Publishing Robinson's *Reports Of Cases Argued And Determined In The High Court Of Admiralty*

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> Since the year 1798, the decisions of Sir William Scott, (now Lord Stowell) on the admiralty side of Westminster Hall, have been read and admired in every region of the republic of letters, as models of the most cultivated and the most enlightened human reason.
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> James Kent, *Commentaries on American Law* Vol. 2, (New York: O. Halsted 1827), 526.

Chancellor Kent's single, luminous sentence, published while Sir William Scott was still on the bench, presents the questions this article will explore. It investigates two interrelated aspects of the trajectory of the first decade of Sir William Scott's admiralty judgments: the history of their nearly simultaneous publication on both sides of the Atlantic and dissemination into the transnational "republic of letters" and the circumstances of their immediate absorption as precedents into the jurisprudence of the United States.[1]

1. Elizabeth L. Eisenstein, *The Printing Press as an Agent of Change* (Cambridge: Cambridge University Press 1979), 1:136–59, n. 287. Whether the process would be as embrasive today is more problematic. Lord Reed, "Foreign Precedents and Judicial

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Scott was the scholarly judge of the High Court of Admiralty in London from 1798 until 1828, delivering judgments both on the instance side (e.g., property rights of the Crown and the Lord High Admiral, salvage, maritime contract, hypothecation, freight, and wages) and the prize side of the court, the latter being of particular significance in the early years of his judicial tenure during the hostilities between England and France.[2] The notes Kent wrote in the front of his copy of the first volume of the reports of Scott's decisions, now in the Diamond Law Library at Columbia University, provide additional biographical detail: "Sir Wm. Scott was a Tutor in University College, Oxford," of whom Gibbon said, "'my personal acquaintance with that Gentleman. . .has inspired me with a just Esteem for his abilities and knowledge; & I am assured that his lectures on history would purpose, were they given to the public, a most valuable treatise.'" After nearly two decades at Oxford as a student, fellow, and reader, in 1779, Scott enrolled as an advocate of the College of Doctors at Law, exercent in the Ecclesiastical and Admiralty Courts. He was appointed an advocate-general to the Admiralty in 1782; in 1788 he was knighted and appointed both King's advocate and a judge of the Consistory Court.[3] Kent's note continues:

> In 1790 Sir Wm. Scott was a Judge of the Consistory Court at London. . . . Here he delivered a most admirable Decision, for Elegance, for moral & clear reasoning in the case of Evans v. Evans, being a Libel filed by the Wife against the Husband on a charge of cruelty. . . .[4]

Reasoning: the American Debate and the British Practice," *Law Quarterly Review* 124 (2008): 253–73.

2. Henry J. Bourguignon, *Sir William Scott, Lord Stowell, Judge of the High Court of Admiralty, 1798–1828* (Cambridge: Cambridge University Press, 1987); Edward Stanley Roscoe, *Lord Stowell: His Life and the Development of English Prize Law* (Boston: Houghton Mifflin, 1916); F. L. Wiswall, Jr., *The Development of Admiralty Jurisdiction and Practice since 1800* (Cambridge: Cambridge University Press, 1970): 4–35; Lord Sankey, "Lord Stowell," *Law Quarterly Review* 52 (1936): 327–44; H. J. Randall, "History of Contraband of War II," *Law Quarterly Review* 24 (1908): 449–64; J. H. Baker, *Monuments of Endlesse Labours – English Canonists and Their Work 1300–1900* (London: Hambledon, 1998): 125–27; and Sir William Holdsworth, *A History of English Law*, 17 vols. (London: Methuen: Sweet & Maxwell, 1964–72): Vol. 13, 668–89.

3. Roscoe, *Lord Stowell*, ix–x, 22; and Arnold D. McNair, "Dr. Johnson and the Law," *Law Quarterly Review* 63 (1947): 302, 312–18.

4. 1 Haggard's *Reports* 35 (1790). The Consistory Court had jurisdiction in matrimonial and probate matters: Holdsworth quotes Dickens as calling Doctors' Commons "'a lazy old nook near St. Paul's Churchyard. . .that has an ancient monopoly in suits about people's wills and people's marriages, and disputes among ships and boats.'" Sir William S. Holdsworth, *Charles Dickens as a Legal Historian* (New Haven: Yale, 1929), 30. An account of two matrimonial cases before Scott there can be found in Lawrence Stone, *Broken Lives – Separation and Divorce in England 1660–1857* (Oxford: Oxford University Press, 1993),

> October 27, 1798 Sir Wm. Scott, His Majesty's advocate General was made Judge of the high Court of Admiralty vice Sir James Marriott resigned, & he was about the same time sworn of his Majesty's privy Council. . .[5]

Kent's use of the expression "the admiralty side of Westminster Hall" in his *Commentaries* was surely figurative, because the High Court of Admiralty and the Consistory Court were held in the Doctors' Commons, located on Knightrider Street, just below St. Paul's Cathedral, miles from Westminster Hall.[6] The distance between them was not merely geographical; exercising powers originally conferred by the Crown on the Lord High Admiral, in prize cases the High Court of Admiralty applied doctrines of the law of nations derived from continental civil law, rather than English common law, and its bar in both prize and instance cases consisted of a small and exclusive group of "civilian" practitioners, with doctorates from Oxford or Cambridge, separate from the common law bar in the Inns of Court.

In the early years of his tenure, Sir William Scott's admiralty judgments were reported by Christopher Robinson, a distinguished civilian and from 1809, King's advocate in the High Court of Admiralty,[7] who succeeded Scott on that bench. According to the English Short Title Catalogue (ESTC), six volumes of Robinson's reports of Scott's admiralty judgments,

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162–269. In "Sir William Scott and the law of marriage," in *Judges and Judging in the History of the Common Law and Civil Law from Antiquity to Modern Times*, ed. Paul Brand and Joshua Geltzer (Cambridge: Cambridge University Press, 2012), 82–101, and *Marriage Law and Practice in the Long Eighteenth Century – a Reassessment* (Cambridge: Cambridge University Press 2009), 60–67, Professor Rebecca Probert is highly critical of one of his leading matrimonial judgments, *Dalrymple v. Dalrymple* (1811), which was singled out for praise at the time by Justice Joseph Story in his review of "Phillips on Insurance," *North American Review and Miscellaneous Journal* 20 (1825), 47, 67.

5. In 1790, Scott was also elected to the House of Commons representing Downton and in 1801 he was elected to the House of Commons representing Oxford University. He was raised to the peerage as Baron Stowell in 1821. Roscoe, *Lord Stowell*, x. However, "Lord Stowell was certainly one of the greatest men in the House of Lords during our period, but he exercised not a tithe of the influence in it that was wielded by his brother, Lord Eldon. He was its expert guide when matters of international law or ecclesiastical law were before it, but he had no ambition to be a political leader." Theodore T. F. Plucknett, "The House of Lords as a Court of Law. 1784–1837," *Law Quarterly Review* 52 (1936), 189–224.

6. The sittings of the High Court of Admiralty were moved to a garret above Westminster Hall in 1860, and in 1861 the Doctors' Commons was demolished. Until then, what was left of its traditional jurisdiction remained the exclusive preserve of civilian lawyers. Edward Stanley Roscoe, *Studies in the History of the Admiralty and Prize Courts* (London: Stevens & Son, 1932), 3. The jurisdiction of the High Court of Admiralty was absorbed by the High Court of Justice in 1875. Ibid., 3–4.

7. Wiswall, *Development of Admiralty Jurisdiction*, 35.

entitled *Reports of Cases Argued and Determined in the High Court of Admiralty; commencing with the Judgments of The Right Hon. Sir William Scott, Michaelmas Term 1798* were "printed by A. Strahan, Law-Printer to the King's Most Excellent Majesty, for J. Butterworth and J. White, Fleet-Street"; the first volume was published in 1799, and the remaining five were published in 1801, 1802, 1804, 1806, and 1808.[8] The ESTC also lists a six volume Philadelphia edition published in 1800, 1801, 1802, 1804, 1807, and 1810: the first four volumes were "Re-Printed: (from the London copy of A. Strachan, law printer to His Majesty) and sold by James Humphreys, no. 106, south side of Market-Street," the fifth volume was "Printed by James Humphreys for I. Riley & Co. New-York," and the last volume was "Printed and published by Isaac Riley."[9]

A leading authority on early American legal publishing , Michael H. Hoeflich, states that "[a]t the time of the Revolution, there were few law books available to American lawyers," that "[f]or several subsequent decades, the growth of the law book trade was slow," and that during the period 1770–1820, "book publishing and distribution was an essentially local activity and… most books published in the United States dealt with local legal concerns. This was also the period when the vast majority of law books…was imported from England…"[10] Up to 1800, few volumes of American case reports had been published,[11] and only

8. ESTC Citation No. T83700 (hereafter referred to as "*Admiralty Reports*"). The Strahans also spelled their name Strachan.

9. ESTC Citation No. W21937. Riley had established in Flatbush what was reputed to be the largest printing establishment in the country in 1807. Riley also printed volumes 2 (1806) through 6 (1812) of the decisions of the Supreme Court of the United States reported by William Cranch.

10. Michael H. Hoeflich, *Legal Publishing in Antebellum America* (Cambridge: Cambridge University Press, 2010), 14, 25.

11. Although American publications of reports of individual cases or trials, both here and in Great Britain, were not uncommon, few law reports collecting American cases were published in America up to 1800: none in New York State; three volumes of Dallas's *Reports* of federal and Pennsylvania cases (1790, 1798, and 1799) and one volume of Addison's local Pennsylvania *Reports* (1800); one volume of Wythe's (1795) and two of Washington's *Reports* (1798 and 1799) in Virginia; Kirby's (1789), Chipman's (1793) and Bay's (1798) single volumes of *Reports* for Connecticut, Vermont, and South Carolina, respectively; and two one-volume editions of his admiralty judgments published in 1789 and 1792 by Francis Hopkinson, the first United States district judge for the district of Pennsylvania, and three single volumes in North Carolina: Martin's *Notes of a Few Decisions* (1796), and Haywood's (1799) and Cameron's *Reports* (1800). Wilfred J. Ritz, *American Judicial Proceedings First Printed Before 1801* (Westport, CT: Greenwood Press, 1984); and John H. Langbein, "Chancellor Kent and the History of Legal Literature," *Columbia Law Review* 93 (1993) 547, 572–75. American lawyers of this period

three volumes of British decisions had been printed in this country, single volumes of *Nisi Prius Reports* compiled by Isaac Espinasse and Thomas Peake published in Hartford and Baltimore in 1795, respectively, and *Latch's King's Bench Reports 1624–1627,* published in Newbern in 1793 by the indefatigable Francois-Xavier Martin. Hoeflich quotes Justice Story's lament in 1813 that, with a volume ready for publication, the reporter of his decisions could find "'no person willing to print them and pay any value for the copyright." He contrasts the drastically changed situation just two decades later, which he attributes to professional demand, the growth of legal training, and the "stroke of genius from a marketing standpoint" of "the reconceptualization of the law as a science."[12]

Therefore, the American printing of Robinson's *Admiralty Reports* in the first decade of the nineteenth century was, ipso facto, unusual. It was the domestic printing of foreign reports, rare at that time, especially as it was a six volume series; Volume 6 of Cranch's reports of the Supreme Court of the United States itself did not appear until 1812, 2 years after the American printing of Robinson's *Admiralty Reports* was completed.

Below the surface, other anomalies abound with respect to both the English and American editions. The ledgers of Strahan's law printing business, which survive at the British Library, and existing copies of the first volume of the American edition, demonstrate the incompleteness of the bibliographical information in ESTC about the printing history of the *Admiralty Reports* in both Great Britain and the United States. Even

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did not want for English reports. In addition to those imported from London, English law reports and treatises—lacking copyright protection abroad—were reprinted in substantial volume in Dublin, and these cheaper reprints were exported to the United States. However, it was not until the arrival in the United States of expatriated participants in the rebellion of 1798—such as Patrick Byrne, who reached Philadelphia in November 1800 after his release from prison but took a year to re-establish his publishing business—that a substantial production of current English law books began in this country. In the 10 years beginning in 1802, Byrne printed locally volumes of Espinasse's *Reports*, Peake's *Reports*, Saunders's *Reports*, Blackstone's *Reports*, Bosanquet's *Reports*, Vesey's *Reports* and in two different series of East's *Reports*, not to mention several British legal treatises. See Richard Cargill Cole, *Irish Booksellers and English Writers 1740–1800* (Atlantic Highlands, NJ: Mansell, 1986), 186–90. James Kent bought volumes of Vesey's *Reports* printed by Byrne both before his exile from Dublin and after his arrival in Philadelphia, and the inventory of Kent's library found in Daniel J. Hulsebosch, "An Empire in Law: Chancellor Kent and the Revolution in Books in the Early Republic," *Alabama Law Review* 60 (2009) 377, 409–24, is illustrative both of the volume of Dublin legal reprints generally and of Byrne's Dublin and Philadelphia output specifically.

12. Hoeflich, *Legal Publishing*, 14–16. See also Craig Joyce, "The Rise of the Supreme Court Reporter: An Institutional Perspective on the Marshall Court Ascendancy," *University of Michigan Law Review* 83 (1985): 1291, 1325–26.

more significantly, it was not the British government, Sir William Scott, the judge, or Christopher Robinson, the reporter, but rather Rufus King, then United States minister to Great Britain, a lawyer trained by Theophilus Parsons in Newburyport, previously a representative of Massachusetts at the Constitutional Convention in Philadelphia in 1787, a delegate to the Massachusetts Ratification Convention in 1788, and afterwards one of the first two United States senators from New York from 1789, who arranged for and partly subsidized with American government funds the publication in England of these judgments of the High Court of Admiralty of Great Britain. The American printing was organized, not by a printer, publisher, or bookseller but rather by Richard Peters, United States district judge for the District of Pennsylvania, using copies of the English edition he obtained directly from Secretaries of State Pickering, Marshall, and Madison, successively, to whom King supplied them. Although King's and Peters's stated purposes were not entirely congruent, they were substantially similar: King needed wider dissemination of British prize court procedures and precedents, so that Americans caught up in the toils of the High Court of Admiralty could know how to protect their interests, and even perhaps avoid those toils the next time, and Peters, charged with the administration of the law of nations, and his bar, needed the availability of current, applicable precedents by a respected judge.

Finally, the ownership of the surviving copies establishes that, in the United States, Robinson's *Admiralty Reports* did reach the highest levels of the republic of letters. Not only were these reports widely disseminated in the United States after publication, but also, Sir William Scott's fame was spread outside the confines of the legal profession in articles by Justice Joseph Story in *The North American Review and Miscellaneous Journal,* America's first literary magazine. Justice Story clearly found in Sir William Scott's judgments the clarity and order needed for "intellectual coherence within a cultural vacuum," craved by the leading lawyers of the early American Republic.[13]

Covering the period from 1798 to April 1, 1808, Robinson's *Admiralty Reports* represent only a portion—albeit the largest portion—of Sir William Scott's published admiralty opinions, and the discussion that follows is, in general, limited to them. With the knighting and promotion of

13. R. Kent Newmyer, *Supreme Court Justice Joseph Story – Statesman of the Old Republic* (Chapel Hill: University of North Carolina, 1985): 120–21, 285; Robert A. Ferguson, *Law and Letters in American Culture* (Cambridge: Harvard University Press, 1984): 31–33; and G. Blaine Baker, "Story'd Paradigms for the Nineteenth-Century Display of Anglo-American Legal Doctrine," in *Law Books in Action–Essays on the Anglo-American Legal Treatise,* ed. Angela Fernandez and Markus D. Dubber (Oxford and Portland: Hart, 2012), 82.

