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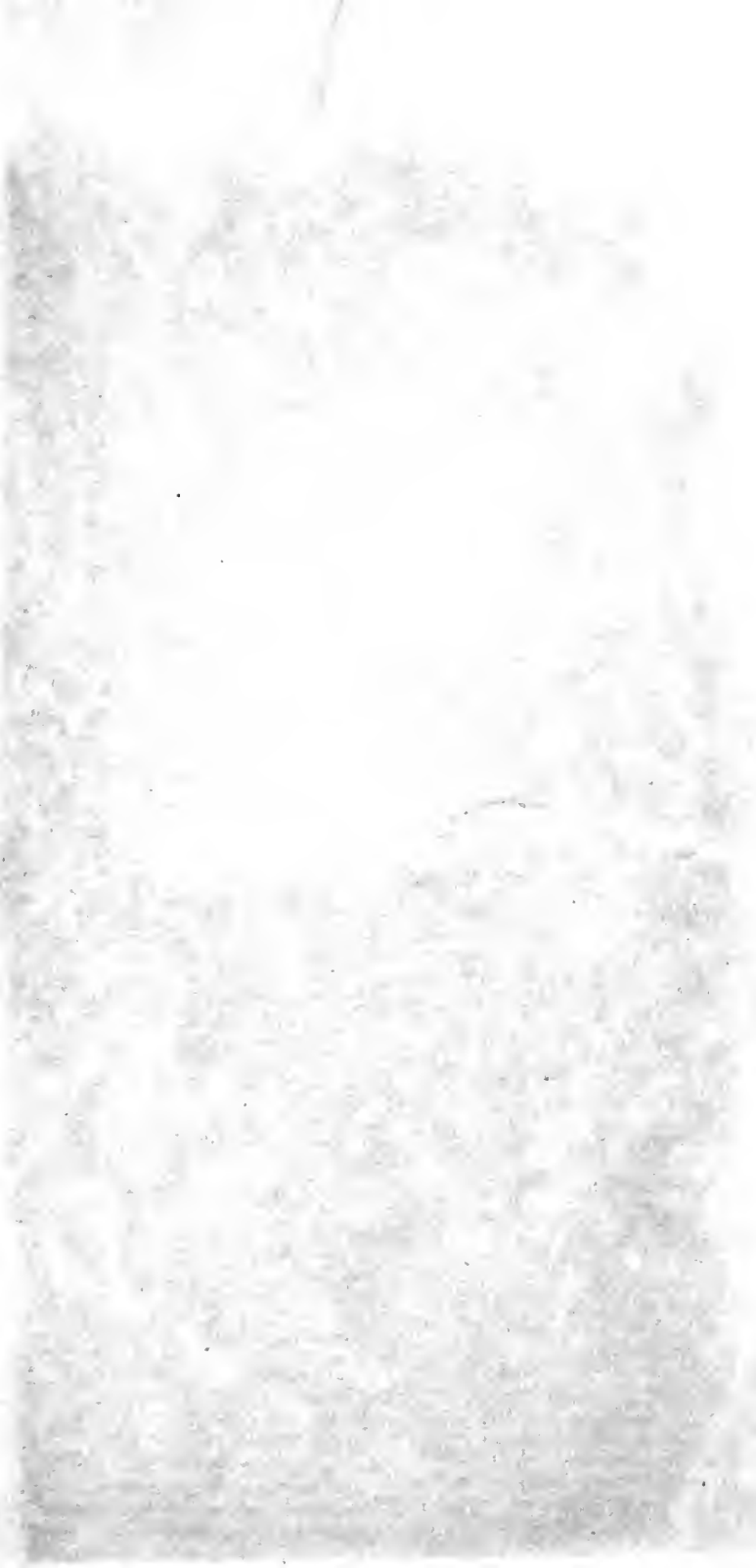

LORD STOWELL

Emery Walker Ph Sc

William Scott, Baron Stowell
From the portrait by Thomas Phillips, R.A.
at Corpus Christi College, Oxford.

LORD STOWELL

HIS LIFE AND THE DEVELOPMENT OF ENGLISH PRIZE LAW

BY

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PREFATORY NOTE

One result of the Great War has been a renewed interest in Lord Stowell's personality and in his judicial work. But his biography in Townsend's *Twelve Eminent Judges*, and the combined biography of the two Scotts in Surtees' short *Lives of Lord Eldon and Lord Stowell*, were published in 1848 and are now out of print. The reader therefore who desires to become acquainted with Stowell's career is left for a modern biography to a slight sketch in a work called *Great Jurists of the World*, and to the brief, though, from its authorship, important article in the *Dictionary of National Biography*. The first aim, therefore, of the following pages is to present an impression of Stowell as a man, from which, supplemented by the tabular statement at the commencement of the book, a clear view can be obtained of the course of his life. The second aim is to enable a reader to realize Stowell's judicial work, to collect and to formulate thoughts and criticisms

which a perusal of his decisions arouses, and to define the achievements of a judge and a jurist whose influence on one branch of British jurisprudence—of international as well as of national value—was individual, important, and permanent.

Two portraits of Lord Stowell may be seen at Oxford—one painted in 1807 by Hoppner, is at University College; another painted in 1827 by T. Phillips, is at Corpus Christi College. In the Library of University College is a statue on the same pediment as one of Lord Eldon. A third portrait by Phillips is in the Council Chamber, Town Hall, Newcastle-upon-Tyne.

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APPENDICES

CHRONOLOGICAL TABLE

1745	October 17	Born at Heworth, County Durham. Eldest son of William Scott of Newcastle-upon-Tyne, one of the Guild of "Hoastmen," shipbroker, and merchant, who died in 1776, and of Jane, daughter of Henry Atkinson of Newcastle, merchant; she died 18th July 1800.
1761	February 24	Elected a Durham Scholar of Corpus Christi College, Oxford, after education at Newcastle Grammar School.
1761	March 3	Matriculated.
1762	June 24	Student of Middle Temple.
1764	November 20	B.A.
1764	December 13	Probationary Fellow of University College. Resigned Fellowship April 7, 1782.
1765	June 14	Actual Fellow, and Tutor till 1776.
1767	June 17	M.A.
1772	May 30	B.C.L.
1774	...	Elected Camden Reader of Ancient History; resigned 1785.
1777	...	Took chambers and lived at 3 King's Bench Walk, Temple, and began to keep Terms, but did not leave Oxford finally till 1780.
1779	June 23	D.C.L.
1779	November 5	Enrolled as an Advocate of the College of Doctors at Law exercent in the Ecclesiastical and Admiralty Courts.
1780	February 11	Called to the Bar, Middle Temple.
1781	April 7	Marriage to Maria Anne, eldest daughter and co-heiress of John Bagnall, Esq., of Erleigh Court,[1] Reading, who purchased it in 1766; she died on September 4, 1809. The Scotts lived at 5 College Square, Doctors' Commons.
1782	May 21	Appointed Advocate of the Admiralty.
1783	...	Appointed Registrar of the Court of Faculties.

[1] See *Erleigh Court and its Owners*, by E. W. Dormer, Poynder, Reading, 1912.

