

## Courts of Admiralty in Colonial America: the Maryland Experience, 1634-1776, by David R. Owen & Michael C. Tolley

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## BOOKS REVIEWED

*Courts of Admiralty in Colonial America: The Maryland Experience, 1634-1776.* By David R. Owen & Michael C. Tolley. Durham, N.C.: Carolina Academic Press, 1995. 421 pages.

We common lawyers are an insular bunch. We pay little attention to the law in the rest of the world, and even less attention to our own legal history, a surprising lacuna given our supposed penchant for history in the form of precedent. Even within our own legal systems we ignore the unfamiliar. As a result, few of us know about maritime law, the most important part of our inherited law that is not part of the common law.

That is unfortunate, for maritime law has much to teach us. Back when the common law was still mired in the petty land disputes of the disreputable Norman nobility, the admiralty lawyers were applying sophisticated law developed from the island of Rhodes to the Baltic, and working in Roman law as well.<sup>1</sup> The law merchant was resolving sophisticated contract disputes centuries before Lord Mansfield personally dragged the common law of contract within sight of modern economics. Admiralty law also had developed advanced features — no parochial jury, in rem jurisdiction, protection of seamen as wards of the court — while the common law was still creaking along in the wake of the Sheriff of Nottingham. We have much to learn from those long-forgotten maritime lawyers.

Now David Owen, a prominent member of the Admiralty Bar based in Baltimore as well as a dedicated legal historian, and Michael Tolley, a colonial historian at Northeastern University, have collaborated on a superb book combining colonial legal history and admiralty law. This is a wonderful book. It is splendidly organized and well written. It covers difficult legal and historical materials with aplomb. *The Silver Oar* is nicely illustrated.<sup>2</sup> The authors provide detailed descriptions of a number of cases, in the body of the text as well as in a lengthy Appendix.<sup>3</sup> It is

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1. Admiralty lawyers were called “doctors” and received training in the “civil law” — that is, the law of civilians. Their chambers are described in loving detail in Chapter XXIII of Charles Dickens’ *David Copperfield*.

2. DAVID R. OWEN & MICHAEL C. TOLLEY, *COURTS OF ADMIRALTY IN COLONIAL AMERICA: THE MARYLAND EXPERIENCE 1634-1776* xxxii (1995). It includes the only pictures I have ever seen of the famous “silver oar,” the symbol of the High Court of Admiralty which, at trial, is placed on a rack in front of the judges’ bench.

3. These case summaries are very interesting. Consider the case of the *Snow Hannah, Edward Prescott, Master* (1793), *see id.* at 324-52. The libellants, seamen, had signed on in Liverpool for a round trip which included visits to Africa and Virginia. They

both instructive as well as a delight to read. Because the book breaks new ground concerning the actual practice of the American maritime courts, it should be of greatest interest to the specialist in that subject. But it should also be of enormous interest to the general reader with some interest in colonial history or in admiralty law.

The book opens with a detailed description of English admiralty practice. I found this fascinating — a concise presentation of complex material with which I was largely unfamiliar. The authors then trace the development of colonial vice-admiralty courts, first in the West Indies, then in New York in 1678, and in Maryland in 1694. Eventually, nine of the thirteen colonies had vice-admiralty courts.<sup>4</sup> These were not ordinary provincial courts under the thumb of colonial Governors; rather, they were a “branch” of the High Court of Admiralty sitting in London.<sup>5</sup> Not all “admiralty” cases in the colonies were heard by a vice-admiralty court, even after those courts became active. A good many maritime cases during the last century of British rule were heard by ordinary courts; in Maryland, this meant that they were heard by the “Provincial Court.” Both that court and the vice-admiralty court located in Maryland, had concurrent jurisdiction to hear maritime matters.<sup>6</sup>

The maritime courts handled a wide variety of cases: insurance, prize, criminal, as well as cases alleging violation of the Navigation Acts.<sup>7</sup> For most of the Colonial period, the Navigation Acts were regulatory, designed to create “one great trading area with London at its hub”; after the Seven Years’ War ended in 1763, however, the goal of the Navigation Acts shifted to “revenue collection.”<sup>8</sup> In either event, smugglers

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left the *Hannah* in Annapolis because of “barbarous inhumanity and ill usage” by the officers. The suit was for wages due, and the seamen were represented by two young lawyers later to sign the Declaration of Independence, William Paca and Samuel Chase. The admiralty court ordered the arrest of the masters and of the sloop itself (*N.B.*: Classic in personam as well as in rem jurisdiction). The court found for the seamen and ordered the sloop to be sold to pay their wages. The authors consider this to be a typical result, for the courts protected seamen as wards of the admiralty. There is also a complete record of the case of *The Ship Ann of Newcastle* (1692), *see id.* at 339-52, another wage case, which makes for interesting reading. I.

4. *See id.* at 35. The authors believe that the first vice-admiralty court actually to sit in the thirteen colonies was in Maryland. *See id.* at 285.

5. *Id.* at 97.

6. There was some split in the *type* of cases handled in each court. Thus, the Provincial Court handled more “instance” cases than did the vice-admiralty courts. *Id.* at 143. That court was also the “preferred forum” for cases involving maritime contracts. *Id.* at 214.