Christopher Robinson to King's advocate in February and March, 1809, the reporting of Sir William Scott's decisions passed to another civilian, Thomas Edwards, who, in a single volume published in parts in 1810 and 1812, covered decisions from April 1, 1808 to July 30, 1812.[14] In 1812, Edwards also separately published fifty-five pages of a single category of Scott's decisions in 1809–12 as *Reports of the Leading Decisions in the High Court of Admiralty in Cases of Vessels Sailing under British Licenses.* The next reporter of Sir William Scott's admiralty decisions was John Dodson, also a civilian, whose two volumes of reports, published in 1815 and 1828, cover the periods 1811–15 and 1815–22.[15] The final reporter of Scott's decisions—as Lord Stowell—was John Haggard, in two volumes, the first covering the period 1822–25, and the second, shared with his successor, Sir Christopher Robinson, covering the period 1825–32.[16]

14. *Reports of Cases Argued and Determined in the High Court of Admiralty; Commencing with the Judgments of The Right Hon. Sir William Scott, Easter Term 1808.* The last decision reported in the volume is the case of *The Snipe*, the 5 day oral argument in which, taken in shorthand by Gurney, was separately printed by Strahan and published by Butterworth in 1812: *Arguments of Counsel in the Cases of the Snipe, the Martha, the Vesta and other American Vessels, Detained under the Orders in Council, and Brought to Adjudication in the High Court of Admiralty before Sir William Scott, on the 8th, 10th, 14th, 15th and 29th of July 1812.* This is the only stenographically recorded proceeding in the High Court of Admiralty before Sir William Scott that has been identified. However, part of Scott's duties included holding the Old Bailey Admiralty Sessions, and there are two reported capital trials that he conducted: *The Trial of William Codling, Mariner … For Wilfully and Feloniously Destroying and Casting Away the Brig Adventure on the High Seas, within the Jurisdiction of the Admiralty of England* (London: Martha Gurney 1803) and *Report of the Trial in the Case of The King v. William Jemott, at the Admiralty Sessions, Held at the Old Bailey, London, before Sir William Scott, Sir Simon Le Blanc, &c. &c.* (London: W. Hughes, 1812). In late 1812, Scott also held a brief trial in the Admiralty Sessions, recorded rather summarily in the journals of the time, at which the young Marquis of Sligo was convicted and sentenced to prison for persuading Navy seamen to desert their ship to crew his private yacht; during the proceedings Scott became acquainted with and later was unhappily married to the defendant's widowed mother. *Celebrated Trials, and Remarkable Cases of Criminal Jurisprudence, from the Earliest Records to the Year 1825,* 6 vols. (London: Knight and Lacey, 1825), 6:115. See Holdsworth, *History of English Law,* 13:675.

15. *Reports of Cases Argued and Determine in the High Court of Admiralty; Commencing with the Judgments of the Right Hon. Sir William Scott, Trinity Term 1811* (London: J. Butterworth, 1815 and 1828).

16. *Reports of Cases Argued and Determined in the High Court of Admiralty during the Time of the Right Hon. Lord Stowell, 1822–1825* (London: J. Butterworth, 1825); and *Reports of Cases Argued and Determined in the High Court of Admiralty, during the Time of the Right Hon. Lord Stowell and of the Right Hon. Sir Christopher Robinson, 1825–1832* (London: Saunders and Benning, 1833).

During his tenure, five of Sir William Scott's admiralty judgments were published as separate pamphlets when they were rendered; the selections were prescient, because each had a dramatic impact, either jurisprudentially or politically. The earliest, *The Maria, Paulsen Master,* was published as *The Swedish Convoy* in a more abbreviated form by Christopher Robinson before any of his *Admiralty Reports* appeared, and is also found in its chronological place on page 340 of the first volume of the London edition. Scott's judgment insisted on the British Navy's right to search neutral ships even when in convoy escorted by a frigate of their own flag. The Swedes, and later the Danes, insisted on the opposite view, and the increasing tension between Great Britain and Sweden and, subsequently, its allies in "the Second Armed Neutrality," which extended diplomacy could not dispel and partisan pamphleteering exacerbated, was ultimately resolved by Lord Nelson's destruction of the Danish fleet at the Battle of Copenhagen in 1801.[17]

17. *A Report of the Judgment of the High Court of Admiralty, on the Swedish Convoy; pronounced by The Right Hon. Sir William Scott on the Eleventh June 1799* (London: J. Butterworth, 1799). See also *The Armed Neutralities of 1780 and 1800 – A Collection of Official Documents Preceded by the Views of Representative Publicists,* ed. James Scott Brown (New York: Oxford University Press 1918), 471–606; and Randall "History of Contraband" 454–60. Randall characterizes University of Copenhagen law professor Schlegel's contemporaneous pamphlet opposing the right of search as "...a fine example of the art of special pleading. Like the theologians, the author unblushingly assumes what he wants to prove, and manifests a sublime disregard for any facts that may tell against his own view." Ibid., 457. See also Bernard Semmel, *Liberalism & Naval Strategy – Ideology, Interest and Sea Power during the Pax Britannica* (Boston: Allen & Unwin, 1986), 20–22. In October 1812, a separate pamphlet was published by Butterworth containing Thomas Edwards's *Report of a Judgment in the High Court of Admiralty by the Right Hon. Sir William Scott, in the case of the Snipe and other American Vessels,* concerning the dispute over the purported repeal of the French Berlin and Milan blockading decrees; rendered June 30, 1812, just as the news that the United States had declared war arrived in London, this decision was added so hastily to the end of Edwards's volume of reports, ahead of many earlier cases that had to wait for reporting later by Dodson, that it does not appear in the index of the volume. The third separately published case, in 1818 by Butterworth, was *A report of the judgment delivered in the High Court of Admiralty, on the 30th day of June, 1818, by the Right Hon. Sir William Scott, on the question of head-money, arising out of the destruction of the French Ships of War in Aix Roads, in April 1809,* reported in 2 Dodson 301 as the *Ville de Varsovie*. It concerned the dispute between Lord Gambier and Lord Cochrane over credit, and therefore, compensation, for this victory. Two other cases, published by Dodson in 1817 and Haggard in 1827, both concerned slavery and are discussed in section V.

I. Legal Culture and Politics in London

The inbred culture of the Doctors' Commons limited public knowledge about the process and judgments of the High Court of Admiralty. The advocates in that court numbered approximately twenty, and practiced within the Doctors' Commons, where the Court also convened.[18] Although historians differ about the degree to which any precedents even existed for the High Court of Admiralty to apply, the most the proponent of their existence can urge is that "[t]he admiralty court and the court of prize appeals had developed a body of unpublished precedents which the small closely knit group of civilians, like high priests of an occult religion, knew and treasured in their personal notebooks."[19] For Americans whose ships had already been taken as prizes by British warships or privateers, and those ship owners who were anxious to know where the lines were drawn to try to avoid that result, the secrecy of British prize law, if law there was, was a tremendous obstacle.

In August, 1794, 6 weeks after his arrival in London for the negotiations which led to the "Jay Treaty," Chief Justice John Jay approached Sir William Scott for "instructions for our people who have appeals or Claims to bring forward" in the admiralty courts, according to letters Jay wrote to Secretary of State Edmund Randolph.[20] Under date of September 10, 1794, Jay received an extensive opinion on that subject from Scott and John Nicholl, transmitted with a cover letter from Scott.[21] Jay wrote to Scott the same day, thanked him for his opinion, and informed him that he would provide a copy to the President.[22] Three days later, Jay wrote to Secretary of State Edmund Randolph, enclosing the opinion and reporting:

> Another Subject remains to be mentioned-it appeared to me advisable that our People should have precise and plain Instructions, relative to the Prosecution of Appeals and Claims in cases of Capture. For that purpose I

18. David R. Owen and Michael C. Tolley, *Courts of Admiralty in Colonial America – The Maryland Experience, 1634–1776* (Durham: Carolina Academic Press, 1995), 19.

19. Bourguignon, *Sir William Scott,* 243–44. Compare Roscoe, *Lord Stowell*, 33–36.

20. John Jay to Edmund Randolph August 9 and 21, 1794 (The Papers of John Jay web site, Columbia University, URL www.columbia.edu/cgi-bin/cul/resolve?AVE8231 [hereafter "Jay web site"], visited May 28, 2014, nos. 04303, 04307). Jay also advised Randolph in the first letter that he had requested that Scott work with "Doctor Nicholl": John Nicholl, who would succeed Scott as King's Advocate in 1798 when Scott was elevated to the bench of the High Court of Admiralty.

21. Sir William Scott to John Jay, September 10, 1794 (Jay web site, nos. 04319, 04451, 08533, representing multiple copies in various repositories).

22. John Jay to Sir William Scott, September 10, 1794 (Jay web site, no. 08902).

> applied to Sir William Scott and requested him in concert with Doctor Nicholl to prepare them-we conversed on the Subject, and I explained to him my views and objects.
>
> On the 10th of September I received these, enclosed with the following letter from Sir William which I insert on account of the friendly disposition towards our Country which it manifests, and which to me appears to be less uncommon here than we generally suppose.
>
> I take the liberty of advising that these Instructions, with a proper title prefix'd, be printed as a pamphlet and published for general information.[23]

Well into 1795, prior to his return to the United States, Jay continued to rely on Scott's assistance in managing "the business of American captures," as Scott put it.[24] Scott even interceded with the British Foreign Minister, Lord Grenville, who wrote to Jay, after seeing Scott "on the subject of American ships," that the three of them should have a conversation over dinner "to shorten and facilitate the business which is much my wish."[25]

However, when Rufus King arrived in London as United States minister in July 1796, the situation seems not to have improved: England and France were still at war, and both countries preyed on neutral American shipping. King had to cope with both unlawful activities by British naval commanders[26] and local Vice-Admiralty Courts in British colonies,

23. John Jay to Edmund Randolph, September 13, 1794 (Jay web site, nos. 04312, 04444, with some variation in text). These were printed in 1794 in Philadelphia by Childs and Swaine, accompanied by a certification of authenticity from the Department of State.

24. John Jay to Samuel Bayard, January 5, 1795 (Jay web site, no. 12531); John Jay to Edmund Randolph, January 31, 1795 (Jay web site, no. 04351); and Sir William Scott to John Jay, March 17, 1795 (Jay web site, no. 7136).

25. Lord Grenville to John Jay, March 20, 1795 (Jay web site, no. 8551).

26. Some measure of those activities can be found in Admiral Lord Cochrane, *The Autobiography of a Seaman* (New York: Lyons Press, 2000), 27, first published in 1860. In it he describes the activities of the Thetis, the British man-of-war on which he served as third lieutenant starting in 1795, sailing along the American coast: "When the *Thetis* was first on the coast, the American republic was universally recognized, and it must be admitted that our treatment of its citizens was scarcely in accordance with the national privileges to which the young republic had become entitled. There were, no doubt, many individuals amongst the American people who, caring little for the Federal government, considered it more profitable to break than to keep the law of nations, by aiding and supporting our enemy, and it was against such that the efforts of the squadron had been chiefly directed; but the way in which the object was carried out was scarcely less an infraction of those international laws that we were professedly enforcing. The practice of taking English seamen out of American vessels, without regard to the safety of navigating them when thus deprived of their hands, has already been mentioned. To this may be added, the detention of vessels against which nothing contrary to international neutrality could

and the jagged jurisdictional boundaries between the High Court of Admiralty in London and the bilateral group of Commissioners appointed under Article 7 of the Jay Treaty.[27] King seems to have continued Jay's practice of using Sir William Scott as his counsel, obtaining an opinion from Scott dated February 4, 1797, on British recognition of American citizenship for British nationals who settled in the United States.[28] The High Court of Admiralty posed its own challenges because of delays occasioned by its judge, Sir James Marriott.[29] King's increasingly vocal complaints to Lord Grenville were joined by other countries: "...his incapacity has been notorious and the Government has received repeated Complaints on this head from the Ministers of all the Neutral Nations."[30] By the time of King's October 16, 1798 letter to Secretary of State Pickering, Marriott had resigned, and King repeated the speculation in his October 6 letter that Marriott's successor would be Sir William Scott; 11 days later, Scott was appointed.

King's duties, and perhaps his inclination as well, kept his attention focused on Scott's decisions, and taken at face value, King's comments to the Secretary of State suggest that, at this time, Scott disappointed him by a lack of liberality in the protection of neutral rights. In a report to Secretary of State Pickering, dated March 15, 1799, King said: "Since the appointment of Sir William Scott in this Court, the business proceeds with great dispatch, tho' I hear that Sir William's decisions manifest an extension instead of a greater limitation of the Rights of Belligerents in respect to Neutrals."[31] The next day, in a letter of a close political comrade,

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be established, whereby their cargoes became damaged; the compelling them, on suspicion only, to proceed to ports other than those to which they were destined, and generally treating them as though they were engaged in contraband trade."

27. Rufus King to Lord Grenville, February 3, 1798 in *The Life and Correspondence of Rufus King,* ed. C.R. King, 6 vols. (New York: G.P. Putnam's Sons, 1894–1900), 2:276–77. See, also, King to Secretary of State Pickering, dated March 26, 1797 and March 17, 1798, ibid., 288–90, 620–33.

28. Rufus King Papers, New York Historical Society, Box 7, Folder 2. This was a subject on which King had earlier corresponded with Grenville. *King Correspondence,* 2:122–23 (December 12, 1796).

29. King to Lord Grenville, January 4, 1797 and September 6, 1798, *King Correspondence,* 2:137–38, 409–10: "The increasing infirmities of the Judge of this Court, and which from his advanced age there is little reason to believe will ever be mitigated, incapacitate him to discharge the Duties of his important office with the ability and dispatch that the undoubted rights and essential interests of neutral nations give them a title to expect and require." Ibid., 409.

30. King to Secretary of State Pickering, October 6 and 16, 1798, ibid., 441–42, 448, 451.

31. Ibid., 560, 564.

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Robert Troup, until the year before briefly United States district judge for the District of New York, King said much the same thing:

> The present judge of the H.C. of Admty. is a man of uncommon abilities; I don't recollect much of his Predecessors, but I am inclined to think him the ablest Judge that has presided in that Court. His Predecessors can have no reason *on earth*, as Lord Kenyon says, to complain of this opinion. You must not infer from hence that Sr. Wm. Scott does not condemn neutral Ships and Cargoes, for I am quite apprehensive he will in this as in most other respects hold the same distinguished Pre-eminence over his Predecessors.[32]

Writing to Secretary of State Pickering 4 months later, King attributed his concerns to the duality of Scott's official roles:

> The Judge of the High Court of Admiralty undoubtedly possesses great learning and distinguished abilities, but he is also a member of the King's Privy Council, occupied in the discussion of questions of State, and consulted concerning those maxims that have so far extended and which are employed to increase & to preserve the dominion of England upon the seas, and he cannot therefore avoid carrying the recollection of these views into the Court, nor prevent their influence upon the questions that are there to be decided.[33]

In his earlier letter to Troup, written nearly 3 years after his arrival in London, King also expressed his impatience with the limited availability of knowledge of how the High Court of Admiralty functioned in prize cases:

> If practicable, I will procure for you some information respecting the Process, &c, of the Prize Court of this Country. There is no book extant that gives any satisfaction upon this Subject. . . . I have taken some pains to enquire of those who ought to understand the mode of proceeding in the Prize Court, but my enquiries have been made to little purpose; for here as in all other Cases of Knowledge passing by Tradition, the reports of the initiated are not only imperfect but various. The College of Doctors, who alone are counsellers or Speakers in this Court, does not consist of more than twenty members, who perpetuate themselves by the admission of new Brothers. These are persons educated at one of the Universities, where they must have resided Eleven years before they could have received the Degrees which form the indispensable qualification for an admission into the College of Doctors

32. Ibid., 571–72.

33. *King Correspondence* 3:53, 56 (July 15, 1799). King was foreshadowing precisely the concerns, which, 200 years later, led to the removal of the Lord Chancellor from judicial duties and the translation of the Law Lords from the House of Lords to a new Supreme Court. See Johan Steyn, "The Case for a Supreme Court," *Law Quarterly Review* 118 (2002): 382, 385–89.

> Commons, where they rarely arrive before they have attained thirty years of age. Give us good Lord peace in our Days, is not one of the prayers of this Brotherhood. . . .Between ourselves I have seen much less reason to discredit our own Courts, and lawyers, and learning and blind Justice, as well as somewhat less reason to admire those of foreign Lands than my simplicity had lead me to think I should !!