1784	...	Elected M.P. for Downton, Wiltshire, but was unseated on petition.
1788	August 30	Appointed Judge of the Consistory Court of the Diocese of London; resigned 1821.
1788	September 3	Appointed King's Advocate.
1788	...	Knighted.
1788	September 24	Appointed Vicar-General of the Province of Canterbury.
1790	...	Elected M.P. for Downton, through the influence of Lord Radnor who had been his pupil at Oxford.
1790	April 3	Appointed Master of the Faculties.
1798	October 26	Appointed Judge of the High Court of Admiralty.
1801	March 23	Elected M.P. for the University of Oxford.
1813	April 10	Second marriage to Louisa Catherine, Dowager Marchioness of Sligo, and youngest daughter of Richard, first Earl Howe; she died at Amsterdam on the 20th August 1817. On this marriage Lord Stowell removed to 11 Grafton Street. He had lived at 47 Leicester Square from 1807 to 1809, and then at 16 Grafton Street. Subsequently Lord Stowell lived at 16 Cleveland Row, after Lady Sligo's death at 11 Grafton Street.
1821	July 17	Created Baron Stowell of Stowell Park, County Gloucester.
1827	December 27	Resigned Judgeship of High Court of Admiralty.
1836	January 28	Died at Erleigh Court and was buried on February 3 at St. Andrew's Church, Sonning, Berks, leaving an only daughter surviving him (his only son William died on November 26, 1835, aged 42), Maria Anne Viscountess Sidmouth, who died 26th April 1842, when Lord Stowell's landed property descended to his nephew, Viscount Encombe, son of the Earl of Eldon. Lord Stowell's estate was sworn under £250,000.
		At Sonning there is a memorial brass in the South Aisle and a mural monument over the doorway of the North Aisle. In the Temple Church is a tablet to the memory of Lords Stowell and Eldon, erected by the Society of the Middle Temple "to the memory of these highly distinguished brothers."

CHAPTER I

BIOGRAPHICAL

1745–1780

Oxford—The Johnson Circle

On the 17th of October 1745, and again on June 4, 1751, a son was born to William Scott "hoastman," coal merchant, broker and shipowner of Newcastle-upon-Tyne. William, the elder of these two boys, became Lord Stowell, the creator of a definite and reasoned body of prize law in Great Britain and in the United States. John, the younger, afterwards Lord Eldon, was for many years Lord Chancellor of England. William Scott in his own generation achieved repute as a civil lawyer—for his knowledge of ecclesiastical, of Admiralty and of prize law was remarkable, but he certainly was not then regarded as more noteworthy than other successful lawyers of his time, and when, in 1805, there were rumours at Westminster that he was about to receive a peerage it was

not—as we should have expected—looked on as an approaching reward for high judicial services, but for his silent votes in Parliament. "I hope," wrote Fox to Windham, "that our friend Sir William will not have his peerage, and that his close attendance and voting through thick and thin will not avail him." He was considered by his contemporaries a clever and agreeable person; "a very useful ingenious man" was a description of him when he was a tutor at Oxford; "one of the pleasantest men I ever knew," was Sir Walter Scott's estimate of him in later life. But not one of Scott's contemporaries foresaw that from an able Oxford tutor and a successful lawyer he would become a famous jurist, and as the names of the eminent judges of the later part of the eighteenth and of the beginning of the nineteenth centuries became more and more obscured by the enveloping mists of time, that of Stowell would continue to emerge, till it stands among those of the great jurists of the world, and as of one who has attained a positive and unique fame on both sides of the Atlantic as the creator of the modern prize law of England and America.

William Scott was elected to a scholarship at Corpus Christi College, Oxford, in February 1761; he finally left the University in 1780, when he was thirty-five. He had then been an

actual Fellow and a tutor of University College since 1765, and a University professor—Camden Reader of Ancient History—since 1773. In fact he did not resign the Readership till 1785, and thus continued in academic connection with his University after he had embarked on an active professional career in London.

In the eighteenth century it was largely a matter of temperament whether a tutor at Oxford or Cambridge was sluggardly or active, for he was left to his own devices, and " comparatively little help was given to the learner." Colleges were filled with Fellows, middle-aged and old, who " were like drone bees," and the younger and more energetic, who were probably in a quiet way less inactive than is often supposed, were lost in the supine crowd which was the easy butt of every University satirist. Scott, as his whole life showed, though not ambitious in the popular acceptation of the word, had a high sense of public duty and an unobtrusive energy which urged him to achievement, and he became, without pressure, an efficient and conscientious teacher. John Barton of Corpus Christi College and William Scott of University College are mentioned by Gibbon in his *Autobiography* as two men who realized their academic responsibilities. Scott's activities even extended beyond his college; he originated a scheme for increasing

the funds of the Bodleian Library by means of an annual payment by those entitled to use it, and by a small fee on matriculation, and he assisted in the raising of a loan for the purchase of certain objects of art for the University Galleries. In the world of Oxford in his day William Scott clearly stood far above the many idlers and mediocrities who sat around the college high tables, he was one of the few "good tutors," and he may be regarded also as one of those through whose efforts and example the University at the end of the century began to improve.

The academic and social atmosphere of Oxford affected Scott's personal and professional career not less than his work as a judge. In his day an Oxford Common Room was a sociable place, it contained both learned and—it must be admitted—very idle persons, but those who entered it lived well, port wine and classical lore made them excellent company. The impress of University College never left Stowell throughout his life. But he carried his learning lightly, uniting with it a northern shrewdness which produced a rare judicial combination, and enabled him to leave to posterity a continuing fame as a jurist, and property which, in technical language, was sworn for probate under two hundred and fifty thousand pounds.

The year 1776 was a crucial one for Scott and changed the course of his life. It is probable that the death of his father, by which he became a man of independent, though small, means, and therefore free from pecuniary anxieties, had to do with this alteration in his career. He inherited the residue of his property, which is said to have amounted to £20,000. It was, at any rate, a substantial sum, and as the emoluments of his fellowship were sufficient for his personal needs he even began to save money, as he continued to do throughout his life. His economical habits were the result of his northern shrewdness, but as he grew older prudence degenerated into parsimony. Sometimes this shrewdness produced a selfish attitude: "for my own part," he wrote in a pessimistic temper to his brother Henry, upon the surrender of Yorktown, in 1777, "I am sick of politics: there is so much folly on the part of ministers, and so much villany of the other side, under the cloak of patriotism, that an honest man has nothing to do but to lament the fate of his country, and butter his own bread as well as he can, and I hope you take care to do so." Stowell throughout his life never failed in buttering his own bread, and it was with the same idea, altruistically applied, that characteristically he gave the larger part of his property to his son in his own lifetime to

escape the legacy duty. But as has happened in similar cases, by an irony of fate, the son died before the father, so that the only result of this attempt at posthumous economy was the payment by himself of legacy duties on his son's estate.

To return, however, to 1776, the important fact is that in this year, confident in his own powers, Stowell relinquished his tutorial duties and surrendered, when he was approaching middle age, an assured and already distinguished academical career for the uncertainties of a professional life; he entered on a period wherein his mind was wholly engrossed in preparation for his subsequent work as a jurist. This intermediate space lasted for four years, during which he lived partly in London and partly at Oxford. But he continued to prepare and deliver the Camden lectures, which greatly increased his academic reputation and gave him a high place in the estimation of scholars and men of letters. These lectures have never been published, and they remain, therefore, only traditional evidence of Scott's academic learning and ability. During the last year of this period he was already an advocate of Doctors' Commons, though in accord with the rescript of the Archbishop of Canterbury—by whom Doctors of Law were admitted to the Faculty of Advocates—he

was unable to practise during the so-called year of silence. Its main interest lies in the fact that it enabled Scott to add largely to his store of legal learning, and in addition to his knowledge of civil law, to make himself thoroughly familiar with the history of the English Common Law and with the decisions of the Courts at Westminster, knowledge which subsequently was clearly evinced in more than one important case.

