mouth of the Captured Party, and not of the Captor, whose Evidence, as well as the Evidence of third Persons, is never admitted, but where no other Proof can be had; as when the Captured abscond, or have destroyed all the Papers." In a memorandum written by Marriott in reply to the Dutch protest of November 6, 1777, he wrote: "Ou trouvera-t-on en justice un axiome plus naturel et supérieur à celui de l'Écriture Sainte, *Ex ore tuo te judicabo?* C'est par les preuves qui sortiront de ta propre bouche que tu seras jugé." *MÉMOIRE JUSTIFICATIF DE LA CONDUITE DE LA GRANDE BRÉTAGNE, EN ARRÊTANT LES NAVIRES ÉTRANGES ET LES MUNITIONS DE GUERRE, DESTINÉES AUX INSURGÉS DE L'AMÉRIQUE* (printed in London, 1801) 9. According to Baty, the date of the *Mémoire* is 1779: *Neglected Fundamentals of Prize Law* (1920) 30 Yale L. J. 34, 39. Cf. HÜBNER, *op cit. supra* note 7, at 71-73.

⁶¹ Story maintained that the rule in question "is not a mere matter of practice or form: it is of the very essence of the administration of prize law". Note in 1 Wheat. 498-99. Cf. The Resolution, *supra* note 28, at 23. While the rule was generally regarded as a protection of neutral interests, it was also used in the interest of the captor. See the argument of the *procureur général* before the French prize court in the case of the Dutch ship *Le Smack* in 1779, *infra* part two.

⁶² The Report of 1753, MOORE, *op. cit. supra* note 16, at 44, stated: "The law of nations requires good faith; therefore, every ship must be provided with complete and genuine papers, and the master at least, should be privy to the truth of the transaction." The French jurists' *Mémoire* of 1753 contended that the master could not be expected to have such knowledge. SATOW, *op. cit. supra* note 16, at 345-46.

⁶³ The English practice was summed up as follows in the Report of 1753, MOORE, *op. cit. supra* note 16, at 44: "The evidence to acquit or condemn, . . . must, in the first instance, come merely from the ship taken . . . Though, from the ship's papers, and the preparatory examinations, the property does not sufficiently appear to be neutral, the claimant is often indulged with time to send over affidavits to supply that defect: if he will not show the property, by sufficient affidavits to be neutral, it is presumed to belong to the enemy." Cf. Scott and Nicholl's description of the exceptional order for "plea and proof", *id.* at 47. There are many reports of Jenkins written between 1664 and 1668 concerning the evaluation of evidence of papers and of interrogatories (evidence *in preparatorio*), the question always being whether further proof should be required from a ship *prima facie* entitled to release but for some reason suspected. BRIT. REC. OFF. MSS. S. P. 9/240.

even shift the burden of proof itself. On occasion, such further proof, including the wide use of presumptions, might destroy the primary evidence "out of the ship's mouth". The very early and continuous resort by neutral merchants to the practice of "coloring" enemy goods and doctoring ship's papers⁶⁴ tended to increase the number of cases in which further proof was ordered. Naturally the principle of determination of the ship's fate "out of her own mouth" broke down to the extent to which extrinsic evidence was admitted either on the part of the captor (or, in the form of presumptions, on the part of the court) to destroy the credibility of the ship's evidence, or on the part of the claimant to sustain his plea of innocence (or to rebut the presumption).

The doctrine of determination of the ship's fate "out of her own mouth" was apparently more literally construed in Continental practice. The French Order in Council of October 26, 1692, expressly stated that, ". . . les pièces trouvées à bord soient les seules sur lesquelles chaque prise doit être jugée . . .";⁶⁵ this provision was reiterated in subsequent ordinances.⁶⁶ In his brief on appeal, the master of the Genoese (neutral) ship, the *Nostre Dame des Carmes*, condemned as good prize on the ground of extrinsic evidence, characterized in 1705 the determination of the ship's fate "out of her own mouth" as a "*principe incontestable*" and sought to sustain his prayer for the reversal of the judgment below on the strength of evidence found on board ship.⁶⁷

A strong affirmation of the rule that the ship's fate should be determined "out of her own mouth" can be found in the *Mémoire* of the French jurists⁶⁸ wherein the English Report of 1753 was analyzed sentence by sentence. There is a vigorous objection to the idea that judgment can be rendered against the ship if the papers are in order, on the basis of the captor's suspicions.

⁶⁴ See Deák and Jessup, *supra* note 5, at 510-15.