II. The Decision to Publish Sir William Scott's Decisions

What information there is about the decision to publish Scott's *Admiralty Decisions* comes from two of Rufus King's published letters, and, improbably, from a diary entry by Philadelphia lawyer Horace Binney 38 years later. The first published disclosure occurred in an anonymous book review in *The American Jurist and Law Magazine* in 1839: "This publication (as we have understood in England) was most earnestly urged, if not originally proposed by our able minister, Mr. King; who, in order to aid this desirable object, engaged to take a considerable number of the copies for the use of our government and country."[34]

At the end of a letter to Secretary of State Timothy Pickering on other subjects, dated February 28, 1800, King said: "Some time since I informed you of my motives in taking pains to effect the Publication of Sir Wm. Scott's Decisions in Prize cases. Having by way of encouragement subscribed for a number of Copies, some of which have been sent to you, I shall send you a dozen more by Mr. Dandridge, who leaves me in a day or two."[35] More than 2 years later, having been continued as minister under newly-elected President Thomas Jefferson, under date of July 21, 1802, King wrote to the new Secretary of State, James Madison:

> As an item in my contingent account relates to the Publication of Robinson's Admiralty Reports, it may be thought proper that I should say a word or two in explanation of this expense. It has not, as you may well know, been the

34. "Art. VIII – Curtis's Admiralty Digest," in *The American Jurist and Law Magazine 21* (1839):111, 116. The review's author, John Pickering, being both the son of the Secretary of State and King's private secretary in London at the time, knew whereof he spoke. "Biographical Sketch of the Late John Pickering," in *The Works of Charles Sumner* (Boston: Lee and Shepard, 1875) 1:214, 216, 220. Sumner was one of the publishers of *The American Jurist*. See also Daniel A. White, *Eulogy of John Pickering, LLD* (Cambridge: Metcalf, 1847).

35. *King Correspondence,* 3:201, 203. The earlier communications to which King refers cannot be located in his 1798 or 1799–1800 Letter Books. Rufus King Papers, vols. 52 and 53, New York Historical Society. His letter of July 15, 1799 to Pickering did transmit a copy of Scott's opinion "in the important Case of the Swedish Convoy." Ibid., vol. 53, Letter nos. 43, 72, 81.

> practice of this country to publish Reports of the decisions of its prize Tribunals; and while a pretty general opinion has prevailed that England administers the Law of Nations in matters of prize with great rigour, Englishmen have uniformly asserted that these Tribunals have manifested greater moderation in that respect than those of any other Nation. So long as the decisions of the English prize Courts remained unpublished, this Disagreement would continue to exist, and so long likewise foreign States would remain without precise notion of the maxims of Public Law by which these Tribunals regulate their Decisions. Upon Sir William Scott's appointment as Judge of the High Court of Admiralty, being alike distinguished for Learning and Integrity, and desirous of extending his reputation beyond the limits of his own country, it occurred to me that the opportunity was a favourable one to endeavor to promote the publication of the Reports of his Court, the natural effect whereof upon such a mind as Sir William Scott's seemed likely to be in favor of a mild interpretation of the Laws of War and Peace, and what appeared to me to be of much importance, such a publication would have a Tendency to procure for this important branch of public Law a fixed character in place of the uncertain and contentious Reputation it has hitherto possessed: by going into the hands of merchants and men of business, these Reports would moreover enable them to avoid such adventures as might be liable to interruption. I accordingly conversed with Sir William Scott upon the subject; at first the proposal encountered difficulty chiefly on account of the contrary usage; this objection finally yielded, and Sir William Scott acquiesced, provided Government would consent and a suitable Reporter could be found to undertake the work. I then applied to the Minister and suggested such arguments as seemed to me likely to engage his attention, and, after a time, the Government gave its consent and nothing remained but to find a Reporter. As these Reports were not expected to be called for by professional men, who are the principal purchasers of the Common Law Reports, it was apprehended that the demand might not be sufficient to reimburse the expenses of publication, and to obviate this objection, recourse was had as usual in cases of this kind to last [sic] subscriptions. Considering the utility of publication and the part I had taken to promote it, I thought it expedient to subscribe for Fifty Copies. These have been sent from time to time, and in the order of their publication, to the Department of State, except the five copies which I have distributed among the American Ministers in Europe and some other public Characters.[36]

Christopher Robinson expressed much the same sentiment in the "Advertisement," beginning his pamphlet publishing both Scott's *Swedish Convoy* judgment and Volume I of his *Admiralty Reports*: "The honour and interest of our own Country are too deeply and extensively involved in its administration of the Law of Nations, not to render it highly

36. *King Correspondence,* 4:150–51.

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proper to be known here at home, in what manner and upon what principles its Tribunals administer that species of law: and to foreign States and their subjects, whose commercial interests are every day discussed and decided in those Courts, it is surely not less expedient that such information should be given."[37]

Finally, an entry in the diary of Horace Binney, the great lawyer from Philadelphia, dated April 20, 1837, reports: "Dined at Sir William Alexander's with Sir John Nicholl, fresh, though much advanced, being upward of eighty. Sir John informed me that Mr. King, our minister to England, and himself first urged Dr. Robinson to report the Admiralty decisions of Sir William Scott. He made inquiries of me concerning Rufus King and two or three other Americans whom he had known in London, and who had been dead perhaps twenty years. . . ."[38] Robinson succeeded Scott in 1828 as judge of the High Court of Admiralty and served for 5 years until his death in 1833, when he was succeeded by Nicholl, who in turn served for 5 years until his death in 1838.

First, King's statements make perfectly good sense. Certainly Scott seemed to have a "friendly disposition," as Jay put it, toward the United States, which King was seeking to capitalize on. That friendship persisted after Scott went onto the bench, and included political efforts by Scott in the interest of the United States.[39]

37. There is a slight difference in text and punctuation between the two versions; the one quoted is from Volume I of the *Admiralty Reports*.

38. Charles Chauncey Binney, *The Life of Horace Binney with Selections from His Letters* (Philadelphia: J. B. Lippincott, 1903), 157–58. Binney's entry continues the conversation. "He asked about General Ira Allen also, who had been dead perhaps forty, and amused himself by telling me of the general's admiralty suit, in which Sir John was his counsel. He had been captured with arms, going somewhere upon a Yankee errand to make the most of a bargain, without much regard to the law of contraband. Sir James Marriott had determined to condemn, and Allen, who meant to show he was not frightened, went into court in his Continental regimentals. Sir John told him he might make whatever fence he pleased, Sir James would leap over it all; and Allen said, 'Well, all I ask is that you make it as high as you can.' He seemed to retain a vivid recollection and even relish of Allen's strongly marked character. . ." The litigation involving Allen, who was Ethan Allen's brother, continued during King's stay in London. See *King Correspondence,* 2:509–11, 513–14; 3:478–79.

39. King to Scott, April 15, 1801, Scott to King, May 21, 1801, *King Correspondence*, 3: 430–31, 453–54. Scott told King in his letter, "I am glad you approve the Bill (for the regulation of the Vice-Admiralty Courts) generally. It is my sincere wish that it may be such as on a fair and dispassionate consideration between the countries you wd. approve.I can assure you that I expressed in our last conversation my own *favorite* idea that the Cruizers might be compelled to carry their Prizes to those Islands only, where the Jurisdiction is established. I hope I am not violating official Confidence when I say Mr. Nepean can inform you with what Ardour I preferred it, and how I entered my Protest against the danger & Inconveniences that may ensue, which I was finally & determinedly assured that the Exigencies of the Public Naval Service would in no degree admit it. It is solely on *your*

Second, the inaccessibility of prize law and Admiralty Court procedures is a theme that runs through the correspondence of this period, with King's March 16, 1799 letter to Robert Troup being an example. But the problems went beyond those identified there. The absence of reports of decisions of the High Court of Admiralty permitted the regional Vice-Admiralty Courts in the English colonies to adopt rules that were the opposite of settled law, or as Sir John Nicholl put it: ". . .I have the honor to report that the principle stated to have been lately adopted in the Courts of Vice-Admiralty at Jamaica and Providence, is directly in opposition to the decisions daily passing in the High Court of Admiralty and the Court of Appeal."[40]

Third, the absence of such reports permitted wholly erroneous newspaper reports to circulate misrepresenting adjudications in the High Court of Admiralty. According to an August 29, 1799 letter from King to Secretary of State Pickering:

> The News Papers of the 23d instant contain a report of the Trials of the American Ships Minerva and Nymph, captured by a French Privateer and recaptured by an English Frigate. According to this Report, the Recaptors not content with the Salvage of an Eighth as heretofore, demanded a condemnation in toto upon the absurd doctrine that twenty four hours enemy possession divests the first Owner of his property. . . .The Report likewise contains some remarks of the Judge alike unexpected and extraordinary. As these Papers may reach the United States and produce the like sentiments there as they have excited here, I think proper to inform you that these Reports in every exceptionable point are wholly erroneous. – Sir William Scott sent for Mr. Williams to express to him how much he had been hurt by the misrepresentations which had gone abroad concerning these Trials. . .[41]

Finally, there is King's insightful comment that the "natural effect" of the publication of Scott's decisions "upon such a mind as Sir William Scott's seemed likely to be in favor of a mild interpretation of the Laws of War and Peace." Although Scott could clearly be a "robust judge," events later in his life suggest that he sought to avoid personal controversy.[42]

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account that I was anxious to obtain a different Rule to be adopted; I dread the Hazard of Constitutional Questions between us and the disinherited Colonies [emphasis in original]."

40. King to Madison, June 1, 1801, quoting Report of the King's Advocate, May 23, 1801, ibid., 468, 471.

41. Ibid., 88, 89. Williams was the United States consul in London.

42. During the Essex controversy, discussed below in section III, the Foreign Office asked Scott to prepare an answer to American protests, but according to the Foreign Secretary, Scott was afraid of the controversy, and his "defense of the new departure was so weak that Mulgrave concluded, 'It may. . .be dangerous. . .to drag our Friend into the fight like Sir Andrew Ague Cheek, when he requires so many Sir Toby's to hold up his sword for him – .'" Bradford Perkins, *The First Rapprochement – England and the United States 1795–*

Evidently, King thought that having to dispense justice publicly would lead Scott to be more even-handed.[43]

III. Printing and Selling Robinson's *Admiralty Reports*

The decision to publish Scott's collected admiralty judgments was clearly reached months before their first appearance in November 1799. Robinson's "Advertisement," dated June 27, 1799, introducing his pamphlet report of Scott's *Swedish Convoy* judgment, concludes: "The Editor takes the present opportunity of mentioning that he has taken accurate Notes of many other Judgments delivered upon Questions of the Law of Nations in the High Court of Admiralty, and entertains the intention of communicating them to the Public." The *Swedish Convoy* pamphlet was printed in two editions of 250 copies each in June 1799[44] and published in July.[45]

1805 (Berkeley: University of California 1967), 180. Similarly, the almost unbelievable *Report of the Cause between William Beaurain, Gent. Plaintiff, and The Right Hon. Sir. W. Scott, Knt. Defendant, for Unlawfully Excommunicating the Plaintiff* (London: J. M. Richardson, 1814), 161–62 finds Lord Chief Justice Ellenborough rationalizing to the jury that a £150 payment from Scott to Beaurain through the medium of Isaac Espinasse was to "preserve[] his own character from being made a subject of question to human justice."

43. A possibly related interpretation appears in John Bigelow, "The First Century of the English Mission," *Frank Leslie's Popular Monthly* 14 (1882): 1. Bigelow—a New York lawyer and politician, an American diplomat in Paris during the Civil War, and the author of history books, including a five volume autobiography entitled *Retrospections of an Active Life* (New York: Baker and Taylor, 1909)—devotes a full page of this ten page illustrated article to Rufus King, in which his principal topic is "[t]he most interesting single event of Mr. King's diplomatic career [,]. . .his agency in securing the publicity of Sir William Scott's Admiralty decisions", that they might be "subjected to the supervision of public opinion". Bigelow asserts that "How important a service Mr. King was thus rendering to the jurisprudence of the world cannot be properly appreciated, even by the most ardent admirers of England's greatest Admiralty Judge, without having in mind the fact that till this time her Admiralty Judges had been in the habit of consulting the Executive Council and deciding by their direction all novel prize questions. This practice was effectually checked by publicity, and the decisions of this court henceforth conformed to the generally accepted doctrines of international law." This view may be contrasted with more recent scholarship. "Even Lord Stowell, who had a majestically lofty notion of the prerogatives of the prize court, did not venture in his court to pass upon the legality of an Order in Council. He would not presume to judge that an Order in Council imposed upon him duties inconsistent with International Law. Orders in Council he assumed to contain applications of the principles of that law provided for the use of the court, or positive regulations not inconsistent with it. . ." Sir Geoffrey Butler and Simon Maccoby, *The Development of International Law* (London: Longmans, 1928), 313–14.

44. Strahan Papers, Volume XX, Add. Ms. 48817, British Library.

45. "Books and Pamphlets Published in July 1799," *The Edinburgh Magazine or Literary Miscellany*, August 1799, 131. The price was one shilling.

Key to an understanding of the form that the *Admiralty Reports* took, and the current incomplete information in the descriptions in ESTC of the publications that took place in London and Philadelphia, is a recognition that each of the six volumes of Robinson's reports was published in two separate parts, printed and released months apart, in England invariably in different calendar years. In England it appears that the final title page, with publication data including year of publication, was issued with the first part of the first volume when it was printed and released, but thereafter, it was issued with the second part; in contrast, with respect to the reprinting of the first volume in Philadelphia, separate title pages for the volume, differing by publisher, were issued with each of the two parts.

A. London

Robinson's *Admiralty Reports* were printed over a 9 year period by "A. Strahan, Law-Printer to the King's Most Excellent Majesty" for J. Butterworth, a prominent London law book publisher, and J. White of Fleet Street.[46] The Strahan firm records in the British Library reflect the printing schedule and output for the six volumes produced for its customer, Butterworth.[47] See Table 1 for details.

Strahan also printed—and charged separately for—indices, appendices, and covers, and, in the ledgers, for wrappers; corrections and "Matter Deleted" were also extras. For Volume 1, Part 1, for example, paper and printing charges were £25 and sixpence, "corrections and Matter Deleted" £5, 3 shillings, and sixpence, and 1,000 covers were 17 shillings.

The copy of Volume I, Part I that King inscribed to Chief Justice Oliver Ellsworth, then in Paris on his diplomatic mission, can be found in the New York Historical Society, as issued in gray paper covers bearing, in large letters, "VOL. I PART I" and the date, 1799, beneath which appears: "*N.B.* These Reports will be continued regularly." and below that: "*Speedily will be published,* A new Edition, with considerable Additions, of Mr. Parke's Treatise on the Law of Marine Insurances." The back of the front cover advertises books "lately published by J. Butterworth"; the title page is identical to the front cover except that it lacks the trade language and, in place of the notation "Vol. I Part I," "Volume The First" appears. The single example reviewed of a separate

46. "William Strahan … effectively united the twin roles of King's Printer and law patentee…", and on his death the business was carried on by his son "A[ndrew]." Wilfred Prest, "Law Books," in *The Cambridge History of the Book,* ed. Michael F. Suarez, S.J. and Michael L. Turner (Cambridge: Cambridge University Press, 2009), V:791, 803.

47. Strahan Papers, Volumes XX and XXI, Add. Mss. 48817, 48818, British Library.

Table 1. The Strahan Firm Records in the British Library, Reflecting the Printing Schedule and Output for the Six Volumes Produced for its Customer, Butterworth.

Volume	Month Printed	Number of Copies Printed
1, Part 1	November 1799	1,000
1, Part 2	May 1800	1,000
2, Part 1	December 1800	1,500
1, Part 1	March 1801	750 (second edition)
1, Part 2	June 1801	750 (second edition)
2, Part 2	June 1801	1,500
3, Part 1	October 1801	1,500
3, Part 2	March 1802	1,500
4, Part 1	April 1803	1,250
4, Part 2	March 1804	1,250
5, Part 1	January 1805	1,250
5, Part 2	October 1806	1250
1, Part 2	June 1807	250
2, Part 1	June 1807	300
6, Part 1	October 1807	1,250
2, Part 2	June 1808	167
6, Part 2	September 1808	1250

Part II of Volume I as issued contains no title page. However, in the subsequent volumes, the publication date on the title page corresponds, not to the date of issuance of the first part, but rather to that of the second. As all six volumes of the London version are made up of parts issued in different years, the Strahan ledgers and contemporaneous publications show that the ESTC entries for the London version of these reports date the publication of each volume either the year before the volume was complete, in the case of the first volume, or the year following the publication of the first part of that volume.[48] That is what the title page for each actually says, even though to that extent, each title page is not accurate.[49]

48. For example, the December 17, 1800 edition of the *London Times* announced, "This day is published, Price 5s, Vol. 2, Part I, or the 3d No. of Reports of Cases Argued and Determined in the High Court of Admiralty commencing with the Judgments of Sir William Scott, in Michaelmas Term 1798… . This number contains the Cases Determined from June to November 1799. The two former numbers may be had for 5s each." However, the publication date of Volume II, based on the title page, is 1801.