Eighteen years form a substantial part of a lifetime, and those which Scott passed at Oxford inevitably had, as has already been pointed out, a permanent effect on his work as a lawyer and on his subsequent social life. He never seems, however, once he had embarked on a professional career, to have reverted to his classical and historical studies as a pastime during his professional and judicial life; he was one who concentrated his mind on the work which lay before him, and when history and the classics had served his purpose he closed his classical and historical books. But Stowell's Oxford years made him for one thing a unique example of an academic lawyer; no one quite like him ever, in modern times, occupied a high judicial position. Before he began to earn fees in London he had been an industrious student and an able teacher, and he was a learned and broad-minded scholar. Thus owing to

his life and work at Oxford he became, unlike most eminent English lawyers, a scientific jurist. He had not been nurtured on special pleading, on technical rules of equity or on judicial precedents collected in a long series of reports; he especially valued form and style, qualities which were essentially those of a University professor rather than of a lawyer educated in the Temple or at Lincoln's Inn.

The years during which Scott had enjoyed a genial Common room and an ample high table had given him a liking for good living; beef steak and oyster pudding is said to have been his favourite dish, and a bottle or two of port was his habitual beverage. He had an excellent constitution and a good digestion, and if he lived well he lived long. But there was a finer side to Stowell's social life. It was through his fellowship at University College that he became known to Dr. Johnson, and that a friendship grew up which presently had a fortunate influence on Stowell's social life in London.

Robert Chambers (b. 1737), a Newcastle man like Scott, was also a Fellow of the same college, he knew Johnson well, and it was on a visit by Johnson to Chambers at Oxford that Scott and Johnson became acquainted. Chambers was appointed to a judgeship in

India in 1774, and when he left England, Stowell, as he said to Croker, "seemed to succeed to his place in Johnson's friendship." He was Johnson's host in the summer of 1777. "I have laid aside," he wrote to his brother Henry, on August 6, "all thoughts of coming down to Newcastle for the year, having devoted the summer to solitude and study at Oxford. . . . The University is very empty; I have had my friend Johnson staying with me for a fortnight." [1]

Perhaps Johnson was thinking of this visit when, in one of his talks with Boswell, he said that University College had seen him drink three bottles of port. At any rate, from this story we see a glimpse of Oxford in the eighteenth century, as well as of the habits of Johnson's two friends.

Through his sojourn at Oxford, Stowell appreciated cultivated and friendly company; he would have enjoyed the learned, easy and witty intercourse earlier in the century, when Harley, Bolingbroke, Swift, Gay and other men of letters forgathered at the Coffee-houses or in their apartments to dine and discuss politics and literature. His election to the Literary Club in 1778, the same year in which Sheridan, Lord Ashburton, Sir Joseph Banks, Windham and Lord Spencer were ad-

[1] Townsend, *Twelve Eminent Judges*, p. 290.

mitted to it, is evidence enough of Stowell's sociability not less than of his intellectual gifts. He was not, so far as one can see, a witty or a humorous talker, but he had a great fund of information, an excellent memory and a pleasant manner. The few anecdotes which exist of his conversation happily do not contain faded bons-mots but are evidence of these substantial attainments. His social qualities were well summarized by Sir Walter Scott when he calls him a pleasant man. A pleasant man in society is always an appreciative listener, which implies good nature and a quick brain, with a corresponding ability to say the right thing at the right time. Without these qualities Stowell would not have been Johnson's intimate friend or his companion, for instance, on the visit to Edinburgh in 1773. It was on this visit—which was the prelude of Johnson's never-to-be-forgotten journey to the Western Highlands and Skye—that Boswell first became acquainted with Scott. Johnson arrived on August 14, and Scott returned to the South when the visit to Edinburgh concluded on the 18th. Boswell was too engrossed in Johnson to record his impressions of the Oxford tutor, and he only tells us, in a cursory way, that "Mr. Scott's amiable manners and attachment to our Socrates at once united me to him." Yet these few words

are valuable, for they convey a sense of Scott's personal affection for Johnson, evidenced by pleasant outward attentions. It is in fact one of the rare occasions when we obtain a glimpse—but a glimpse only—of the personality of Scott.

We again meet Johnson, Boswell and Scott in April 1778. One evening they dined together at Scott's chambers in the Temple. The sage was not in good spirits and for some time the conversation flagged; but presently Johnson began to give his opinions on subordination, then on fame, on wealth and on war, and at last on the perennial subject of the Cock Lane ghost, but throughout the evening, at least in Boswell's chronicle, Scott had little to say, and the main impression which is left by these pages is of the pleasant and friendly intimacy of the gathering. We seem to realize Boswell and Scott quietly listening to Johnson, stimulating him by occasional remarks to continue his rich stream of talk. The last time we meet them is on Easter Sunday of 1781. After service at St. Paul's Cathedral, Boswell called on Johnson; presently Dr. Scott joined them and then followed some familiar and serious talk. "Lectures," said Johnson, talking of education, "were once useful; but now, when all can read and books are so numerous, lectures

are unnecessary; if your attention fails, and you miss a part of the lecture, it is lost, you cannot go back as you do upon a book." Dr. Scott agreed with him. Then Boswell evidently thought that Scott had given him an opening for his wit, and he continues, well pleased with himself, "but yet," said I, "Dr. Scott you yourself gave lectures at Oxford." He smiled. The sequel is in Boswell's best style. "You laughed then," said I, "at those who came to you." Scott was too urbane to do more than smile at Boswell's blundering remarks, and he probably smiled again, elusively.

After Stowell reached the Bench he had time to enjoy social pleasures, but when an advocate his professional occupations, which engrossed his days and often long parts of the night, prevented him, though sociable in temperament, from mixing much in general society, and the tone of the Johnsonian circle best suited his easy pleasant character and his intellectual gifts. In that circle he was essentially a comrade. "Poor Reynolds' death," he wrote to Warton on April 2, 1792, "occasions a terrible void among us, we have had no society worth naming since his death." Here we see at once an appreciation of that group which comprised the first men of letters and of art of the later

years of the eighteenth century, an appreciation at once personal and intellectual. On the day of Johnson's funeral we have a glimpse of Scott dining with Reynolds, Dr. Burney and others who valued the friend they had lost, a party which marks and emphasizes the place of Stowell in the literary life of the London of his time. It is as one of the Johnson circle, and only as one of that remarkable group, that Stowell will, from the point of view of the history of English society, continue to be remembered.

Yet looking back to that agreeable company we note a difference between "Dr. Scott"—as he was called in the Club—and his literary friends and associates. We never know him as we know, for example, Johnson, and Reynolds, and Dr. Burney and Burke, with whom we have long been friends, and who are endeared to us not less by their faults than by their gifts. We may have a sincere admiration for Scott's striking abilities, but he never was and never will be a friend. He never gives us his confidence, nor are there revealed to us in him the many human qualities which are among the chief attractions of the eminent men with whom he so intimately associated. This is partly his misfortune, for materials for a kindlier remembrance of him do not exist, and, instinctively almost, we portray him

from his judgments. Yet his fellowship with so many warm-hearted and gifted persons proves that he had fine qualities of the heart as well as of the head.

Stowell's friends, however, had more substantial grounds for their appreciation of him than his pleasant companionship; he was a sound adviser and he was always ready to place his time and his capacity at their disposal. He thus obtained and held their confidence. It was for this reason, one cannot doubt, that Johnson appointed him, with Reynolds and Sir John Hawkins, one of his executors, bequeathing to him with a right appreciation of the tastes of his learned friend, his *Dictionnaire de Commerce* and Lectius' edition of the Greek poets. This confidential position, after the death of Reynolds and Hawkins, involved Scott in a troublesome correspondence with Dr. Parr, who had been commissioned by Reynolds, on behalf of the executors, to write a Latin epitaph on Johnson. The self-willed divine refused to submit his composition for approval and grew wrathful at the request; Stowell, after some conciliatory letters, left the matter to be settled by Malone, who too was a friend of Johnson and a member of the Literary Club. This was the characteristic letter under cover of which Stowell retreated from the discussion:

April 30, 1795.