⁶⁵ I LEBEAU, *op. cit. supra* note 23, at 166. The order was issued in response to complaints that the adjudication of prizes was often delayed by unsupported claims.

⁶⁶ See, *e. g.*, art. 11 of the Règlement of July 26, 1778, *supra* note 54; art. 6 of the Instructions of September 30, 1781, ARCH. NAT., *Fonds de la Marine*, mss. F2-77. Whether the rule thus stated was only intended to exclude extrinsic evidence offered by the claimant in sustaining his plea of innocence or in rebuttal of whatever presumptions may be raised against the ship's evidence,—or whether it also precluded the impeachment of the ship's evidence on the basis of suspicions of the captor, is not quite clear from the text of the prize-regulations. It does seem, however, that the French were less prone than the English to use presumptions and there is some indication that the captor was expected as a rule, to sustain his case from the ship's evidence. See *infra*, part two.

⁶⁷ ARCH. NAT., *Fonds de la Marine*, mss. G5-214. "Il n'y a pas la moindre pièce dans son bord, qui puisse donner aucun supçon de déguisement, tout y est régulier; & suivant les dispositions des Ordonnances, il faut regarder les connoissemens du bord, comme les seuls titres qui servent à la décision du chargement; toutes les pièces étrangères sont inutiles, & ont toujours été rejetées. . . . Comme l'Armateur n'a rien trouvé dans le Vaisseau qui puisse concourir à ses mauvais intentions, il est obligé d'avoir recours à des pièces étrangères; mais c'est une maxime certaine, que l'on n'ajoute foy qu'aux pièces trouvées à bord; . . ."

⁶⁸ *Supra* note 30.

"What can a neutral owner do," the French jurists asked, "to assure his goods, except to put the sea papers in order; there is nothing else which depends on him. He ought not to be responsible for the false suspicions which are inspired by the cupidity of the captors, nor for answers which one can extort from the members of a crew, often exaggerated, whether from intimidation, or by eliciting them from tricky questions; or even by corrupting part of the crew. Threats, guile and corruption ought to prejudice only those who utilize them, and not those against whom they are used."⁶⁹

The Spanish were equally insistent upon this rule. The production of other papers by the master or owner was apparently regarded as a favor to them to be allowed only occasionally by the judge.⁷⁰ According to article 48 of the Ordinance of 1801, which seems merely to have restated the rule contained in the earlier Ordinance of 1718, no papers could be admitted other than those found on board. But if there were not enough evidence to support a judgment and the master proved that the papers were lost by unavoidable accident, the court might grant a brief space of time within which he was permitted to supply the defect.⁷¹ Apparently, the claimant was seldom forced or allowed to rebut the captor's allegations with outside evidence. But in some cases at least, the captor was allowed to discharge his burden of proof by the testimony of experts who examined the goods and, by their character or marks, declared that they were of enemy origin. In such cases the claimant had the burden of proving that the goods were not enemy-owned.⁷²

It is interesting to note that the Anglo-French treaty of September 26, 1786, included a provision containing the principle of determining the ship's fate "out of her own mouth" but apparently indicating that the French yielded to the British point of view as to the admissibility of extrinsic evidence.⁷³

[To be concluded]

⁶⁹ Translation from the French text in SATOW, *op. cit. supra* note 16, at 346.

⁷⁰ ABREAU, *op. cit. supra* note 12, at 117-18.

⁷¹ 3 NOVÍSIMA RECOPIACIÓN DE LAS LEYES DE ESPAÑA (1805) 131. The same rule is found in art. 34 of the Ordinance of 1779, HENNINGS, *op. cit. supra* note 13, at 308.

⁷² ABREAU, *op. cit. supra* note 12, at 115; but *cf. id.* at 101-103.

⁷³ Art. xxxiii. 2 MARIENS, *op. cit. supra* note 21, at 680, 700; 1 CHALMERS, *op. cit. supra* note 21, at 517, 537. It was therein provided that if the quality of vessel and cargo sufficiently appear from the papers, no other proof shall be required by the captor (apparently on visit). But if any of the papers be missing, the ship might be examined, "de façon cependant que si, par d'autres Indices et Documens, il se trouve qu'il appartient véritablement aux Sujets d'un des dits Souverains, et qu'il ne contienne aucune Marchandise de Contrebande destinée pour l'ennemy de l'un d'eux, il ne devra point être confisqué, mais il sera relâché, avec sa charge. . . ."