49. The value to the historian of a minute analysis of the printer's schedule and the dates of parts may not be immediately apparent, but it is real. For example, *The Papers of Thomas Jefferson* (Princeton: Princeton University Press 2007), 34:497, 501, reprinted "Levi Lincoln's Opinion on the Betsy Cathcart," dated by the editors July 3,

B. Philadelphia

Under date of May 17, 1801, Richard Peters, United States district judge for the District of Pennsylvania, wrote to James Madison, President Thomas Jefferson's recently appointed secretary of state:

> Mr King has heretofore transmitted the Numbers, as they came out, of Robinson's Admiralty Cases, to the Office of State. At my Request & under an Engagement to have them printed for general use, Col Pickering furnished me with the first Number, & General Marshal[l] with the second; which have been reprinted. If any Succeeding Numbers have arrived you will oblige me & the Gentlemen of my Bar, by transmitting them. It is best to have the whole reprinted in the same Type, & of the same Size.[50]

Two weeks later, on June 1, 1801, Peters wrote to Madison again:

> I have been much engaged since Reciept of your Favour, enclosing Robinson's Cases... It was with Difficulty I prevailed on the Printer to continue the Publication of Robinson's Cases. It is a Work much interesting to the Citizens of these United States, diplomatic, juridical, mercantile, &ca. Yet the Printer declares he has not been paid for the Impression of the first Volume. I thought the Trade of Book printing was more profitable, than from this Specimen it appears to be.[51]

As noted earlier, the ESTC entry for the Philadelphia edition credits James Humphreys with printing and publishing the first four volumes and with printing the fifth for Isaac Riley, who is said also to have printed and published the sixth. But that is not actually what occurred; the bibliographical circumstances have again been obscured because of the publication of the

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1801, and characterized as a subsequently prepared fair copy of the now lost original with interlineations and erasures transmitted to Jefferson by Lincoln under cover of July 5, 1801 from Worcester, Massachusetts. Ibid., 515. The fair copy includes a reference to Scott's decision in *The Christopher*, cited as "Ropinson's [sic] Adm. Repts. Vol. 2d page 209" (the London citation). The difficulty is that *The Christopher* begins Part II of Volume Two of Robinson's *Admiralty Reports* in both the London and Philadelphia editions. The Strahan ledger shows that Part II of Volume II was printed in June 1801. A trip across the ocean took 40 days. See footnote 62. Therefore, assuming the accuracy of the Strahan ledgers, even if the printing began on Monday June 1, 1801, and the first copy off the press was for Levi Lincoln, it could not have traveled from London to Worcester, Massachusetts in time for him to use a case reported in it in an opinion transmitted to the President on July 5, 1801.

50. Author's collection.

51. Robert J. Brugger, Robert A. Rutland, Robert Rhodes Crout, Jeanne K. Sisson, Dru Dowdy., eds., *The Papers of James Madison, Secretary of State Series* (Charlottesville: University of Virginia Press, 1986), 1:254.

reports in parts, but here in a different way. The proof is found in the surviving copies that belonged to Thomas Jefferson and James Kent.

Thomas Jefferson's copy is described in the Sowerby catalogue as being limited to the first two volumes: "Vol. I is a mixed copy, the first part printed by Poulson at Philadelphia, the second half being the English edition printed by Strahan"[52]—no mention of Humphreys. James Kent's copy appears to contain all of the pages necessary to describe, if not to resolve, how Volume I was actually published.

Kent's copy starts with a title page for "Volume The First," which is "Printed by Zachariah Poulson, Junior, No. 106, *Chesnut-street*—1800." After page 156 appears a second title page for "Volume The First," this time "Philadelphia, Re-Printed: (from the London Copy of A. Strachan, Law Printer to His Majesty) and Sold by James Humphreys, No.106, South Side of Market-street—1800." Bound more or less in the middle are two single half-title pages, one for "Vol. I, Part I" with no name on it, the second "Vol. I, Part II" with James Humphreys' name on it. Therefore, it appears that Poulson printed Part I of Volume I and Humphreys printed Part II; given a choice of two title pages, except for James Kent, those persons binding their copies chose the one that came with the last installment, Humphreys', rather than the first, Poulson's, and that is what ESTC recorded.[53]

The May 20, 1800 edition of *The Gazette of the United States* in Philadelphia announced the publication of Volume I, Part I, of Robinson's *Admiralty Reports* and its availability from Zachariah Poulson Jun'r at No. 106 Chesnut Street for $1.00; 1 month earlier, beginning April 19, the *Gazette* periodically published Poulson's notices that the reports were "now in the press, and speedily will be published... ." In Kent's copy of Volume I, and *apparently* from their placement (for what that is worth) part of Part I, are the cover letter and opinion which Scott and Nicholl provided to John Jay under date of September 10, 1794, discussed previously. Preceding the text is the following heading: "The following copies of a LETTER and INSTRUCTIONS from the Right Hon. Sir William Scott and Sir John Nicholl, prepared at the Instance of His Excellency John Jay, Esquire, though not in the London Edition of this

52. E. Millicent Sowerby, *Catalogue of the Library of Thomas Jefferson*, 5 vols. (Washington DC: Library of Congress, 1952–59), II:370. Jefferson's second volume was from the first London printing.

53. One exception located is in the Special Collections at the Johns Hopkins Library. Hulsebosch, "An Empire in Law," mistakenly follows the Diamond Law Library on-line catalogue in crediting Volume I in its entirety to Poulson when describing Kent's copy; the remainder of Kent's copies, except Volume 6, were of the first London edition, 418.

Work, cannot otherwise than prove an acceptable Introduction to this American Edition."[54]

Poulson, the son of a printer of the same name, was a substantial Philadelphia printer in his own right. However, his production for others ceased almost completely after he purchased and assumed the publication for the next 39 years of a daily newspaper, renamed *Poulson's American Daily Advertiser*, on October 1, 1800.[55]

James Humphreys had begun his career in printing in Philadelphia in 1775 as a printer of *The Philadelphia Ledger* and of books, including one attacking Thomas Paine. In late 1776 Humphreys fled Philadelphia, returning with the British Army, which he followed to New York in 1778. At the end of the war, he left for London, where he received government subsistence and testified before the Royal Commission on the Losses and Services of American Loyalists. From London, Humphreys went to Nova Scotia, the Loyalist stronghold; there he published *The Nova Scotia Packet,* returning to Philadelphia in 1797, where he resumed the printing of books until his death in 1810.[56]

Humphreys's succession of Poulson was first advertised in the August 23, 1800 *Gazette of the United States*: Humphreys announced the availability of Part I of Volume I at his premises on Market Street and added: "The *second Part* which concludes this Volume is now in the press, and will be published with all the expedition possible." Humphrey's publication of Part II was announced in the *Gazette* on October 23, with the following promotion: "The following work may perhaps appear from its Title as only necessary to the Gentlemen of the Bar-The *whole trading world* are interested in the knowledge of its contents. It is replete with information to the *Man of Business*; and the *Merchant,* the *Underwriter*, the *Sea Captain*, &c. &c. will find themselves particularly and immediately concerned in the knowledge it affords."

The American Review and Literary Journal for July, August and September, 1801 advertised that:

> James Humphreys, of Philadelphia. . .has also published the first and second volumes of Robinson's *Reports of Cases in the High Court of Admiralty in Great-Britain.* These reports are a very valuable addition to the very few

54. These had been previously published in Philadelphia. See, above, footnote 23.

55. Isaiah Thomas, *The History of Printing in America* (New York: Weathervane Books, 1970; reprinted from the second edition), 439, 454–55. The online catalogue of the Library Company of Philadelphia reflects the reduction in Poulson's output starting in 1800.

56. Ibid., 397–401, 439–40. *The Royal Commission on the Losses and Services of American Loyalists, 1783 to 1785, Being the Notes of Mr. Daniel Parker Coke, MP* (Oxford: Oxford University Press, 1915), 135–36.

> books which we have relative to the proceedings and decisions of the British Admiralty Court. They are peculiarly deserving the attention of the American lawyer whose inquiries are directed to this branch of law, since he must have hitherto been almost wholly ignorant, for want of reports, of the principles which have been decided in a court where the rights of so many of our own citizens are litigated. The inquisitive and intelligent merchant may, by the perusal of these volumes, add to his stock of information many important particulars relevant to the conduct of trade and the law of nations.[57]

On May 7, 1802, the *Philadelphia Gazette* advertised that "Mr. James Humphreys has put to press the fifth Number of Robinson's Admiralty Reports, Part I, of Vol. III."[58] However, in 1806, although Humphreys was the printer for Volume V of Robinson's *Admiralty Reports,* the publisher of that volume was Isaac Riley, whose 1806 *A Priced Catalogue of Law Books, to be had at the Law Repository of I. Riley and Co., City-Hotel, Broad-Way, New-York* offered four volumes for $11 and stated that "*5th in the press*", although it did not emerge from the press until 1807. Riley published the sixth and final volume in 1810.[59]

No explanation has been found for the transfer of the publication from Humphreys to Riley. Perhaps Humphreys was preoccupied in 1805 and 1806 with his four volume publication—evidently in two editions, the first by a subscription led by President Thomas Jefferson—of Bryan Edwards's *The History, Civil and Commercial, of the British Colonies in the West Indies*.[60] However, Judge Peters's June 1, 1801 letter to James Madison, quoted above, reports Humphreys's complaint that the edition of Robinson's *Admiralty Reports* he was printing in Philadelphia was unprofitable.

57. Published in New York by T. & J. Swords, Vol. 1, No. 3, 373.

58. The same year Humphreys published in Philadelphia the first American edition of Charles Abbott (later Lord Tenterden), *A Treatise of the Law Relative to Merchant Ships and Seamen* (London: Brooke & Rider: Butterworth 1802), a later edition of which is discussed below in section V.

59. As noted above at footnote 9, Riley was a major printer in New York at the time. However, he had severe financial problems not long afterwards. "Isaac Riley, a prominent publisher and bookseller in New York, declared bankruptcy several times before beginning anew in Philadelphia, where he eventually declared bankruptcy twice, once in 1812 and again in 1820. He never recovered from the first bout with his creditors, and in his second Philadelphia disaster a number of his creditors from the previous collapse were still unpaid. Riley's business, at its peak, was substantial, and it is possible that his love of creative financing had finally taken its toll." Rosalind Remer, *Printers and Men of Capital–Philadelphia Book Publishers in the New Republic* (Philadelphia: University of Pennsylvania Press, 1996), 120.

60. Edward B. Rugemer, *The Problem of Emancipation: the Caribbean Roots of the American Civil War* (Baton Rouge: Louisiana State University Press 2008): 48, 52–53.

As noted above, the first three Parts issued in London sold for 5 shillings each, and Poulson's Part I of Volume I sold for $1; the London edition was, therefore, slightly more expensive in London than the Philadelphia edition was in Philadelphia. For any copies imported from London for sale, there would also be the London to Philadelphia shipping costs, although judged by available information in roughly parallel situations these should not have been substantial.[61] However, as the Philadelphia edition was reprinted from the London edition, the latter would be available in Philadelphia for professional use sooner: the Part I of Volume III, which the *Philadelphia Gazette* reported on May 7, 1802 that Humphreys had "put to press," had been printed by Strahan in October 1801.[62]

That London copies of Robinson's *Admiralty Reports* were being sold in Philadelphia at the same time that Humphreys was printing them is demonstrated by *Bibliotheca Legum Angliae. Davis's Law Catalogue For 1802. . ..1803, of the Latest English and Irish Editions*, printed in or after June 1802 for George Davis's "Store exclusively for the sale of Law Books," ironically by none other than James Humphreys. On page 7 under "London, Octavo, Reports", there appears:

	Dolls.	*Cts.*
Robinson's Admiralty Cases 2 vols. –	7	
Do. do. vol. 2d	3	50

And on page 12, under "Dublin, Octavo, Reports":

Robinson's Admiralty Cases, 2 vols. (Philad.)				5	
Do.	do.	vol. 2	do.	2	50

Although the difference of $1 is the equivalent of $15 today, the two editions were demonstrably in competition.[63] Moreover, the assignment of the Philadelphia edition to the Dublin Octavo section of the catalogue was an explicit characterization that it was like an Irish reprint of the time, cheaper because of its smaller size, smaller print, and poorer quality paper, all of

61. James Raven, *London Booksellers and American Customers–Transatlantic Literary Community and the Charleston Library Society, 1746–1811* (Columbia, University of South Carolina Press 2002), 115–16 (25% of wholesale costs).

62. The trip across the ocean would have taken about forty days. Robert Ernst, *Rufus King–American Federalist* (Chapel Hill: University of North Carolina Press 1968), 277; and Perkins, *The First Rapprochement*, 44.

63. Prices rose in both England and America later in the decade. The 1806 Riley catalogue cited above was selling four volumes of the Philadelphia edition for $11, and in London the price for the last Part, Part 2 of Volume 6, had risen from 5 shillings to 9. *The Monthly Magazine; or British Register* 26 (1808): 250.

which are still evident when the two editions are compared.[64] This may explain why Jefferson and Kent began with the purchase of the Philadelphia edition but then moved to the London one. Finally, although not a starred edition as such, the Philadelphia volumes contain tables of cases that give not only the page references to the cases as reported in that edition, but also the page references to the cases as reported in the London edition, effectively treating the London edition as the authoritative one.

The size and number of the London editions establish that the London publication did not need Rufus King's subscription to fifty copies to be successful. Both Volume I and Volume II were quickly reprinted by Strahan, as shown. In addition, several repositories hold copies of a third edition of Volume I, printed in 1806, and it appears that there was a fourth edition in 1812. As the admiralty bar in London did not number more than twenty, the question naturally arises: who were the purchasers of the thousands of copies printed in London, not to mention of the Philadelphia edition?[65]

A number of different sources permit educated guesses. Certainly both judges and lawyers not only in Britain but also—as Judge Richard Peters believed—in the United States, were potential purchasers. Further, although the admiralty bar in London was very small, the importance of prizes as a source of income to naval officers and men often away at sea and the volume of prizes needing processing and, potentially, judicial involvement created a substantial superstructure of prize agents and navy agents: middlemen representing and empowered by interested officers and crew members to manage all but the trial of legal issues involved in

64. Cole, *Irish Booksellers*, 21. "The main business, then, of the eighteenth-century Irish book trade was reprinting London editions usually without authorization from the author or publisher holding the copyright and without paying royalties. . . . Although the Irish reprint trade claimed to be interested primarily in supplying cheap reprints to Ireland's poor and untutored masses, its clientele in Ireland itself was the landed and professional classes for the most part, supplemented by at least some readers in Britain and perhaps exceeded by Americans as the century neared its end."

65. Although limited to books printed before and 1801 and, therefore, to the first volume of the Philadelphia edition, Wilfred Ritz's 1984 *American Judicial Proceedings* identified copies at Catholic University of America Law School, the Library of Congress, the Boston Athenaeum, Harvard Law School, the American Antiquarian Society, the Baltimore Bar Library, the Clements Library at the University of Michigan, Duke University, the New Jersey Historical Society, the John Carter Brown Library and the University of Virginia Law Library. Further copies are identified below in section V. A six volume set is at Johns Hopkins. On May 5, 1840, the chancellor of the State of New York supplied the Senate with a catalogue of the Chancery Court library, which included Robinson's *Admiralty Reports* but did not identify the edition.

the detention and liquidation of their prizes and their cargoes.[66] These seem a likely market for Robinson's *Admiralty Reports.* Warship captains needed to know the law, and some carried law books on their vessels.[67] Finally, in the context of Robinson's *Admiralty Reports,* both Rufus King and the *American Review and Literary Journal* thought merchants would be potential buyers, to familiarize themselves with the legal issues relevant to their international trading activities.