7. The first and last categories were the most prevalent in the maritime courts. *See id.* at 103 (Tbl. 5-A).

8. *Id.* at 108.

had more friends than most law-breakers. As a result, being an admiralty official in Maryland was not an easy job. Two Collectors of Customs were murdered between 1684 and 1689, leading the King to revoke Maryland's charter as a proprietary colony and instead make it into a royal one.<sup>9</sup> The Collectors also had to face judges and juries who at times seemed to be quite favorable to the smugglers caught evading the Navigation Acts. Although the authors believe that later historians have exaggerated juror opposition to enforcement of the Navigation Acts in the early days, "on occasion, the partiality [of the jurors] was not only palpable but extreme."<sup>10</sup>

More pleasant for the judges must have been the more routine "instance" litigation cases involving seamen's wages, salvage, charter parties, and other ordinary grist for the maritime mill. These disputes took up about half of the court's caseload.<sup>11</sup> The maritime courts played its traditional role as friend of the common sailor. Incredibly, seamen won "every wage case brought in Maryland courts, common law as well as admiralty."<sup>12</sup> There were also a few prize and piracy cases in the admiralty courts, although the most famous of the former in Maryland occurred in 1794,<sup>13</sup> and the most famous piracy case took place in 1638, before either the Provincial or admiralty court had been formed.<sup>14</sup>

The authors describe in some detail the practice and procedure of the vice-admiralty court, as well as the judges and attorneys who served in it. They have identified eighteen lawyers who appeared in maritime cases between 1664 and 1775. The list is truly impressive: two (Paca and Chase) signed the Declaration of Independence, *ten* became Attorneys General of Maryland, and one (Chase) sat on the Supreme Court of the United States.<sup>15</sup>

The most important tale told by the author's data concerns the relation between the vice-admiralty courts and the American Revolution. It often has been asserted that the courts were a particular source of grievance for the colonists. Owen and Tolley assert, however, that they "found no evidence in either the primary or secondary sources to support

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9. *See id.* at 113-114.

10. *Id.* at 123.

11. *See id.* at 142.

12. *Id.* at 147.

13. This was *Glass v. The Sloop Betsey*, 3 U.S. 6 (1794), described as "the leading prize case in Maryland." Owen & Tolley, *supra* note 2, at 157. The trial judge in the case was William Paca, who earlier had been a lawyer in the vice-admiralty court.

14. The defendants were tried by the General Assembly, sitting as a court.

15. Owen & Tolley, *supra* note 2, at 176-77. Chase, of course, remains the only Justice ever tried in the Senate on charges of impeachment.

even a minor causal relationship between the worth of the Court of Vice-Admiralty and Maryland's attitude toward active participation in the Revolution."<sup>16</sup> They find no evidence of "explicit complaints about the vice-admiralty" during the Maryland Conventions of 1774, 1775, and 1776, even though there was "extreme discontent with the Stamp Act in general."<sup>17</sup> Moreover, the authors find "suspect" the complaint in the Declaration of Independence concerning the vice-admiralty courts.<sup>18</sup> They offer compelling proof: The existence of a "remarkable degree of continuity" between the colonial Vice-Admiralty practice and procedure and the admiralty provisions of the Federal Judiciary Act of 1789.<sup>19</sup> The authors present overwhelming evidence of that continuity. Because the continuity thesis contradicts such distinguished historians as Roscoe Pound and Morton Horwitz,<sup>20</sup> it is worth presenting the Owens/Tolley evidence in some detail. They use four examples of continuity:

1. *Jurisdiction.* The federal courts rejected the English notion that admiralty jurisdiction was limited to tidal waters. Instead, the Supreme Court eventually held that "the framers had in mind the much broader colonial jurisdiction granted in the vice admiralty commissions . . ." <sup>21</sup> Similarly, colonial precedents were used to support a holding that federal admiralty courts had jurisdiction over cases involving maritime necessities, carriage of goods, insurance, and charter parties.<sup>22</sup>

2. *Substantive Law.* Because the admiralty courts did not write formal opinions, it is difficult to trace continuity in substantive law from the colonial era. Nevertheless, the authors identify some convincing continuity from colonial to federal law.<sup>23</sup>

3. *Procedure.* There was great continuity in procedure. Such traditional admiralty features as in rem jurisdiction procedure, attachment, and the "non-jury" trial carried over into the federal era.<sup>24</sup>

4. *Structure.* Not only is the arcane terminology of the vice-admiralty courts followed in federal admiralty courts, but the key organizational point—shared jurisdiction between the regular and admiralty courts—also survived into the modern era.

16. *Id.* at 207-209.

17. *Id.* at 203.

18. *See id.* at 205-07.

19. *Id.* at 202.

20. *See id.* at 202 n.3 & 4.

21. *Id.* at 213.

22. *See id.* at 215.

23. *See id.* at 230.

24. *Id.*

Obviously, as this discussion makes clear, the framers did not find anything obnoxious about the vice-admiralty courts they had come to know so well. If they had felt any serious concerns, the drafters of our Constitution and our early statutes certainly would not have carried forward the law and procedure of the colonial courts if they had found it oppressive.

As Owens and Tolley explain:

Several reasons may explain why the law of admiralty continued largely intact and unscathed during these years. First, the substantive law of the admiralty had already been pressed into service of commercial and economic development. For centuries the law merchant, based upon the "customs of merchants," had been responsible for rationalizing commerce and facilitating commercial interactions. Second, the unique procedures of the admiralty were so conducive to trade that the complaints that trials without juries violated "right of Englishmen" were easily disarmed by the framers of the Judiciary Act of 1789 who saved "to suitors, in all cases, the right of common law remedy where the common law is competent to give it." Third, the interest of the new republic in establishing national power coincided with the interests of the admiralty in a broad, uniform jurisdiction. As the nation grew and more power became lodged in the new national government, so too did the admiralty jurisdiction of the federal courts.<sup>25</sup>

In short, this an interesting, informative, and valuable book. It should be widely read and enjoyed.

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25. *Id.* at 234

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