My dear Sir—Don't think me guilty either of affectation or of disrespect to you, when I tell you, that the term being come in, attended with an uncommon load of business, both professional and official, I really am not able to reply to your obliging letters otherwise than by thanking you for them, and by saying that I have transferred to our common friend, Mr. Malone, the pleasure of answering them according to his own judgment; in which, having entire confidence, I shall be thoroughly disposed to concur. You will, I am sure, thank me for the choice of correspondent; and I beg you to believe me, with real respect, your very humble servant,

W. Scott.

To-day the pedantic epitaph and Bacon's classical statue of Johnson, each singularly inappropriate, can be seen by any one who visits St. Paul's Cathedral, and a perusal of Dr. Parr's eulogium may recall to some of us the friendship of Johnson and Stowell.

CHAPTER II

BIOGRAPHICAL

1780–1836

Advocate—Judge

We now see Scott starting on a professional career as an advocate in Doctors' Commons.

This legal nest of civilians was a quiet spot under the shadow of St. Paul's, on the southern side of the Cathedral, with an entrance from Knightrider Street. There were gathered the advocates—a group of some twenty-five, Doctors of Law, who had in early times been formed into a "Society," and were, in 1768, incorporated by Royal Charter under the title of the College of Doctors of Law exercent in the Ecclesiastical and Admiralty Courts. Here were their business Chambers, but sometimes an advocate would occupy an entire house with his family, as did Lord Stowell. Here too were the offices of the proctors—also limited in number—or, as they would now be called, solicitors, though they were not

admitted to general practice. The pleasant group of brick buildings, with stone quoins and dressings, dated from 1762. Erected on the site of Mountjoy House, under a perpetual lease granted in 1570,[1] the first buildings were burnt down in the Great Fire, and for a time the Doctors made Exeter House their home until their new habitation arose. Doctors' Commons had a collegiate appearance with its two quadrangles: in one was the Library,[2] and hard by was the Hall which served as the Court-house, not only for the Admiralty Court exercising its Instance or civil jurisdiction, but in addition, in time of war, its prize jurisdiction. Within it were held also the Consistory Court of the Diocese of London, and the Courts of the Province of Canterbury, in which the Doctors of Law and the Proctors were practitioners. Few men can now be living who were familiar with this interesting portion of vanished London. But, from the description of one who knew it well in the days of Dr. Lushington, an accurate picture of the interior of the Hall, when Stowell held his Court within its walls, can be obtained.

The Judge occupied an elevated seat at the upper end of a room panelled with oak;

[1] See Appendix IV.

[2] The books, MSS. and portraits from the Library were sold in April 1861, the buildings on November 25, 1862; the College being dissolved under the Probate Act, 1857.

on the walls hung the coats of arms of the advocates. Below the Judge was placed the Mace or Silver Oar, and on either side were seats for the advocates, each having his allotted place; beneath sat the proctors at a long table which extended at right angles from the Bench. At the lower end of it was a seat for the Registrar, or his deputy, behind whom a few spectators were sometimes to be seen. A touch of colour was added when the King's Advocate and the Admiralty Advocate were in Court in the scarlet robes worn by Doctors of Law.

Doctors' Commons was a close borough in which much important business was decorously transacted, and which, as readers of Horace Walpole's *Letters* know, was the last scene of many of the fashionable scandals of the time. The inclusion in it of the Admiralty and Prize Courts seems at first sight singular. To understand it we must carry our minds to the fourteenth century, to an age when there were no commissioned warships, and when owners of private vessels seized the property of belligerents and neutrals alike—whether ships or cargoes—with equal zest. We have also to picture an Admiral of the Fleet who, from his position, became an arbiter in maritime disputes. If an instance were needed one might note the fact that in 1357 the King of Portugal complained that an Englishman had removed

Portuguese goods from a French ship which had previously captured them. "The answer of Edward the Third is that our Admiral has judicially and rightly determined the ownership of the goods claimed by your merchants." This is the first mention that has been found of judicial proceedings before the Admiral; it marks the beginning of the Court of Admiralty as a prize tribunal. For two centuries after this date there are few indications, in the records, of its prize jurisdiction, cases usually came before the Council or the Chancellor, or Commissioners *ad hoc*.[1] Formal legal proceedings for prize were, therefore, probably very rare, it was at least three centuries before disputes as to prize were generally brought before the Lord High Admiral's legal deputy, and it was not until the eighteenth century that all cases of prize came before the Court.

But once the legal germ existed it required only opportunity to grow into more ample size. In 1498, in a treaty with France, it is provided that all prizes shall be adjudicated on by the Admiral. This is one instance only of a more general recognition of the Admiral as a judicial personage; but, as soon as this high official deputed his judicial work to a lawyer, a regular tribunal was in time evolved.

[1] "Early English Prize Jurisdiction," *English Historical Review*, vol. xxiv. p. 680.

This gradual evolution can be illustrated by a letter of Sir Leoline Jenkins in 1666 to the Lords Commissioners of Prizes, in which he tells how the master of a Riga ship had been barbarously treated by the captors in order to obtain evidence favourable to them. He concludes: "Thus I have given your Lordships an Account of the Pretensions of the one Side and of the other, as minutely as I can; in Regard this business is devolved to your Lordships from His Majesty in Council. But I do suppose the Privateer will insist upon the Title he has to a legal Trial, which as I humbly conceive, cannot be denied him." [1] This letter seems to point to an informal investigation in the first place by the Lords Commissioners of Prizes, and, if this was not satisfactory to the captors and the claimants, then to a formal trial before the Judge of the Admiralty Court, who at that time was Jenkins himself. As for the judge, he was, at first, merely a substitute for the higher official, as in a case in 1389, in which one William Toomer is spoken of in the records as "Substitute and deputy." But so soon as we realize that the deputy of the Admiral became in time the judge alike for prize and for maritime disputes, we grasp succinctly the history of the Admiralty Court. For as the Prize Court was also the

[1] *Life of Sir Leoline Jenkins*, by William Wynne, vol. ii. p. 730.

Admiralty Court, and the prize jurisdiction one which was only in being in time of war, the history of the Prize Court and of its judges is necessarily the same as that of the Admiralty Court at certain times in our history.[1] But there was this fundamental difference between the jurisdiction of the judge in regard to Admiralty and to prize matters. He could only exercise this latter jurisdiction after an appointment by the Crown—"the captors' right to prize money being derived from the Crown, the Crown decided what was and what was not good prize." Orders or commissions to try cases of prize were, therefore, constantly issued, and in time a practice was established by which, at the commencement of a war, the Crown issued a Commission which required the Judge of the High Court of Admiralty "to proceed upon all and all manner of captures, seizures, prizes, and reprisals of all ships or goods which are or shall be taken, and to hear and determine according to the course of Admiralty and the law of nations." Because it was by the law of nations that the Prize Court was guided, and because the Admiralty Court was guided,

[1] See further on this subject Marsden's "Early Prize Jurisdiction and Prize Law in England," *English Historical Review*, vol. xxiv. p. 675, vol. xxv. p. 243. See also *Select Pleas in the Court of Admiralty*, 2 vols., edited for the Selden Society by Reginald G. Marsden. *Law and Custom of the Sea*, by Reginald G. Marsden. *Publications of the Navy Records Society*, vol. xlix.

in its earlier days, by ancient maritime customs and ancient maritime codes, and not by the common law of England, the High Court of Admiralty was never one of the ordinary municipal tribunals, one of the King's Courts at Westminster, administering the common law of England. The practitioners in it were therefore civil lawyers, and from among them the deputy of the Lord High Admiral was selected. At first without a fixed abode, the Court in time became more and more localized: at one time in the old church of St. Margaret, Southwark, and then, about 1675, it was finally established among the civilians at Doctors' Commons, after they had secured permanent quarters in the City of London.