Certainly the British government found the publication of Robinson's *Admiralty Reports* useful. When the pamphlet war on neutral shipping got under way after the resumption of hostilities with France in 1803, the first and most effective publication for the British position was James Stephen's anonymous *War in Disguise; or, the Frauds of the Neutral Flags* in 1805, in support of the decision of Lords Commissioners of Appeals in Prize Causes in *The Essex*.[68] After quoting several pages from Scott's November 1799 decision in *The Immanuel, Eysenberg Master,* 2 Rob. 186, the pamphlet proclaims:

> I quote from the second volume of the Reports of Dr. Robinson; a work of transcendent value; and which will rise in the estimation of Europe and America, in proportion as the rights and duties of nations are better known and respected. It repays the attention of the English lawyer, statesman, or scholar, not only by legal and political information of a highly important kind, and which is no where else to be so fully and correctly obtained; but by exhibiting some of the happiest models of chaste judicial eloquence.[69]

66. Richard Hill, *The Prizes of War–The Naval Prize System in the Napoleonic Wars, 1793–1815* (Stroud, Gloucestershire: Sutton Publishing, 1998), 139–61, 248.

67. John Fabian Witt, *Lincoln's Code – the Laws of War in American History* (New York: Free Press, 2012), 87, 165. Witt was referring to the United States Navy, but the British Navy had nearly 300 ships of the line and cruisers in 1800. N. A. M. Rodger, *The Command of the Ocean – A Naval History of Britain, 1649–1815* (New York: Norton, 2005), 606–9. The author's collection includes a handsomely bound Part II of Volume I of the London edition of Robinson's Admiralty Reports with the bookplate of Thomas Gordon Caulfeild, R.N., who in 1803 was commanding the HMS Grampus, a 50-gun vessel, and 10 years later the HMS Hibernia, a ship of the line with 120 guns.

68. London: J. Hatchard. Perkins, *The First Rapprochement*, 180. Stephen first submitted the text of the pamphlet to Scott, who passed it on to Pitt, and later counseled Stephen to publish it to educate the public but to do so privately, in order to give the government greater flexibility. Ibid; see also Semmel, *Liberalism & Naval Strategy,* 22–26. Writing to James Madison from London under date of October 26, 1805, James Monroe described *War in Disguise* as "a ministerial work, or rather under its auspices" which "advises direct war on us in pretty plain terms…" Madison Papers, Library of Congress.

69. *War in Disguise,* 16–17n.

IV The Decision to Reprint Robinson's *Admiralty Reports* in Philadelphia

> When I came to the Bench there were no reports or State precedents. The opinions from the Bench were delivered ore tenus. We had no law of our own, and nobody knew what it was."

James Kent, quoted in William Kent, *Memoirs and Letters of Chancellor Kent 1763–1847* (Boston: Little, Brown 1898), 117.

Article III, Section 2, of the Constitution extended the judicial power of the United States to, inter alia, "all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers, and consuls; to all cases of admiralty and maritime jurisdiction. . ."[70] According to Chief Justice Marshall, writing for a unanimous court:

> The Constitution certainly contemplates these as three distinct classes of cases; and if they are distinct, the grant of jurisdiction over one of them, does not confer jurisdiction over either of the two. The discrimination made between them, in the Constitution, is, we think, conclusive against their identity. If it were not so, if this were a point open to inquiry, it would be difficult to maintain the proposition that they are the same. *A case in admiralty does not, in fact, arise under the Constitution or laws of the United States.* These cases are as old as navigation itself; and the law, admiralty and maritime, as it has existed for ages, is applied by our Courts to the cases as they arise.[71]

Justice Iredell had said much the same thing specifically about prize courts in February 1795, while Chief Justice Jay was in England: "I think *all prize cases* whatsoever ought to belong to the national sovereignty. They are to be determined by the law of nations. A prize court is, in effect, a court of all the nations of the world, because all persons, in every part of the world, are concluded by its sentences, in cases clearly coming within its jurisdiction."[72]

70. Section 9 of the Judiciary Act of 1789 conferred on the district courts, to the exclusion of the circuit courts, "exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction. . .: And . . . also . . . exclusive original cognizance of all seizures on land, or other waters than as aforesaid made, and of all suits for penalties and forfeitures incurred, under the laws of the United States." Although Section 8 of Article I did confer on Congress the power to pass laws punishing piracy and violations of the law of nations, and to "make rules concerning captures on land and water," Article I in terms did not expressly confer power on Congress to enact a general law of admiralty.

71. *American Ins. Co. v. 356 Bales of Cotton,* 26 U.S. 511, 545–46 (1828) (emphasis supplied).

72. *Pennhallow v. Doane's Administrators,* 3 U.S. 54, 91 (1795).

This view seems to have been commonly accepted. Justice James Wilson, a legal philosopher serving on the Supreme Court of the United States in its early days, appears to have struck the same note in the lectures that he gave at the College of Philadelphia starting in 1790. The ninth of his thirty-five lectures—published in 1804, after his death, by his son—concerned the law of nations. Singling out the law of merchants and the law maritime as branches of the law of nations and beneficiaries of recent exposition in judgments by Lord Chief Justice Mansfield, Justice Wilson pointed out that the law of nations "and especially . . .the maritime law is not the law of a particular country," and asked the question, "the greatness of which is self-evident: 'How far, on the principles of the confederation, does the law of nations become the municipal law of the United States?'" Finding that Article III of the Constitution had continued the jurisdiction of the courts to enumerated cases in which the law of nations had been applied before the ratification, he raised the question rhetorically what law should now apply. Noting that in its common law courts England applied the law of nations as part of the law of England, he concluded that its similar treatment by the courts of the United States would lead to: "an immense improvement. . . in the application and administration of the law of nations ! . . . This deduction, if properly founded, places the government of the United States in an aspect, new, indeed, but very conspicuous. It is vested with the exalted power of administering judicially the law of nations, which we have previously seen to be the law of sovereigns. . . What a beautiful and magnificent prospect of government is now opened before you !"[73] But before leaving for England, Chief Justice Jay had pointed out that this "magnificent prospect" was accompanied by serious responsibilities that required the existence of "a national judiciary, to be instituted by the whole nation, and to be responsible to the whole nation":

> [T]he United States, had, by taking a place among the nations of the earth, become amenable to the laws of nations; and it was in their interest as well as their duty to provide, that those laws should be respected and obeyed; in their national character and capacity, the United States were responsible for the conduct of each State, relative to the laws of nations, and the performance of treaties; and there the inexpediency of referring all such questions to State Courts, and particularly to the Courts of delinquent States became apparent.[74]

73. Robert G. McCloskey, ed. *The Works of James Wilson* (Harvard: Harvard University Press, 1967), 1:279, 282.

74. *Chisolm v. Georgia*, 2 U.S. 419, 474 (1793). See Anthony J. Bellia, Jr., and Bradford R. Clark, "The Federal Common Law of Nations," *Columbia Law Review* 109 (2009): 1, 37–45. A recent article argues that "a core purpose of American constitution-making was to facilitate the admission of the United States into the European-based system of sovereign states governed by the law of nations." David M. Golove and Daniel J. Hulsebosch, "A

As district judge in Philadelphia, Richard Peters was the man on the firing line, discharging these responsibilities with considerable caution.[75] Peters also shared with King the Federalist tenet of the importance of international commerce to America's success.[76]

But he needed precedents, and, other than treatises by European civilians, he had none. Under the Articles of Confederation, each state had its own admiralty court,[77] commonly with jury trials.[78] Review was available in the Federal Court of Appeals, but that court's reported decisions for its entire existence fill a mere forty-two pages, covering a 6 year period, in the second volume of Dallas's reports.[79] British admiralty and prize precedents were secreted in the notebooks of the small group of practitioners in Doctors' Commons. It is hardly surprising, given his responsibilities, that Judge Peters considered Robinson's *Admiralty Reports* "much

Civilized Nation: The Early American Constitution, the Law of Nations and the Pursuit of International Recognition," *New York University Law Review* 85 (2010): 932, 934–35, 1001, 1003.

75. Peters's initial view of his court's prize jurisdiction was extremely conservative and, therefore, unhelpful in supplying precedents. William R. Casto, *Foreign Affairs and the Constitution in the Age of Fighting Sail* (Columbia: University of South Carolina Press, 2006), 86–90, 165–69.

76. Stephen B. Presser, "A Tale of Two Judges: Richard Peters, Samuel Chase, and the Broken Promise of Federal Jurisprudence," *Northwestern University Law Review* 73 (1978): 26, 34–36; and Ernst, *Rufus King*, 209. Presser states that "[f]or Peters, American Admiralty law was to come rather from the maritime laws of the 'law of nations'"; he wrote in an opinion in 1795 that "we must resort to the regulations of other maritime countries, which have stood the test of time and experience."

77. See, for example, Daniel D. Blinka, "Jefferson and Juries: The Problem of Law, Reason, and Politics in the New Republic," *American Journal of Legal History* 47 (2005): 35, 78–81. Charles Merrill Hough, *Reports of Cases in the Vice Admiralty of the Province of New York and the Court of Admiralty of the State of New York 1715–1788* (New Haven: Yale University Press, 1925); and David R. Owen and Michael C. Tolley, *Courts of Admiralty; Proceedings in the Court of Vice-Admiralty of Virginia 1678–1775*, ed. George Reese (Richmond, VA: State Library, 1983). See, generally, Dorothy S. Towle, *Records of the Vice–Admiralty Court of Rhode Island 1716–1752* (Washington, DC: American Historical Society, 1936); and Carl Ubbelohde, *The Vice-Admiralty Courts and the American Revolution* (Chapel Hill: University of North Carolina Press, 1960).

78. Hamilton explained the Constitution's exclusion jury trials in admiralty matters: "I feel a deep and deliberate conviction, that there are many cases in which the trial by jury is an ineligible one. I think so particularly in cases which concern the public peace with foreign nations; that is in most cases where the question turns wholly on the law of nations. Of this nature among others are all prize causes." *The Federalist*, No. 83, New York, 1788, 2: 327, 337.

79. The few published texts available at the time were either British—on admiralty law-or Continental—on the law of nations. Henry J. Bourguignon, *The First Federal Court–The Federal Appellate Prize Court of the American Revolution–1775–1787* (Philadelphia: American Philosophical Society, 1977), 179–90.

interesting to the Citizens of these United States, diplomatic, juridical, mercantile. . .” and was actively trying to get them into the hands of the Philadelphia Bar.[80] In a letter to Sir William Scott in 1819, Justice Joseph Story summed up the need this way:

> [T]he Courts of this country. . .had not the benefit of a long-established and well-settled jurisdiction, and of an ancient customary law, regulating the practice of the Court. The traditions of former times and the modes of proceeding, were not familiarly preserved by a body of regular practitioners in the Court. The Admiralty Law was in a great measure a new system to us; and we had to grope our way as well as we could by the feeble and indistinct lights which glimmered through allusions incidentally made to the known rules and proceedings of an ancient court. Under these circumstances, every case, whether of practice or principle, was required to be reasoned out, and it was scarcely allowable to promulgate a rule without at the same time expounding its conformity to the usages of Admiralty tribunals.[81]

V. Into the Republic of Letters

“[P]ublications and correspondence that generated a transnational public sphere, which contemporaries called ‘the republic of letters’. . . enabled

80. That said, the availability of these precedents was hardly a complete solution for the problems confronting district judges sitting in admiralty. The following is taken from an opinion of Judge Samuel Rossiter Betts of the United States district court for the Southern District of New York 35 years later. “This point of practice is not regulated by the standing rules of this Court, and, accordingly, it must be governed by the principles and practice prevailing in the Courts of Admiralty, or under the civil law, which is the common source of procedure to the forums, both of this country and of England. The course of procedure in the English Admiralty, which is the immediate source of our practice, is in conformity to the practice of the Courts of the canon law, being administered substantially in the methods and with the formulae of the Roman law. . . . Clerke, who is regarded as a standard authority, is the earliest authentic writer on the subject. He compiled, in Latin, a Praxis for each tribunal, making that of the Ecclesiastical Courts the authoritative one, and refers throughout, in the other, for the rules of proceedings in Admiralty, to the usages and practice of the Ecclesiastical Courts. No other treatises on the Admiralty practice are recognised in an English Court as authority. And, indeed, it may be said, that the Admiralty in England appears to be governed by no determinate system of practice, but to conduct its business conformably to what is there understood to be the usage and custom of the Court, evidenced in its files and archives, or by the report of the registrar.” *The Mary Jane* (1833); Samuel Blatchford and Francis Howland, *Reports of Cases Argued and Determined in the District Court of the United States for the Southern District of New-York* 1 (1855): 390, 391; and 16 F. Cas. 987 (No. 9,215).

81. William W. Story, ed., *Life and Letters of Joseph Story* (Boston: Charles C. Little and James Brown 1851), 1:318.

thinkers to communicate across space, including national boundaries and, Americans believed, oceans."[82]

A. Association Copies

More than 200 years later, still-surviving association copies, or references to such copies, make the case that Scott's judgments reached the contemporary American legal intelligentsia through the medium of Robinson's *Admiralty Reports.*

The survival of Part I of Volume I owned by or intended for Oliver Ellsworth, Jefferson's two volumes, and Kent's full set has already been mentioned.[83] A copy of the first volume of the third edition with a manuscript by Justice Story is at the Harvard Law School; in addition, *The 1846 Auction Catalogue of Joseph Story's Library* offered "449 [-] Robinson's Admiralty Reports. vol. 5 Philadelphia 1801," the description being obviously flawed either in the volume number or the date.[84] Pierre du Ponceau owned a copy of the American edition: he used it extensively in his translation of Bynkershoek in 1810, and it was auctioned with the rest of his books in 1844 after he died.[85] Undoubtedly these were among the books he made available to James Madison in the summer of 1805, when Madison was in Philadelphia writing his denunciation of the British Rule of 1756.[86] In 1816, Daniel Webster had five volumes of Robinson's *Admiralty Reports* in his library, probably the Philadelphia

82. Golove and Hulsebosch, "A Civilized Nation," 974, nn. 168–69, citing Kent's comment quoted at the beginning of this article.

83. Only Volumes I–III of Kent's set were available for the author's review at the Diamond Law Library. However, the inventory of his law library in Hulsebosch, "An Empire of Law," reflects that the first volume was from the Philadelphia printing, the next four were from the London printing, and the last was printed by Isaac Riley.

84. Hollis No. 006866907; Michael F. Hoeflich and Karen S. Beck, *Catalogues of Early American Law Libraries: The 1846 Auction Catalogue of Joseph Story's Library,* Tarlton Law Library, Legal History Series No. 5 (Austin: University of Texas, 2004), 29.

85. Peter S. Du Ponceau, *A Treatise on the Law of War. Translated from the original Latin of Cornelius Van Bynkershoek* (Philadelphia: Farrand & Nicholas, 1810), 38 n., 99 n., 145–46 n., 165–67 n.; and *Catalogue of Valuable Law and Miscellaneous Books from the Library of the Late Peter S. Du Ponceau, LL. D.* (Philadelphia: Dorsey, 1844), 24.

86. *A Memoir, Containing an Examination of the British Doctrine, which Subjects to Capture a Neutral Trade Not Open in Time of Peace* in *Letters and Other Writings of James Madison* (Philadelphia: J. B. Lippincott, 1865), 2:229–391; and Ralph Ketcham, *James Madison* (Charlottesville: University of Virginia Press, 1990), 442–44. Madison cited both the London and Philadelphia editions and noted, but not invariably, the "Am. edit." when citing to the Philadelphia edition. Du Ponceau cited only the American edition, which is all that he ever used. Kent, in Volume I of his *Commentaries,* cites Robinson's *Admiralty Reports* extensively, but leaves it to the reader to discover that his citations to

edition.[87] Yale Law School's copies of the volumes of the Philadelphia printing have an impressive provenance: Simeon Baldwin, a judge of the Superior Court and the Connecticut Court of Errors; his grandson, Simeon Eben Baldwin, Governor of Connecticut; J. Warren Brackett, a lawyer and member of the Common Council of the City of New York; and David Daggett, founder of the Yale Law School, United States senator, mayor of New Haven and chief justice of the Connecticut Supreme Court of Errors. St. George Tucker's copies of Volumes 2–4 of the Philadelphia edition also survive.[88]

B. Citation in Contemporaneously Reported Cases

Even more impressive than the surviving association copies is the speed with which Robinson's *Admiralty Reports* were widely cited and quoted by bench and bar in the United States. Given that Volume I, Part I, was printed in November 1799 in London and was published in Philadelphia in May 1800, it is striking that Justice Chase should have referred to Scott by name and quoted from his opinion in *The Santa Cruz,* as reported in the Philadelphia edition of Volume I, Part I, in his opinion in *Bas v. Tingy* in the August 1800 term of the Supreme Court.[89] Other references

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the first volume are to the Philadelphia edition that he had, and that those to the next four volumes are to the London edition.

87. Alfred S. Konefsky and Andrew J. King, *The Papers of Daniel Webster, Legal Papers, Volume 2, The Boston Practice* (Dartmouth: Univesity Press of New England, 1983), 11. The basis for this attribution is that Webster argued the case of *The St. Lawrence, Webb, Master* at the February 1814 term of the Supreme Court of the United States, 12 U. S. 434. His argument as reported—said by the Webster Legal Papers (*The Federal Practice*, 3:14–15) to have been derived by Cranch from "a memorandum of points, furnished in compliance with USSC Rule 8"—relies on six of Sir William Scott's judgments and provides citations to both the London and the Philadelphia editions. Ibid., 438–39. The owner of the Philadelphia edition could provide the London page citations from the table in it, but there was no equivalent table in the London edition for the Philadelphia pagination.

88. Author's Collection. According to the General Introduction to Charles F. Hobson and Joan S. Lovelace, eds., *St. George Tucker's Law Reports and Selected Papers, 1782–1825* (Chapel Hill: University of North Carolina Press, 2013), I:108, once he was appointed United States district judge for the District of Virginia, "[w]ith characteristic thoroughness and system, Tucker undertook to collect and digest all the information and materials he needed to master his new office. Among his first actions was to order reports of American and English admiralty cases, including the volumes of Dallas, Bee and Robinson." I am grateful to Mr. Hobson for this reference. See also ibid., 3:1649, 1652, n.6, *United States v. The Schooner Romp* (1817), in which Tucker cites *The Rebeckah* in the first volume of the Philadelphia edition.

89. 4 U.S. 37, 44. Elsewhere the case is styled *Baas v. Tingey.* The statement in Maeva Marcus, ed., *The Documentary History of the Supreme Court of the United States, 1789–1801,* 9 vols. (hereafter Documentary History) (New York: Columbia University Press,

to Robinson's *Admiralty Reports* appear in William Tilghman's notes for his argument and his notes of William Rawle's argument, although they are not in Dallas's summary of either.[90]

Similarly, in *Talbot v. Seeman,* a prize case at the August 1801 term of the Supreme Court, in the latter part of their arguments counsel for both sides cited repeatedly and sometimes specifically ("American ed.") the American edition of Volumes I and II of Robinson's *Admiralty Reports*, and several times referred to Scott or Robinson by name.[91] Chief Justice Marshall relied on several of Scott's decisions, and distinguished one with some difficulty, in his opinion for the Court in *Rose v. Himely*.[92]

By 1801, at least Part I of Volume I had reached Charleston, where Judge Bee used the London citation of a case reported in it; his reports contain several other citations to later volumes also.[93] In his two volume *Admiralty Decisions in the District Court of the United States, for the Pennsylvania District by the Hon. Richard Peters, comprising also Some Decisions of the Same Court by the late Francis Hopkinson, Esq.,* (1807), Judge Peters sprinkled references to the Philadelphia edition of Robinson's *Admiralty Reports* in footnote annotations, but for the most part these seem to have been added after the decisions were rendered in

1985–2007), 8:434 n. 21. that Dallas cited to the wrong page of Scott's opinion in his report of *Baas* fails to take into account the existence of the American edition, the page numbering of which differs from the London editions.

90. Ibid., 422, n. 11, 430.

91. 5 U.S. 1, 6, 12–26. The citations to Volume II of the Philadelphia edition—and particularly to Part II—raise timing questions. Both sides are said to have cited 2 Rob. 246 (*The War Onskan*), which is in Part II of Volume II of the Philadelphia edition; in the London edition it starts on page 299, rather than page 246. Given that Peters had none of Volume II on May 14, 1801, and that according to Strahan's records, Part II of Volume II was not printed in London until June 1801, it is quite remarkable that a Philadelphia edition of Part II of Volume II could have been set, printed, and sold in Philadelphia and used in Supreme Court argument there just 2 months after it came off the press in London. One cannot help wondering whether a citation such as this was not adjusted from the English to the American edition after the oral argument, particularly as Volume 1 of Cranch was not published until 1804. But there is no proof that it was so.

92. 8 U.S. 241 (1808). Although Chief Justice Marshall did not cite to Robinson's *Admiralty Reports* in his opinion for the Court in the earlier case of *Murray v. Schooner Charming Betsy,* 6 U.S. 64, 75 (1804), the report of the oral argument contains the following statement: "The Ch.J. mentioned the case of the Sally, capt. Joy, in 2 Rob. 185 (Amer. Ed.) where a court of vice-admiralty had decreed, in a revenue case, that there was no probable cause of seizure." See also Mark W. Janis, *America and the Law of Nations 1776–1939* (Oxford: Oxford University Press, 2010), 40–44.

93. Thomas Bee, *Reports of Cases Adjudged in the District Court of South Carolina* (Philadelphia: Farrand, 1810), 180, 194, 220–22 ("Eng. Ed."), 227, 235.

further support of the result; in some cases Judge Peters's decision predated the one by Sir William Scott that was referred to.[94]

C. The Next Two Centuries

These early Supreme Court cases merely mark the beginning of the spread of Robinson's *Admiralty Reports* into American jurisprudence. Du Ponceau's translation of Bynkershoek, published in 1810, was reliant to some degree on Robinson's *Admiralty Reports,* although the translator was careful, as a Frenchman would be, to note when they reflected what he considered to be the opportunistic British view.[95] More embracing was Joseph Story, then a practicing lawyer in Salem, Massachusetts, who in 1810 published with his annotations the second American edition, from the third London edition, of Charles Abbott's *A Treatise of the Law Relative to Merchant Ships and Seamen*.[96] Using a format similar to *Tucker's Blackstone,* published earlier in that decade, Story supplemented Abbott's text with annotations, some of them running for pages, accompanied by American authorities and, in the instance of salvage, marshaling American and English authorities side by side. In addition, as he stated in the introduction, he "[i]n some few cases. . .added English authorities which were not noticed by Mr. Abbott, or have been published since the last edition of his work."[97] These last included a number of new citations to cases "not noticed" in volumes of Robinson's *Admiralty Reports* available to him.

Once on the bench, Justice Story included Robinson's *Admiralty Reports* among the authorities in his landmark admiralty decision, *De Lovio v. Boit*, and in earlier cases in the Massachusetts circuit court.[98]

94. See William R. Casto, "Foreign Affairs Crises and the Constitution's Case or Controversy Limitation: Notes from the Founding Era," *American Journal of Legal History* 46 (2004): 237, 247 n.59.

95. "Such appears also to have been the opinion of that able civilian, sir *William Scott* (while *advocate-general*) and of the whole court of King's Bench in England, in 1789. (*Smart v. Wolff*, 3 *Term Rep*. 329). But political considerations have since induced that learned judge to maintain the opposite doctrine, contrary to the ancient, nay, inveterate practice of his own country. . .." Ibid., 38 n.

96. Charles Abbott, *A Treatise of the Law Relative to Merchant Ships and Seamen* (Newburyport: Edward Little & Co. 1810). Abbott, later Lord Tenterden, Lord Chief Justice of the Court of Kings-Bench, had published the first edition of the volume in 1802. The third London edition was published in 1808. The first American edition was published in 1802 in Philadelphia by James Humphreys.

97. Ibid., x, 451–53.

98. 7 F. Cas. 418 (C.C.D.Mass. 1815) (No. 3,776). See also *The Alexander*, 1 Fed. Cas. 357 (C.C.D. Mass. 1813) (No. 164); and *The Emulous*, 8 Fed. Cas. 697 (C.C.D. Mass. 1813) (No.4,479), *rev'd on other grounds* as *Brown v. United States*, 12 U.S. 110 (1814).

As litigation arising from the War of 1812 began to reach the Supreme Court at its February 1814 and 1815 terms, Justice Story, Justice William Johnson, and Chief Justice Marshall each wrote opinions for the Court that treated decisions of Sir William Scott as dispositive,[99] but Chief Justice Marshall also wrote the opinion for the Court reversing Justice Story's decision in *The Emulous*,[100] and he and Justice Story more than once found themselves on opposite sides of a divided Court in prize cases during this period.[101]

In dissent in *The Venus*, Chief Justice Marshall began his extensive canvass of Sir William Scott's decisions in Robinson's *Admiralty Reports* with the statement: "I respect *sir William Scott*, as I do every truely great man; and I respect his decision; nor should I depart from them on light grounds: but it is impossible to consider them attentively, without perceiving that his mind leans strongly in favor of the captors."[102] And in a case the following year in which the appellant sought to distinguish decisions by Sir William Scott, and the appellee relied on Scott's position that the rule "has been so repeatedly decided. . . that it is no longer open to discussion," Chief Justice Marshall wrote for a unanimous court:

> The United States, having, at one time, formed a component part of the British Empire, *their* prize law was our prize law. When we separated, it continued to be our prize law, so far as it was adapted to our circumstances and was not varied by the power which was capable of changing it. It will not be advanced, in consequence of this former relation between the two countries, that any obvious misconstruction of public law made by the British Courts, will be considered as forming a rule for the American Courts, or that any recent rule of the British Courts is entitled to more respect than the recent rules of other countries. But a case professing to be decided on ancient principles will not be entirely disregarded, unless it be very unreasonable, or be founded on a construction rejected by other nations.[103]

99. *The Julia, Luce, Master*, 12 U.S. 181 (1814) (Story, J.); *The Adventure*, 12 U.S. 221 (1814) (Johnson, J.); and *Thirty Hogsheads of Sugar v. Boyle,* 13 U.S. 191 (1815) (Marshall, Ch. J.).

100. See footnote 98, above.

101. *The Venus, Rae, Master*, 12 U.S. 253 (1814); *The Nereide, Bennett, Master,* 13 U.S. 388 (1815); and *The Commercen*, 14 U.S. 382 (1816). Justice Washington, with Story's concurrence, and Story, both sedulously following Scott, wrote for the majority in the first and the last cases cited; Chief Justice Marshall's views prevailed in the second. Interestingly, in *The Nereide*, counsel cited the American edition of Robinson's *Admiralty Reports,* but Story cited the London edition.

102. 12 U.S., 288, 299.

103. *Thirty Hogsheads of Sugar v. Boyle*, 13 U.S., 198. See also Eric A. Belgrad, "John Marshall's Contributions to American Neutrality Doctrines," *William & Mary Law Review* 9 (1967): 430–451. Although closely allied with Justice Story, Henry Wheaton, about to

This statement was mild compared to the earlier, increasingly shrill pamphlet war, which began with the resumption of hostilities between Britain and France in 1803 and helped to fuel the War of 1812.[104] It had its origins in the Rule of 1756, promulgated by the British in the Seven Years War, prohibiting neutrals from engaging in wartime in trade between an enemy's colony and its home territory if they were excluded from it in peacetime, a doctrine that worked in parallel with the disputed British denial of the doctrine of "free ships make free goods."[105] While expounding the Rule in *The Immanuel,* in his decision in *The Polly* in February 1800 Scott created an indulgent workaround that treated landing and paying duties on goods in the neutral shipper's home country as conclusively interrupting

become the reporter of the Supreme Court's decisions, voiced the same caution in the introduction to his *A Digest of the Law of Maritime Captures and Prizes* (New York: M'Dermut & D. D. Arden, 1815), x. "The decisions of the present judge of the high court of admiralty in England are entitled to great respect and attention, and being the adjudications of a court of the law of nations, are of binding authority in that law, except upon those questions in regard to which certain peculiar doctrines have been maintained by the British government. . . .Had that great man followed the example of his illustrious countryman. . .in refusing to be bound by the instructions and rescripts of his government where they infringed the law of nations and abridged the rights of neutrals, the authority of his adjudications would have been entitled to still more respect with foreign nations and with future ages."

104. In *A Memoir, Containing an Examination of the British Doctrine, Which Subjects to Capture a Neutral Trade Not Open in Time of Peace*, James Madison actually led off the pamphlet war on the American side, responding to the seizure and condemnation of the Aurora in the Vice-Admiralty Court for Newfoundland on grounds indistinguishable from Scott's decision to the contrary, expressly indulgent of American commerce, in the *Polly, Lasky Master*, 2 Rob. 295, 301 (1800) (American edition). Following the decision in *The Essex* in June 1805, James Stephen published *War in Disguise* in October 1805. In February 1806, a pamphlet, published anonymously but written by Gouverneur Morris, attacked both Sir William Scott as a hypocritical tool of the Ministry, as well as the Stephens pamphlet. *An Answer to War in Disguise; or Remarks Upon the New Doctrine of England, Concerning Neutral Trade.* (New York: I. Riley, 1806). More measured comments came from Fisher Ames. Seth Ames, ed., *Works of Fisher Ames*(Indianapolis: Liberty Classics 1983; reprint of 1854 NY ed.), I:386. In London, a lengthy response to Madison's pamphlet was published (J. Johnson 1806) as *Belligerent Rights Asserted and Vindicated against Neutral Encroachments*. Charles Jared Ingersoll of the Philadelphia bar weighed in (Philadelphia: Conrad, 1808) with *A View of the Rights and Wrongs, Power and Policy, of the United States of America,* attacking Scott's decision in *The Immanuel* on the regulation of neutral shipping from enemy ports.

105. See, for example, Witt, *Lincoln's Code,* 60–62. The validity of both doctrines had been conceded in the Jay Treaty. Samuel Flagg Bemis, *Jay's Treaty–A Study in Commerce and Diplomacy*, revised ed. (New Haven: Yale University Press, 1962), 358; Mlada Bukovansky, "American Identity and Neutral Rights from Independence to the War of 1812," *International Organization* 51 (1997), 209, 228.

the prohibited "continuous voyage" from the enemy's colony to its home territory.[106] Stricter enforcement of the Rule of 1756 after 1803 culminated in the decision by Sir William Grant, Master of the Rolls, presiding for the Lords Commissioners of Appeal in Prize Cases in *The Essex*, in which he effectively overruled *The Polly*.[107] Because of the similarity in the judges' names and the publication in Volume V of Robinson's *Admiralty Reports* of Grant's related decision, *The William, Tefry, Master,* and of *The Maria, Jackson,* Scott's acquiescence in *The Essex,* Scott became America's whipping-boy for *The Essex*.[108]

Nevertheless, Justice Story remained a steadfast admirer of Sir William Scott. He fought alone for the application of the *Swedish Convoy* case and other judgments of Scott to neutral goods on an armed belligerent vessel in *The Nereide, Bennett, Master*.[109] He relied heavily on Robinson's *Admiralty Reports* in the two notes—*On the Practice in Prize Causes* and *On the Rule of the War of 1756*—which he contributed anonymously to Volume I of Henry Wheaton's *Reports of Cases Argued and Adjudged*

106. See note 104 above.

107. Bradford Perkins, "Sir William Scott and the *Essex*," *William and Mary Quarterly, 3d Ser*. 13 (1956):169–83. As Perkins shows, in his *History of the United States during the Second Administration of Thomas Jefferson* (New York: Chas. Scribner's Sons, 1890), Henry Adams repeatedly pilloried Scott as the author of the *Essex* decision, an error that continues virtually to this day. Ian W. Toll, *Six Frigates – The Epic History of the Founding of the U.S. Navy* (New York: Norton, 2006), 275.