Stowell's reputation at Oxford had preceded him to Doctors' Commons, and he sprang at once into a considerable practice. This rapid rise could hardly have occurred—even in a small professional circle—to a man who was without the personal and intellectual influence which this eminent civilian had already attained. It was but two years after Scott first appeared in Court that he was appointed Advocate-General to the Admiralty, an office which gave him the right to appear professionally for the Admiralty in suits to which it was a party. In the following year (1783) John Scott, his brother, wrote of him, "His success

is wonderful and he has been fortunate beyond example." This short space of three years, at the beginning of Scott's professional life, is an epitome of his entire career as an advocate; he was in constant practice, he was paid large fees, and, in his quaint fashion, he used to carry to his bedroom at night for safe custody those fees which he had received during the day. Lucrative offices, open only to civilians, were bestowed on him, which are stated in detail at the beginning of this volume. It was, therefore, almost a matter of course that he should become the successor of Sir James Marriott, in 1798, as Judge of the High Court of Admiralty, and, as Great Britain was then at war, Judge also, by virtue of his office, of the British Prize Court.

The domestic atmosphere of the Court in which Sir William Scott practised was not one which stimulated advocacy to a high pitch of eloquence or passion. What little evidence there is on the subject makes one believe that Stowell's manner was conversational, his matter substantial, and that towards the end of his career at the Bar he was sometimes rather overbearing. The manner of Doctors' Commons has perhaps become traditional, for one seems to recognize in Stowell the same characteristics as have since been noted in the Courts which are the successors

of that in which Stowell practised. He was clearly more suited by temperament to a seat on the Bench. He had what is called a good presence, a fine face, and a dignity of manner as he presided over his Court which were lost when he left it; for his short and rather stout figure was ungainly, and we are told by a practitioner in his Court that he had a waddling walk like a duck.[1] Nor was he particular in his dress. One likes, therefore, to think of him as the judge rather than in any other sphere of activity. Sometimes in his speech even on the Bench he recalled his northern origin by his occasional provincial accent, and turned his "e's" into "a's." "The m*a*rchant in this case," he would say; and he once observed to a practitioner, whose methods he did not like, that "We want none of your J*a*rsey tricks in this Court." He had a kindly feeling for those who practised before him, and from time to time entertained a party of members of his Bar to dinner; and then, seated at the head of his table, pleased his guests by his admirable conversation, of which, however, the younger members of the party who were at the lower end heard only precious scraps and fragments.

Two episodes in Stowell's personal life

[1] "Anecdotes of Lord Stowell," *Gentleman's Magazine*, vol. xxvi. part ii. p. 367.

deserve brief mention—his first and second marriages. The first was in 1781, when he married a lady who was co-heiress of John Bagnall, Esquire, of Erleigh Court, Berkshire. She is now for us a name only, but it was in all respects a fortunate alliance for Stowell: in her right he became the owner of the pleasant estate of Erleigh Court, near Reading, with a moderate-sized house, within easy reach of London, and which henceforth became his country home.

However, in his second marriage Stowell made the one mistake of his life, and this demands a few lines of notice. On December 16, 1812, the Marquis of Sligo, a young man of twenty-two, was indicted at the Admiralty Sessions at the Old Bailey for seducing two seamen in time of war from a king's ship to enter his service on a brig, with which he was about to cruise on the coast of Greece. He pleaded guilty, and Stowell in his dignified way passed sentence, fining Lord Sligo £5000 and ordering him to be imprisoned in Newgate for four months. After this trial, through the intervention of an aunt of the boy's mother, the Marchioness of Sligo, and a friend of Stowell's, he became acquainted with this lady. Within four months they were married. The event caused no little amusement in London society, and was unfortunate for each of the parties. The wife was generous, the husband

parsimonious; the wife liked her evenings at home, the husband preferred the society of the Club and of his legal friends. Of their short married life we know little, but it is certain that the marriage was not agreeable in its outcome, and Stowell and his wife became estranged. Lady Sligo died during a visit to Paris and Amsterdam while Stowell was making a tour in Switzerland.

One almost forgets that for thirty-one years Stowell was a member of the House of Commons, for in those days the Judge of the High Court of Admiralty was not ineligible for a seat in Parliament. It is sufficient to say that he was a strong Tory in politics, and a close attendant at Westminster, and that he never intervened in debate except on some one of the rather technical subjects of which he was a master or in which he was officially interested. He was created a peer on the Coronation of George IV., taking his now historic title from an estate which he had purchased in Gloucestershire, and which—by the way—turned out an unprofitable investment. But it gave him a name which has become historical.

Stowell outlived most of his contemporaries and consequently became the oldest member of the immortal Club, but after he retired in 1828 from the Bench of the High Court of Admiralty, with which he is permanently

associated, he lived for the most part quite quietly at Erleigh Court, his fine intellect much impaired by age. His daughter, the wife of Henry Addington, afterwards Lord Sidmouth, was his favourite companion. She had many of her father's gifts, and Mary Russell Mitford has left a very pleasing sketch of her. "I have," she wrote soon after Lady Sidmouth's death, "seldom known any one more thoroughly awake and alive to all that was best worth knowing. She had an enlightened curiosity, a love of natural history, of antiquities, of literature, of art; was herself full of talent, intelligence and gaiety, and had a quick and peculiar humour." Stowell remained also on terms of affectionate confidence with his brother, Lord Eldon, by whom he was often visited. It was in his pleasant country home that Stowell died on February 28, 1836, many years after his memorable judicial work had been completed. Learned and hard-headed, prosperous and pleasant, his life was, apart from his transcendent achievements as a judge, undistinguished. Personal details, which once may have been of interest, and which excited the curiosity of his contemporaries, have now been reduced to their proper proportions, so that in the historical perspective Stowell has become almost an impersonal figure, so closely is his individuality merged in his monumental work.

CHAPTER III

THE PRIZE COURT AND PRIZE LAW

When an eminent man has been in his grave for eighty years, posterity in that space of time has generally assessed his career and his work at their true value. History is strewn with examples of the inaccuracy of contemporary estimates; and the opinion formed of Stowell by the men of his own generation is yet another instance of this statement, for if one had asked one of his contemporaries upon what his reputation rested, the answer certainly would have been that it was due to his learning and experience as an ecclesiastical lawyer. Posterity has finally and decidedly formed a different estimate of Stowell's historical position. As an ecclesiastical lawyer he was the adviser of officials and of private persons, as such he held several important ecclesiastical judgeships, and in his judicial capacity pronounced some interesting and valuable judgments. In a legal text-book these decisions must necessarily be

enumerated, but as we approach the end of a century from Stowell's birth, to us who stand at a long distance from the period of his professional and judicial activities, these judgments are no more than personal incidents in his judicial life, evidence of his capacity in one of his several spheres of work. Some of these decisions have, it is true, become, in lawyer's language, "leading cases" in matrimonial and probate law; but in spite of this fact, for us they are dead, and their individuality is merged in a mass of subsequent decisions and of statute law.