108. 5 Rob. 365, 385. Therefore, in Volume I of *The American Law Journal* (Philadelphia: Farrand 1808): 221, Hall introduced a brief report of Scott's ruling in *The Eliza, Haff, Master* on January 21, 1804, not reported by Robinson, as follows: "The following case, of which the manuscript copy has been handed us by a friend, will be read with no ordinary share of interest, as it contains the latest decision pronounced by *Sir Wm. Scott*, on the former criterion as to what should be a discontinuance of a voyage, and which is directly in the teeth of the latter criterion at this time acted on. … [H]ad it not been that the extremities of this country, as a neutral nation, have driven her to examine with the eye of severe criticism the juridical decisions of this celebrated civilian, his fame might have been left to stand on a broader basis than that of an *eloquent judge*."

109. 13 U.S. at 436. James Kent points out the importance of *The Nereide* in Volume I of his *Commentaries* (120–24). There, Chief Justice Marshall held that the American creed that "free ships make free goods" had no support in the law of nations, but he also rejected the converse that the captors there contended for: that an enemy ship makes enemy goods. Story argued that shipment of neutral goods on an armed enemy vessel that resisted inspection should result in forfeiture, a position Scott had taken the year before in *The Fanny, Lawton,* 1 Dodson 443, a case that Story did not cite and might not yet have known about. Kent comments that "it is to be regretted, that the decisions of two courts of the highest character, on such a point, should have been in direct contradiction to each other." See, also, Newmyer, *Supreme Court Justice Joseph Story,* 95–97.

in the Supreme Court of the United States. February 1816.[110] He also corresponded with Scott, starting with a letter in 1818 forwarding the first two volumes of reports of Story's own decisions, and continued intermittently until Scott's death.[111]

Justice Story brought Scott's jurisprudence to a wider audience than the judiciary and the Bar. In 1818, in the *North American Review and Miscellaneous Journal,* reviewing Jacobsen's *Laws of the sea with Reference to Maritime Commerce During Peace and War,* he quoted favorably from its text:

> As to the law of prize, it is almost entirely borrowed from the reports of the decisions of the High Court of Admiralty, since the time of Sir William Scott. For this, the author himself offers a very striking reason. "If," says he, "in the subsequent part of the work, he (the author) has confined himself somewhat more exclusively to the doctrines and opinions of that celebrated man whose unrivalled decisions on maritime law, like the judgments and opinions of the Roman jurists in the civil law, will constitute an essential part of maritime law for centuries to come,—*it was because the continental jurisprudence is barren of examples in those branches of the subject.*" As the commercial law of Great Britain received much of its perfection through the decisions of Lord Mansfield, so the maritime laws of war of that country have attained their maturity, through the decisions of Sir William Scott.

In an address to the Suffolk County Bar Association in 1821 Justice Story said:

110. Henry Wheaton, *Reports of Cases Argued and Adjudged in the Supreme Court of the United States. February 1816* (Philadelphia: Matthew Carey 1816), 494–534. Story, *Life and Letters*, 1:281–83. Justice Story began with a discussion of the opinion Scott and Nicholl wrote to John Jay under date of September 10, 1794.

111. Ibid. 307–8, 318–21, 552–61. Decisions of Judge Peters and Judge John Davis of the district of Massachusetts in prize cases arising out of the War of 1812 made extensive use of Sir William Scott's judgments in Robinson's *Admiralty Reports* as authority. *Cases Decided in the District and Circuit Court of the United States for the Pennsylvania District, and also a Case Decided in the District Court of Massachusetts, relative to the Employment of British Licenses on board of Vessels of the United States* (Philadelphia: Redwood Fisher, 1813). So did Justice Bushrod Washington, sitting in the circuit court in Philadelphia, and Judge William P. Van Ness in New York. *Sperry v. Delaware Ins. Co.,* 22 Fed. Cas. 923 (E.D. Pa. 1808) (No. 13,326); Hon. William P. Van Ness, *Reports of Two Cases Determined in the Prize Court for the New-York District,* (New York: Gould, Banks and Gould, 1814). Nonetheless, Judge Van Ness suggested that Scott could have feet of clay: "Sir William Scott, who, when his opinions are not influenced by the executive authority, or by the peculiar situation and policy of his nation, is great and high authority, has adopted these principles in their whole extent." *Johnson v. Thirteen Bales,* 13 F. Cas. 836, 839 (No. 7,415) (C.C.D.N.Y. 1814).

> How few have read with becoming reverence and zeal the decisions of that splendid jurist, the ornament, I will not say of his own age or country, but of all ages and all countries; the intrepid supporter equally of neutral and belligerent rights; the pure and spotless magistrate of nations, who has administered the dictates of universal jurisprudence with so much dignity and discretion in the Prize and Instance Courts of England? Need I pronounce the name of Sir William Scott?[112]

Only Story's loathing of slavery in general at this time of his life, and of the international slave trade in particular, could temper his admiration for Sir William Scott. In December 1821 he was confronted by a case raising issues that had been decided by Sir William Scott in the third of his judgments printed separately, *The Louis, Forest, Master,* decided on December 15, 1817, and published by Dodson as a pamphlet before the end of that year. *The Louis* concerned the capture by a British naval vessel of a French ship off the coast of Africa waiting to take on twelve slaves; eight British sailors were killed in *The Louis*'s resistance to a British inspection. After *The Louis* was condemned by the British Vice-Admiralty Court in Sierra Leone, the French claimants appealed to the High Court of Admiralty in London. Sir William Scott held that the vessel had been improperly seized, concluding that the right of search did not exist in peacetime; that the slave trade, although outlawed in England and elsewhere, did not violate the law of nations; that there was no evidence that the slave trade violated French law and, that even if it had, that would not have justified a British seizure of the vessel.

In the *La Jeune Eugenie*, Justice Story was confronted with a case with nearly identical facts involving a United States naval vessel's capture of a French slave ship. Story struggled with *The Louis*. First, there was his obligatory homage to Scott:

> I will not yield to any person in reverence for the profound learning and talents of the accomplished judge, by whom that decision was pronounced. His judgments have been justly the admiration of Europe and America; and will be read for instruction, for beauty of illustration, for felicity of style, and for unambitious, but lofty principles, long after their illustrious author is gathered to the fathers, who have enlightened and improved mankind. . .

But for Justice Story, Scott's judgment in *The Louis* departed from the preclusive position to the contrary taken earlier in the opinion of Sir William Grant, Master of the Rolls, sitting as a judge of the Court of the Lords Commissioner of Appeals in Prize Cases in the *Amedie,* and also by

112. Ibid., Vol. 7, 323, 345. Story, *Life and Letters*, 1:410.

Scott himself in the earlier case of the *The Fortuna.*[113] After pointing out ways that *The Louis* could arguably be distinguished from these earlier precedents, Story nevertheless had to admit:

> . . .I find myself utterly at a loss to comprehend, how the fundamental doctrine of the case of The Amedie, and the other cases already cited, that the slave trade, abstractly speaking, cannot have a legal existence, and that it is repugnant to the principles of universal law, and the law of nations, can consist with the unequivocal denial of the same doctrine in the case of Le Louis. I find myself driven, therefore, to the conclusion, that the last case is meant silently to abandon and repudiate the whole doctrine, on which the former cases rest.

Justice Story chose to follow "the dictates of my deliberate judgment," not Scott's.[114] He rejected the arguments of the French claimants but did accept the president's suggestion that the vessel be held for disposition by the French government.[115]

113. 1 *Acton's Reports* 240 (1810); and 1 *Dodson's Reports* 81 (1811).

114. 26 Fed. Cas. 832, 847–49 (C.C.D.Mass. 1822 [sic]) (Case No. 15,551). John T. Noonan, Jr., *The Antelope – The Ordeal of the Recaptured Africans in the Administrations of James Monroe and John Quincy Adams* (Berkeley: University of California Press, 1977), 69–74.

115. However, with Story's silent acquiescence, in *The Antelope*, 23 U.S. 66, 117–23 (1825), Chief Justice Marshall held that Scott's opinion in *The Louis* "demonstrates the attention he had bestowed upon it, and gives full assurance that it may be considered as settling the law in the British Courts of Admiralty as far as it goes." He construed Scott's judgment to hold that "the vessel even of a nation which had forbidden the slave trade, but had not conceded the right of search, must, if wrongfully brought in, be restored to the owner. But the Judge goes farther, and shows, that no evidence existed to prove that France had, by law, forbidden that trade. Consequently, for this reason, as well as for that previously assigned, the sentence of condemnation was reversed, and restitution awarded." Finally, Marshall agreed with Scott that the slave trade did not violate the law of nations and that "this traffic remains lawful to those whose governments have not forbidden it. . . . It follows, that a foreign vessel engaged in the African slave trade, captured on the high seas in time of peace, by an American cruiser, and brought in for adjudication, would be restored." The specific facts of the case permitted the Court to liberate some, but not all, of the slaves who had been on the vessel when it was captured. Scholars dispute the precise ground for Scott's holding. Compare Holger Lutz Kern, "Strategies of Legal Change: Great Britain, International Law and the Abolition of the Transatlantic Slave Trade," *Journal of the History of International Law* 6 (2004): 233, 239 with Hugo Fischer, "The Suppression of Slavery in International Law," *International Law Quarterly* 3 (1950): 28, 36–39. Scott's judgment in *The Louis* earned him (and the Chief Justice for agreeing with him in *The Antelope*) special mention in John Quincy Adams's oral argument in *The Amistad*, 40 U.S. 518 (1841): "But here Sir William Scott proclaims a *legal standard of morality*, differing from, opposed to, and transcending the standard of nature and of nature's God. This legal standard of morality must, he says, in the administration of law, be held, by a Court, to supersede the laws of God, and justify, before the tribunals of man, the most atrocious of crimes in the eyes of God." *Argument of John Quincy Adams, before the Supreme Court of the United*

Seven years later Story could write in *The North American Review*:

> But a still more striking example is Lord Stowell, (better known in this country as Sir William Scott,) the present venerable Judge of the High Court of Admiralty, of whom it may be justly said, in the language of Cicero, that he is *jurisperitorum eloquentissimus.* This great man has presided in the Court of Admiralty since 1798; and during this period he has commanded the admiration of all Europe by the learning, acuteness and finished elegance of his judgments… With the exception of the doctrines respecting colonial trade, in which it is but common justice to admit, that he either acted upon public Orders in Council, which he was bound to obey, or upon the Rule of 1756, which his government had previously chosen to consider as part of its prize code, the differences between his decisions upon prize law, and those promulgated by the Supreme Court of the United States, are so few, as to be almost evanescent… .[A]s a maritime judge, deciding, in what is called the Instance Court, the great principles of jurisprudence … [h]is superiority is most signal … One scarcely knows which most to admire, the simplicity of his principles, the classical beauty of his diction, the calm and dispassionate spirit of his inquiries, his critical but candid estimate of evidence, his strong love of equity, his deep indignation of fraud, chastened by habitual moderation, or that pervading common sense, which looks into, and feels, and acts upon the business of life with a discriminating, but indulgent eye content to administer practical good without ostentation, and wasting nothing on speculations, whose origin is enthusiasm and whose end is uncertainty or mischief.[116]

In 1826, James Kent published Volume I of his *Commentaries on American Law.* The first third of the book begins with nine chapters devoted to the law

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States, in the case of the United States, Appellants. Vs. Cinque, and others, Africans, Captured in the Schooner Amistad (New York: Benedict 1841), 126.

116. J. Story, "Phillips on Insurance," 65–66; Scott propounded a justification for enforcing the Orders in Council, but query how persuasive it was. *Fox and Others*, 1 Edw. 311 (1811); and Hill, *The Prizes of War*, 50–51. And echoing King's correspondence and Chief Justice Marshall's reservations, Justice Story recognized that: "There was a time, when it was the fashion in this country to undervalue the solid excellence of his opinions. Our commerce was so directly involved in conflict with his administration of prize law, that it was difficult to avoid prejudices on a subject in which, as neutrals, we had so deep an interest, and were so liable to indulge strong animosities." Ibid., 65. Much the same thought was echoed by John Pickering in his review of Curtis's *Admiralty Digest* in 1839, 115. "Under such peculiarly trying circumstances, the eminent English judge we have mentioned—himself too, belonging to one of the belligerents—was called upon to administer the principles of the international law of Europe. That his decisions should in some cases have been ill received by a people, whose important interests were so deeply affected by them, is natural; but that he should, with so few exceptions, have decided in a manner which we ourselves on cooler reflection are obliged to approve, cannot but excite our wonder."

of nations, and in all but the first two chapters, dealing with its origin and application in time of peace, Scott's judgments play a prominent role; these later chapters address issues arising in wartime, and, particularly with respect to neutral nations and their trade, Kent relies on Scott's judgments in the absence of rare Supreme Court authority to the contrary. Importantly, Kent rewrote Chief Justice Marshall's cautious opinion in *Thirty Hogsheads*; he quoted the first two sentences excerpted previously, omitted the balance, and substituted his own words with a highly assimilative thrust that he labeled "the language of the Supreme Court.": "The great value of a series of judicial decisions, in prize cases, and on other questions depending on the law of nations, is that they liquidate, and render certain and stable, the loose general principles of that law, and show their application, and how they are understood in the country where the tribunals are sitting. They are, therefore, deservedly received with very great respect, and as presumptive, though not conclusive, evidence of the law in a given case."[117]

Robinson's *Admiralty Reports* also continued to appear in decisions by Justice Brockholst Livingston and his successor, Justice Smith Thompson, sitting in the circuit courts for the Southern District of New York and the District of Connecticut in the 1820s.[118] Judge Conkling of the Northern District of New York cited to these reports extensively in his discussion of most substantive issues, and of a few procedural issues as well, in his comprehensive, two volume work on admiralty.[119]

Samuel Rossiter Betts, United States district judge for the Southern District of New York from 1828 to 1868, cited Robinson's *Admiralty Reports* from the time he came onto the bench.[120] Judge Betts's greatest reliance on those reports, however, was when holding the Prize Court during the Civil War. The vast majority of his decisions, particularly those of any substance, contain one or more citations to Robinson's *Admiralty Reports.*[121] The most important cases decided by that Court,

117. Ibid., 67.

118. Elijah Paine, Jr. *Reports of Cases Argued and Determined in Circuit Court of the United States for the Second Circuit* (New York: R. Donaldson, 1827), 1:76–77, 182–83, 675.

119. Alfred Conkling, *The Jurisdiction Law and Practice of the Courts of the United States in Admiralty and Maritime Causes*, 2 vols. (Albany: W.C. Little, and Boston: C.C. Little and J. B. Brown, 1848), 25–44, 89 n., 166 (referring to the "N.Y. ed. of 1810"), 197, 199, 221–22, 229–31, 251, 260, 269, 282–90, & n. c (providing the London edition citation and a parallel citation to "Phila. ed. of 1802"), 324, 355, 367, 375–76, 535, 553–54, 645–47.

120. Decisions from Betts's decade as district judge are reported in Blatchford and Howland, *Reports of Cases Argued*.

121. Judge Betts's prize decisions were reported by Samuel Blatchford, his successor and a future Justice of the Supreme Court of the United States, in a 729 page volume, *Reports of*

The Crenshaw and *The Hiawatha,* were consolidated with others for argument and decision by the Supreme Court in *The Prize Cases,* 67 U.S. 635 (1862). Counsel included the leaders of the New York bar at the time, William M. Evarts and Daniel Lord, Jr., and the United States district attorney for the District of Massachusetts, Richard Henry Dana, Jr. Each of them relied in their briefs on cases from Robinson's *Admiralty Reports*, and Justice Grier, writing for the majority, cited Scott (as Lord Stowell) by name. Id. at 668. In *The Circassian,* arising out of the blockade of New Orleans and its capture by Union forces in April 1862, both Chief Justice Chase's majority opinion and Justice Nelson's dissent relied on decisions in Robinson's *Admiralty Reports.* 69 U.S. 135 (1864). John Fabian Witt concludes[122] that in 1863, Seward and Gideon Welles found Scott's law of blockade not rigorous enough and successfully secured from Chief Justice Chase and the Supreme Court more expanded rights of seizure.[123]

Cases in Prize, Argued and Determined in the Circuit and District Courts of the United States, for the Southern District of New York. 1861–'65 (Washington, DC, GPO, 1866). The United States district court in Key West, sitting in prize, early in the hostilities adopted the additional interrogatories at the back of Volume I of Robinson's *Admiralty Reports*. Madeleine Russell Robinton, *An Introduction to the Papers of the New York Prize Court 1861–1865* (New York: Columbia University Press, 1945), 33. Judge Marvin of that court also relied on cases from Robinson's *Admiralty Reports* in *The Dolphin,* 7 Fed. Cas. 868 (S.D. Fla. 1863) (No. 3,975) and *The Pearl*, 19 Fed. Cas. 54 (S.D. Fla. 1863) (No. 10,874).

122. *Lincoln's Code,* 154–55.

123. A full discussion of Sir William Scott's influence on American jurisprudence cannot omit a reference to his decision as Lord Stowell, much later than those appearing in Robinson's *Admiralty Reports*, in *The Slave, Grace* (1827), reported by Haggard and published in a separate pamphlet with Scott's permission as *The Judgment of the Right Hon. Lord Stowell, Respecting the Slavery of the Mongrel Woman, Grace, on an Appeal from the Vice-Admiralty Court of Antigua* (London: Benning and Wilson, 1827). The issue in the case was whether Grace, a household slave in Antigua who had been taken to London by her mistress in 1822 and had returned with her to Antigua in 1823, had been freed for all purposes by her sojourn in London by operation of Lord Mansfield's opinion in *Somerset v. Stewart* (1772). *The Slave Grace*'s procedural origin—her seizure by the Antiguan Customs, 2 years after her return, on the grounds that the proper declaration had not been filled out for her reimportation as a slave—was so obviously feigned that it infuriated the 82-year-old Scott: "See how a claim of this kind betrays its imbecility." Scott also made it clear that he deplored what he considered to be Lord Mansfield's departure from settled precedent, history, and custom in *Somerset,* and he refused to expand the freedom *Somerset* granted to a slave while in England to a freedom that continued on returning to the home colony. See Stephen Waddams, "The Case of Grace James (1827)," *Texas Wesleyan Law Review* 13 (2006–7): 783–94; Edlie L. Wong, *Neither Fugitive nor Free – Atlantic Slavery, Freedom Suits, and the Legal Culture of Travel* (New York: New York University Press, 2009), 36–48, 144. Given the similarity in fact patterns, it is hardly a

Well after the Civil War Scott's judgments retained their precedential value in the Supreme Court of the United States, citing several of Scott's early blockade decisions from the first volume of Robinson's *Admiralty Reports*, Chief Justice Fuller characterized him as a "great jurist."[124] Only 20 years ago, in the litigation arising from the attempted sale and Government seizure of the ship's bell from the *C.S.S. Alabama*, it was Scott's judgment in *The Rebeckah*, 1 Rob. 227 (1799) that the Government pressed on the Third Circuit[125] as a governing precedent in favor of its position on the capture of the *Alabama* by the *Kearsarge.*

Conclusion

In her most recent writing on Sir William Scott's matrimonial jurisprudence, discussed previously, Rebecca Probert makes a case that his judgment in *Dalrymple v. Dalrymple* may have been influenced by the per curiam opinion, 2 years earlier, of the New York Supreme Court in *Fenton v. Reed*, 4 Johns. Rep. 52 (1809), which interpreted—or misinterpreted, from her perspective—the law of marriage contracts the same way Scott would 2 years later.[126] Certainly, after 1789, it was not unusual for

surprise that *The Slave, Grace* was the subject of discussion in the separate opinions of Justices Nelson, Daniel, Campbell, McLean, and Curtis in *Dred Scott v. Sandford*, 60 U.S. 393 (1857), 467 (Nelson), 486 (Daniel), 499–500 (Campbell), 535, 559–60 (McLean), 591 (Curtis). Justice Daniel asserted that *Somerset* had "been overruled by the lucid and able opinion of Lord Stowell in the more recent case of the slave Grace." In subsequent debates in the Senate, Judah P. Benjamin asserted that Lord Stowell was "a judge of resplendent genius" with "an intellect greater than Mansfield's." Don E. Fehrenbacher, *The Dred Scott Case – Its Significance in American Law and Politics* (Oxford: Oxford University Press, 1978), 397–99, 475.

124. *The Olinde Rodrigues,* 174 U.S. 510, 514–515 (1899).

125. *United States v. Steinmetz*, 973 F.2d 212 (3d Cir. 1992), *cert. denied*, 507 U.S. 984 (1993). David J. Biederman, "The Feigned Demise of Prize," *Emory International Law Review* 9 (1995): 31, 48; Mark Thompson, "Finder Weepers Losers Keepers: United States v. Steinmetz, the Doctrine of State Succession, Maritime Finds, and the Bell of the C.S.S. Alabama," *Connecticut Law Review* 28 (1995): 479, 505; and Susan Poser and Elizabeth R. Varon, "United States v. Steinmetz: the Legal Legacy of the Civil War, Revisited," *Alabama Law Review* 46 (1995) 725, 740 n.90.

126. She does acknowledge that, apart from the parallel holdings and a coincidence of dates, there is no evidence that Sir William Scott had any knowledge of *Fenton v. Reid.* Similarly, with varying degrees of certainty, legal historians attribute the opinion in *Fenton v. Reed* to then-Chief Justice James Kent but offer no factual support whatever. Goran Lind, *Common Law Marriage – a Legal Institution for Cohabitation* (Oxford: Oxford University Press 2008), 372, 475 n.22 ("Kent is reputed to have made the decision in Fenton v. Reed. . ."); and Michael Grossberg, *Governing the Hearth – Law and Family in*

American courts to adopt domestic rules of decision from contemporary judgments of British courts, and vice versa.

More recent examples abound. A number of American courts adopted the definition of obscenity in criminal cases from *Regina v. Hicklin*, (1868) L.R. 3 Q.B. 360.[127] In the famous "snail in the bottle case," *Donoghue v. Stevenson,* in the House of Lords, [1932] A.C. 562, Lords Atkin and Macmillan relied upon the decision of former Associate Judge Benjamin Cardozo of the New York Court of Appeals in *MacPherson v. Buick Motor Co.* in rejecting the requirement of privity for recovery in negligence.[128] Recent scholarship demonstrates the immediate international influence of the treatises of Blackstone, Story, and Kent.[129]

All these examples involve treating foreign judgments or treatises with persuasive value domestically. A separate jurisprudential category involves conflicts of laws cases, in which domestic courts were and are obliged to construe, and sometimes to apply, foreign precedents or treatises, although not to adopt them as the domestic law of the forum.

Sir William Scott's decisions in prize cases fall in yet a third category. As he himself expressed it:

> . . .[I] consider myself as stationed here, not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference that justice which the law of nations holds out, without distinction, to independent states, some happening to be neutral and some to be belligerent. The seat of judicial authority is, indeed, locally *here*, in the belligerent country, according to the known law and practice of nations: but the law itself has no locality. . . .If, therefore, I mistake the

Nineteenth-Century America (Chapel Hill: University of North Carolina Press 1985), 70–71 ("attributed to James Kent"). The notion appears to originate in Otto E. Koegel, *Common Law Marriage and Its Development in the United States* (Washington, DC: J. Byrne, 1922), 80 n.1 ("There is [sic] good reasons for believing that Kent wrote the opinion"), but Koegel does not say what they are. Nevertheless, given the influence of Robinson's *Admiralty Reports*, further evidence might establish that, purposefully or not, this particular jurisprudential transatlantic current ran in both directions.

127. *Roth v. United States*, 354 U.S. 476, 488–89, n.24 (1953).

128. 217 N.Y. 382 (1916). Alan [later Lord] Rodger, "Lord Macmillan's Speech in *Donoghue v. Stevenson*," *Law Quarterly Review* 108 (1992): 236; see also John D. Gordan, III, "The American Authorities in Donoghue v. Stevenson: A Resolution," *Law Quarterly Review* 115 (1999):183.

129. See Kunal M. Parker, "Historicising Blackstone's Commentaries on the Laws of England," Philip Girard, "'Of Institutes and Treatises': Blackstone's Commentaries, Kent's Commentaries, and Murdoch's Epitome of the Laws of Nova–Scotia," Angela Fernandez, "Tapping Reeve, Coverture and America's First Legal Treatise," and G. Blaine Baker, "Story'd Paradigms" in *Law Books in Action*.

> law in this matter, I mistake that which I consider, and which I mean should be considered, as the universal law upon the question. . . ."[130]

Because, given his own definition, American courts had as much right and were as competent to construe the universal law of nations as Sir William Scott, the acceptance by American courts of the entire canon of his judgments, in times of strife and sometimes of war between the two countries and often in cases arising out of that strife and warfare, justified James Kent's encomium, quoted at the outset of this article.[131]

Subtler still, but at least as arresting is the reconciliation, near the end of Sir William Scott's judicial career and after the War of 1812, of the differences that separated the views of the principal communicators in this portion of the "transnational public sphere," Justice Story and Sir William Scott, on the two issues on which they had earlier disagreed: first, the British application of their Rule of 1756 and, second, slavery.

As discussed, the Rule of 1756 curtailed—to a lesser or greater extent, depending upon its varying application from time to time—trade by neutral ships between a colony and its mother country when the latter was at war with Great Britain, particularly when that country was France. Having taken a very liberal position on this issue in *The Maria, Paulsen, Master* in 1799, Sir William Scott was pulled up short by the much stricter decision of the Lords Commissioners of Appeals in Prize cases in *The Essex* in the late spring of 1805, a few months before Nelson's victory at the battle of Trafalgar. Thereafter, Scott "loyally applied the principles of the superior court, beginning with the case of the *Enoch* in July. But he obviously believed that it was unsound law and risky politics. In August he urged the Foreign Secretary to turn his attention to the problem and perhaps modify the principle."[132]

Nearly 25 years later, on September 25, 1829, John Quincy Adams, in his first year out of office, ended a long letter to Joseph Story with the challenge: "Is not Lord Stowell the most responsible man of our age for the last war with Great Britain?" and reminded Story of the "Salem Memorial,

130. *The Maria, Paulsen, Master,* 1 Rob., 350.

131. "Indeed, the Court continued to rely extensively on Scott's prize decisions even during the War of 1812, when purported British violations of U. S. neutral rights—which Scott had consistently upheld in the British prize courts—were the *casus belli* of the conflict." David Golove, "The Supreme Court, the War on Terror, and the American Just War Constitutional Tradition," in *International Law in the U.S. Supreme Court–Continuity and Change,* ed. David L. Sloss, Michael D. Ramsey, William S. Dodge (Cambridge: Cambridge University Press 2011), 561, 573–74.

132. Bradford Perkins, *Prologue to War 1805–1812 – England and the United States* (Berkeley: University of California Press, 1968), 81 n.24.

1806", condemning the rule of war of 1756, which Story himself had drafted. Story replied on October 2:

> The application of the rule of 1756 is that in which he bore most powerfully upon American Commerce and American rights. But even here, if you assume that rule to be correct as a part of National Law, his application of the rule, though in some cases harsh, was generally with its reach. I for one, have never admitted the legal existence of the rule.... But after all, I am bound to do this justice to Lord Stowell, and to state that he had British authority for the rule, and that he did not create it. It is one of those questions upon which enlightened men may honestly differ.[133]

What Story might have added, had he known of it, is that in negotiating his Treaty of Amity, Commerce and Navigation of 1794 with Great Britain, John Jay, acting on instructions, had "yielded to the operation of the Rule of 1756 though not accepting it in principle, a concession which was to strengthen tremendously the operation of that arbitrary dictum."[134]

The second issue was slavery. Story's opinion in the *La Jeune Eugenie*, refusing to follow Sir William Scott's in *The Louis,* was not his only outspoken denunciation of slavery in the early 1820s.[135] Story sent his opinion in the *La Jeune Eugenie* to Scott in January 1822, soon after it was rendered, "aware how slender claims it has upon your notice, considering that it differs from that which you entertain, and have expounded with so much force of reasoning and illustration."[136] If Scott answered, his reply has not been printed.

Six years later, under date of January 9, 1828, Scott wrote to Story, forwarding his opinion in *The Slave Grace.* Story received the letter, but did not reply, and Scott sent him a second letter, dated May 17, 1828.[137] To the second letter Justice Story replied, assuring Scott that he would have decided the case the same way, adding that "[i]t appears to me that the decision is impregnable" and that: "I have occasion to know that your

133. Story, *Life and Letters*, 2:9–17. However, this appraisal by Story may be contrasted with his anonymous note "On the Rule of War of 1756" in Volume I of Wheaton's Supreme Court Reports, 14 U.S., 507, 533 (1816), in which—while protective of Sir William Scott—he decried the 1798 and 1803 Orders in Council reviving the Rule as "condemned by the universal voice of the impartial world...by the past example of the powers which issued them...[and] by the authority of the jurists whom Europe revered in better times, as the oracles of public law."

134. See Bemis, *Jay's Treaty*, 358.

135. See, for example, *Charge Delivered to the Grand Jury of the Circuit Court of the United States, at its First Session in Portland for the Judicial District of Maine* (Portland, 1820), 13–14.

136. Story, *Life and Letters*, 1:357–58.

137. Ibid., 1:552–54.

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judgment has been extensively read in America, (where questions of this nature are not of infrequent discussion), and I have never heard any other opinion but that of approbation of it expressed among the profession of the Law."[138]

Scott's second letter to Story suggests that there was nothing novel in Justice Daniel's enthusiastic conclusion in *Dred Scott* that Scott had overruled Lord Mansfield's judgment in *Somerset*, for which Scott provided the following remarkable explanation: "I have ventured to differ sometimes in the interpretation of the law as given by our Judges, and have incurred censure on that account, as straying from an authority that ought to bind me. I have rather thought, that in the jurisdiction of the Admiralty, I am to look at the real justice of the case, and not to what has been pronounced in a somewhat similar case by the decision of a single Judge of the Common Law." The "real justice of the case", from Scott's point of view, appears to have been this: "I am a friend of abolition generally, but I wish it to be effected with justice to individuals. Our Parliaments have long recognized it and have not only invited, but actually compelled our colonists to adopt it, and how, under such circumstances, it is to be broken up at the sole expense of the colonist, I cannot see consistent with either common reason or common justice. . ."

Six years after *La Jeune Eugenie*, Justice Story's enthusiasm for *The Slave Grace* opinion may have been based on more than his admiration for Sir William Scott. Having had his effort to extirpate the international slave trade rejected by Chief Justice Marshall in an opinion for the Supreme Court in *The Antelope* expressly adopting Sir William Scott's views in *The Louis,* Story was starting down a different path, not wholly dissimilar to Sir William Scott's in its abstract choice of priorities, which would lead to Story's profoundly ambiguous opinion for the Supreme Court in *Prigg v. Pennsylvania* in 1842.[139] There, Story implemented his goal to strengthen the authority of the national government by federalizing the rendition of slaves and excluding the States from any obligatory participation in that process. In the short term, *Prigg* made the Fugitive Slave Act of 1793 ineffectual, leading Story's son to christen the decision "a triumph of freedom" and to attribute his father's purpose to that claimed result. However, in the longer term, that ineffectuality led to the passage of the Fugitive Slave Act of 1850, which deployed a framework of federal commissioners whom Story himself had proposed in private correspondence with Senator John Berrien of Georgia both shortly before and shortly after the decision in *Prigg,*

138. Ibid., 557–59.
139. 41 U.S. 539 (March 1, 1842).

and, which, therefore, intensified the controversy about slavery, bringing on the Civil War.[140]

140. H. Robert Baker, Jr., *Prigg v. Pennsylvania: Slavery, the Supreme Court and the Ambivalent Constitution* (Lawrence: University Press of Kansas, 2012); H. Robert Baker, Jr., "The Fugitive Slave Clause and the Antebellum Constitution," *Law and History Review* 30 (2012):1127–74; Leslie Friedman Goldstein, "A 'Triumph of Freedom' After All? Prigg v. Pennsylvania Re-Examined," *Law and History Review* 29 (2011): 763–96; James McClellan, *Joseph Story and the American Constitution* (Norman: University of Oklahoma Press, 1971), 262–63 n.94; Paul Finkelman, "Joseph Story and the Problem of Slavery: A New Englander's Nationalist Dilemma," *Massachusetts Legal History* 8 (2002): 65–84; and Paul Finkelman, "Prigg v. Pennsylvania: Understanding Joseph Story's Pro-Slavery Nationalism," *Journal of Supreme Court History* 2 (1997): 51–64.