In some degree, but to a lesser extent, oblivion has clouded the individuality of Stowell's purely Admiralty decisions, or, as they should strictly be termed, decisions on the Instance side of the High Court of Admiralty. The qualities and the characteristics of Stowell as a judge in the Prize Court, and the unique circumstances which occurred at the time he held that office, which make his tenure of it permanently remarkable, were present in some degree in relation to his Admiralty judgments, and of these an impression is given in a later chapter. But whereas the Prize Court acts only in time of war, the Admiralty Court sits year in and year out, and in the long period since Stowell resigned his office a large number of decisions of his

successors, of the Judicial Committee of the Court of Appeal and of the House of Lords, have completed the structure of which some of Stowell's decisions may be regarded as corner-stones. It is therefore on his work as Judge of the Prize Court for twenty-nine years, and on that work alone, that the universal fame of Stowell with posterity indubitably rests.

Before, however, we turn to Stowell and the Prize Court, it is desirable to sketch first of all, in a few lines, the nature of the jurisdiction exercised by the Prize Court in the eighteenth century. The first fact to bear in mind, as Stowell himself pointed out, is that "all rights of prize belong originally to the Crown, and the beneficial interest derived by others can proceed only from the grant of the Crown." It was under this grant to ships of war, and, in the eighteenth century, to privateers, evidenced by the issue of a proclamation at the commencement of every war, that vessels forming units of the Royal Navy, and privateers to which letters of marque had been issued, were entitled to those ships and cargoes which they captured during war and which the judge of the Court condemned as lawful prize. Another large class of prizes was known as Droits of Admiralty. This arose out of ancient grants

by which the Crown ceded a portion of its rights to the Lord High Admiral; they were, once for all, expressly defined by an Order in Council of March 6, 1665–66; and, briefly stated, comprehended "all prizes captured during hostilities either in port or by non-commissioned vessels, or persons." [1] A third class—Droits of the Crown—should also not be left out of notice, comprising captures effected by a conjoint force of the Army and Navy—as on the seizure of an enemy's colony or possession—and captures made before the commencement of hostilities. For an embargo or stop was often placed on vessels of another Power which were lying in port before a declaration of war, and if hostilities ensued, these vessels and their cargoes were proceeded against in the Prize Court as lawful prize.

The distinction between Crown Droits and Droits of Admiralty became of historical interest only after 1702, when Prince George of Denmark, then Lord High Admiral, surrendered the Droits of Admiralty to the Crown. But the distinction between captures under the grant of the Crown and captures which, it was alleged, were Droits of Admiralty, had, when Stowell was Judge of the Prize Court, a real importance, and often gave rise to warm disputes between the captors and the Govern-

[1] *Prize Droits*, by H. C. Rothery, C.B., p. 13.

ment, which now possessed the rights of the Lord High Admiral. Some of Stowell's most luminous and lengthy judgments were delivered for the purpose of deciding these opposing claims.

Another important branch of prize jurisdiction was concerned with disputes as to Joint Capture—differences between rival ships of war as to whether this ship or that—whether one of the Royal Navy or a privateer—was entitled to a share in a prize. These contests between admirals and captains, subordinate officers and the crews, gave rise to legal disputes, which seem inappropriate to such differences, and to quite a series of decisions on the rules which should guide the Court in allowing a vessel to take a share of the booty in the hands of the Court. Such picturesque, if perhaps unedifying, disputes no longer trouble the Prize Court to-day, since the captors do not now obtain any individual benefit from prizes taken at sea.[1] There were yet other subjects for the consideration of the Court, such as prize salvage—the reward for the recapture of British vessels previously taken by the enemy,—and the various claims for freight, damages and other subsidiary matters arising out of seizures of ships and cargoes. But this jurisdiction was,

[1] Order in Council, August 28, 1914.

as compared with that of the ordinary Civil Court, obviously small and limited, and was therefore susceptible of receiving and retaining the impress of a single and a powerful legal mind.

Before, however, one can properly appreciate the extraordinary results of Stowell's tenure of the judgment seat of the English Prize Court, one has also to realize the state of the law by which the Prize Court was guided when he became Judge of the High Court of Admiralty in 1798 and when he retired in 1828. English prize law had, unlike other prize laws, been administered judicially from the thirteenth century, and numbers of judgments of the High Court of Admiralty were preserved among its records as well as the decisions of the Lords Commissioners of Prize Appeals. But these judgments and decisions were no more than formal expressions of the results of the hearing in the first instance and in others of an appeal, and did not, except in a few rare instances, contain the reasoning on which a decision was based. The latest of these documents differed little in form from the earliest, and, as they were not usually supported by recorded judicial expressions, they were useless as precedents. A few isolated cases, it is true, had been chronicled, as for example by Sir William

Burrell, an advocate of Doctors' Commons, who collected a number of decisions in the High Court of Admiralty, and of the Lords Commissioners of Prize Appeals which extended from 1758 to 1765,[1] and there were also a few decisions, more fully reported, of Sir George Hay and Sir James Marriott from 1776 to 1779.[2]

In the note-books and in the memories of the advocates of Doctors' Commons precedents also existed which were utilized both by the advocates and by the Judge, but they were hardly more than legal traditions, often liable to be misunderstood, for they could not be accurately verified. A remarkable instance of this vagueness of traditional precedent is the case of the "Med Guds Hielpe," decided by the Lords Commissioners of Prize Appeals in 1778, by which it was settled that pitch and tar were absolute contraband. This was referred to by Lord Stowell in 1798 as "the famous case of Med Guds Hielpe." "The manuscript notes which I have of that case," he continues, "expressly state it (the cargo) to have been condemned on the ground of

[1] *Reports of cases determined in the High Court of Admiralty and upon Appeal therefrom, Temp. Sir Thomas Salusbury and Sir George Hay, Judges, 1758–1774*, by Sir William Burrell, Bart. Edited by Reginald G. Marsden, Barrister-at-Law, London, 1885.

[2] *Decisions in the High Court of Admiralty during the time of Sir George Hay and of Sir James Marriott, late Judges of that Court, 1776–1779.*

contraband." [1] But it was not till 1856, when Dr. Pratt published his book on the *Law of Contraband of War*, and printed in it some manuscript notes of Sir George Lee, an eminent civilian and statesman, which were stored at Hartwell in Buckinghamshire, among others a summary of the arguments and judgment in this case, that any published report of it was available to the legal profession, and even that was of a meagre and unilluminating nature. Nothing, in fact, in the nature of a series of judicial precedents having the validity of a legal code was to be found—there was a chaotic collection of law, the usefulness of which was slight. Perhaps this was not surprising when the small number of lawyers who were permitted to practise in the Prize Court is borne in mind. The great body of English lawyers, barristers and solicitors, knew and cared nothing about prize law. It was not a subject which interested them professionally, and therefore there was no reason why they should study it academically, for the study of jurisprudence as a science has never taken root in England, and legal study has been regarded mainly as a preliminary to the acquisition of money. This limitation of the practice of the Prize Court to a few civilians, which continued until after the

[1] The *Staadt Embden*, 1. C. Robinson, p. 26.

Crimean War, has also unquestionably tended to the neglect of the study of international law in more recent years, and when the present war broke out, with the old limitations removed, the Prize Court open to all practitioners, and the site of Doctors' Commons covered by commercial buildings, it found English lawyers serenely ignorant of the groundwork of British prize law.

Returning to the time when Stowell became judge of the Prize Court, the reader will have realized that no body of jurisprudence by which judges and advocates could be guided, or by which an Administration could be assisted in dealing with foreign Powers, was to be found, and Great Britain was therefore, from a scientific point of view, without a prize law. Such was the state of things on the appointment of Sir William Scott.

The absence of reported decisions not only rendered the English prize law uncertain, it also gave greater weight to the contents of the various treaties by which certain points of prize law had from time to time been agreed upon by Great Britain and European Powers. Administrative instructions necessarily, under such circumstances, possessed a higher value than they deserved as expositions of prize law. Thus in 1664 an Order in Council was issued which contained various rules and

directions to be observed by the High Court of Admiralty in the adjudication of prizes. The second of these stated "that where the ship shall belong to any of His Majestyes friends, allyes, or subjects, or any of them, and shall have persons or goods found aboard her belonging to any of the states of the United Provinces, their subjects or inhabitants, in such case the said ship and the said goods shall be alike condemned as good and lawful prize." [1]

This rule is quite opposed to the law as administered in the British Prize Court a century later, a fact which shows how little regard judges may have for law as expressed in administrative orders.

The absence of judicial precedents produced another result. It necessarily obliged officials, who from time to time had to defend the national action in regard to maritime capture, to refer to the opinion of such text-writers as they thought would justify their views. In the dispute—for example—as to the Silesian Loan, in 1753, Frederick the Great made a claim for compensation for damages and loss sustained by his subjects in consequence of the seizure and detention of Prussian ships by Great Britain. The Law Officers of the Crown in their Report or answer relied

[1] Pratt on the Law of Contraband, p. 250.

on the authority of various writers, Grotius, Voet, Heineccius and others, on the Law of Nations.[1]

The English people have been bred on legal precedents; administrative decrees and irresponsible academical opinions are therefore wholly alien to the spirit and the history of English jurisprudence. Charles Butler, who, in his time, was extraordinarily learned in English Common and Real Property law, and was also a skilful conveyancer, adverting to the small attention paid to the study of the Law of Nations in England, pertinently observes in his *Life* of Grotius: "Is it not also, because the law of nature and nations, with all its merits, is so loose, that its principles seldom admit of that practical application which renders them really useful; and which an English mind always requires?" Stowell appreciated the nature of the English mind and at once proceeded to place the prize law of Great Britain on the same basis as, and to assimilate it in character with, the law which was administered in the municipal courts of England. He impressed on his collection of international law the historical and national characteristics of English law. He placed it above the uncertainties of temporary administrative orders, outside mutual international

[1] *The Silesian Loan and Frederick the Great*, Satow, p. 88.

pacts; he removed it from academical discussion, he demonstrated to the world that the British Prize Court was a completely impartial judicial tribunal, with a well-defined procedure, and that its decisions were based on a reasoned body of jurisprudence, and he completed promptly and boldly, with infinite wisdom and sagacity, the long evolution of British prize law which had begun in the fourteenth century. This was a remarkable and a memorable achievement, of immense present and future importance, when the growth of the British Empire and that of the United States is borne in mind, and, fitly enough, it was synchronous with the victories of the British Navy, which raised the maritime power of Great Britain to a supreme position.

CHAPTER IV

STOWELL'S JUDICIAL WORK AND ITS RESULTS

When Scott became Judge of the High Court of Admiralty, with its two distinct jurisdictions, he had attained a peculiar position for which he was especially fitted, at a time fortunate for his country and himself; as Lord Morley says of the appearance of Voltaire, "in the phraseology of pre-scientific times it might well have been called providential." His temperament was judicial. He was a masterly scholar and an erudite lawyer; he was hard-working and shrewd, clear-headed and broad-minded. The union of these attainments and qualities, which may be summarized as a union of learning and sagacity, together with the inestimable gift of being able to apply his powers aright, produced a remarkable result — judgments which are their fruit and representation.

At the moment when Stowell became a judge England was involved in a great European struggle and in a long maritime

war—the seas swarmed with British cruisers and with brave and energetic, not to say rapacious, privateers. The Prize Court was therefore in continuous request. Stowell instinctively realized his opportunity, and set himself to fulfil a great task which was admirably achieved. How clearly he recognized his position is to some extent evidenced by some words in a judgment delivered early in his judicial life in 1799—in which also he definitely stated certain basic principles in regard to visit and search of neutral vessels by belligerent ships of war. "I trust," he says, "that it has not escaped my anxious recollection for one moment, what it is that the duty of my station calls for from me—namely, to 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." [1] Stowell pursued judicial ideals and he perceived that he was placed in a position in which they could be realized and in which he could permanently create a body of British prize law. Many capable and

[1] The *Maria*, 1. C. Robinson, p. 340; 1. *English Prize Cases*, p. 152.

honest judges would have been satisfied to deliver, what Stowell called in the judgment in the *Maria*, occasional and shifting opinions. There is, indeed, a great temptation to a judge of a Prize Court to look rather to present and transitory circumstances than to general principles. It has been said that Stowell leaned towards his own country—a belligerent nation. This criticism was certain to be made against his judgments, because in them he recognized the fundamental basis of maritime capture in time of hostilities, that it is in principle a necessary operation of war. For this reason he would not countenance any suggestion by which a blockade should be weakened. "What is the object of a blockade?" he asked. He answers the question by the words, "to cut off all communication of commerce with the blockaded place." "I must, therefore," he continued, "consider the act of egress to be as culpable as the act of ingress." [1]

There are and always will be two schools in regard to the conflicting interests of belligerents and neutrals, one seeking to affirm the powers of belligerents and the other to safeguard the convenience of neutrals in time of war. Stowell, whilst he recognized the

[1] The *Frederick Molke*, 1. C. Robinson, p. 86; 1. *English Prize Cases*, p. 58.

supremacy of the belligerent, was equally careful of the cause of neutrals. Thus he definitely decided that when a neutral ship carries a contraband cargo, the shipowner should only lose his freight and not his vessel, unless it was proved that the claimants had acted fraudulently.[1] A sound basis of common sense underlies this rule, but for the moment that is not the point. The purpose of reference to the question in this place is to show Stowell's tenderness to neutrals, when it was possible to unite it with the safeguarding of the power of a belligerent. Again, he decided not that, as is the law of France, the purchase of a vessel from a belligerent by a neutral in time of war is absolutely invalid, but that it may be invalidated; "such purchases have been allowed to be legal but they will always be open to much suspicion."[2] At any rate, therefore, the neutral was not deprived of his ship without a judicial examination.

In no respect, however, was Stowell more lenient to neutrals than when he very decisively ruled that under no circumstances could a neutral vessel be destroyed without payment of compensation. It is the primary duty of a captor to bring a neutral vessel and a cargo

[1] The *Ringende Jacob*, 1. C. Robinson, p. 89; 1. *English Prize Cases*, p. 60.

[2] The *Bernon*, 1. C. Robinson, p. 102; 1. *English Prize Cases*, p. 70.

which is seized into port for the purpose of obtaining the judgment of the Prize Court as to whether it is or is not lawful prize. Stowell admitted no qualification or modification of the rule. It might be impossible by reason of the impracticability of placing a prize crew on board the captured vessel, or from some other maritime cause, to navigate a captured neutral vessel into port, but under such conditions the choice lay between release and destruction with payment of compensation. " Where it (the vessel or other property) is neutral, the act of destruction cannot be justified to the neutral owner, by the gravest importance of such an act to the public service of the captor's own state; to the neutral it can only be justified, under any such circumstances, by a full restitution in value." [1] Stowell thus safeguarded neutrals without embarrassing belligerents from a military point of view. This ruling was not only just, but was also for a belligerent diplomatically sound, since, speaking broadly, a neutral could not well complain, if the act of destruction did not injure him financially.

It is outside the scope of this book to discuss problems of international law in their bearing on future relations between belligerent and neutrals. But it certainly seems that Stowell's

[1] The *Felicity*, 2. Dodson, 381; 2. *English Prize Cases*, 233.

judicial decisions on the point should become of general application, though it must be admitted that the weakness of some neutrals will apparently lessen the value of such a rule unless there is sufficient union among neutral nations in time of war to safeguard a few general regulations at least. The continuous destruction of neutral vessels by Germany, and the refusal of the German Prize Court to order the payment of compensation, have shown that only combined action by neutrals can have any practical value, and of this there has—in the present war—been a complete absence.

The individuality of Stowell's work produces an almost indefinite but certainly existing tendency to regard him as an original creator, whereas, in fact, it was his admirable art to adapt the opinions of publicists and theorists to the facts which were brought before him. He seldom cited a writer on international law, but he had recognized treatises in his mind and he applied doctrines boldly and on his own responsibility, so as to produce a series of decisions on which his own individuality was stamped.

The value of this body of law, at once clear, definite and flexible, can be better appreciated by those who are not lawyers if it be compared with the present state of prize law in France,

by which the Conseil des Prises is now guided, which is thus described by a French writer:

Les juridictions administratives, à défaut de codes, se fondent du moins sur des lois. Le Conseil des Prises, lui, n'a cette ressource qu'exceptionnellement. En effet, le législateur n'est presque jamais intervenu en notre matière. Ce ne sont donc guère que des décrets qui l'ont réglementée. Ils sont nombreux, mais assez peu cohérents, ayant été faits à des dates très éloignées, sous des régimes fort différens, en raison de besoins variés et parfois contraires. Les plus récens n'ont pas toujours abrogé les plus anciens, mais souvent l'abrogation implicite résulte pour ceux-ci de l'impossibilité où l'on serait de concilier leur application avec l'état de choses actuel. On conçoit que l'embarras du juge soit parfois assez grand au milieu de cet amoncellement de textes non co-ordonnés. Il s'aggrave du fait que les décrets ne sont pas les seules sources du droit que le Conseil a à consulter. En dehors des textes français, il doit en effet s'inspirer de textes internationaux, déclarations ou conventions adoptées dans des congrès ou des conférences diplomatiques, et qui lient les Puissances co-contractantes, lorsqu'elles ont été dûment ratifiées par leurs autorités souveraines respectives. Il doit même parfois appliquer des textes purement étrangers, par exemple lorsqu'il a à apprécier les relations qui unissent, d'après leur loi nationale, deux parties momentanément soumises à sa juridiction. Il doit encore tenir compte des usages nautiques généralement suivis, tirer parti de la jurisprudence adoptée par ses devanciers français des siècles antérieurs, ne pas négliger celle des tribunaux de prises étrangers, particulièrement quand ce sont ceux de Puissances alliées, enfin respecter en toutes circonstances l'équité. Les inspirations qu'il puisera

dans ces diverses sources ne seront pas toujours d'accord entre elles.[1]

From falling into this "amas de textes si variés," as the writer of this interesting paper in another place terms French prize law, which can be studied in detail in Pistoye and Duverdy's *Traité des prises maritimes* (Paris, 1885), Lord Stowell for all time effectually guarded British prize law.

In so doing Stowell surrounded English prize law with an atmosphere of justice—not so much by actual phrases in the course of a judgment as by the continuous exposition of the grounds of justice on which his decisions were founded. Sometimes, it is true, actual words are to be found which heighten the effect of the general equity of the judgment by indicating a personal sympathy which, however, was not allowed to hinder justice. "This is an unfortunate case," so we read in the *Two Susannahs*;[2] "the Court is very desirous that full justice should be done to the claimants, but the cargo is not equal to it. . . . The question then is, whether the captors have acted so irregularly as to make themselves liable." The answer was in favour of the captors, but the decision, while adverse to the claimants,

[1] *Revue des Deux Mondes*, tome trentième—1re livraison (1er novembre, 1915, p. 104, art. "La Juridiction des prises").

[2] 1. C. Robinson, p. 132.

recognized that they had a reasonable ground for bringing their case before the Court. In another and later case Lord Stowell concluded a judgment by which a claimant was held to be a Dutch subject, whose vessel must therefore be condemned, by observing that: "The Court is therefore under the necessity of considering this gentleman as a merchant of the enemy's country and of pronouncing the ship, as his property, liable to condemnation." [1] It is not necessary to emphasize the suggestive art of this sentence—the implication of an imperious but proper claim of justice, not less than the courtesy to the claimant as an individual. Other and similar passages could be collected, but apart from their context they are less striking, and it is the cumulative effect of a whole series of judgments from which emanates, by reason of Stowell's masterly manner, a sense of even-handed justice.

A very different scene was thus spread before the legal observer after the lapse of a little more than a quarter of a century from the day when Sir William Scott took his seat as a judge. Nine volumes—except the two last entirely filled with prize cases—enshrined the decisions of Lord Stowell in the Prize Court, and in them were contained

[1] The *President*, 5. C. Robinson, p. 277.

a series of precedents so comprehensive, so full of principle, and so logical that the collection was of greater value than any code, since it exhibited, as no code could, the application of judicial principles to concrete and varying facts. From beginning to end they retained a continually high level of thought, learning, form and expression, revealing keen perception of legal principles with rare insight into the value of facts.

The long continuance of the war against Napoleon was a fortunate circumstance for Stowell in the rôle of law-giver, it made his judicial position unique. For a very long period—year after year—he alone was the Judge of the Prize Court, no colleague modified his views or differed from his conclusions, no colleague's judgments varied the continuity of his judicial style. He was master of the procedure of his Court, which became a kind of individual judicial domain. The Prize Court was thus, through a concurrence of circumstances, identified with a personality. There was, it is true, a Court of Appeal in the shape of the Lords Commissioners of Appeals in Prize Cases, on which body some able men were to be found. Sir William Grant (1772–1859), for some time Master of the Rolls, was one of these, and seems to have usually acted as President of the Court: his reputation

among his contemporaries, at first as a parliamentary debater and later for his judicial grasp and the admirable expression of his judgments, was very high. But the decisions of this tribunal were, as a rule, quite baldly stated and, except those delivered from 1809 to 1811, were not republished in a volume, and even in Acton's Reports there is scarcely a judgment which is more than a few lines in length. Stowell's decisions were, moreover, affirmed with an agreeable monotony which assisted in adding to the authority of his judgments. The long-drawn-out war further enabled him to accumulate his judgments, and to link them one to the other, to develop an embryonic principle, and to establish it by reference not to one set but to a series of facts. A sense of continuity and of system was thus created which gave the reports collected by Dr. Christopher Robinson and Dr. Dodson the value of a treatise, with the additional and important weight of judicial authority. During the long period of peace which existed from November 20, 1815, to March 27, 1854, this special body of jurisprudence became more and more recognized as authoritative and national.

A lasting result of Stowell's action was to introduce a remarkable certainty into English prize law. Judicial precedent being as it

is the basis of modern English law, Lord Stowell's precedents, especially uninfluenced as they were by previous decisions, formed at once a fixed juridical groundwork, and as they were so little varied by the Court of Appeal, and attained at once among lawyers and statesmen a high repute, they became year by year more solidly established. Lord Stowell was thus, in the words of an eminent English judge of the present day, rather a law-giver than a judge. But for Stowell there would never have been that sharp difference between the clear and definite body of English prize law and the unsystematic and indefinite collection of administrative decrees, decisions, and academic opinions which constitute continental prize law. Nor would the prize law of the United States have grown up—as it has done—in the same form and on the same principles as that which was evolved in Doctors' Commons between 1798 and 1828. Lord Stowell in fact lifted British prize law to a quite different plane from that on which it had previously rested: it emerged under his guidance from the condition in which all other prize laws still are, to one which placed almost the entire groundwork on a basis of reasoned principles. The effect he could have little foreseen, for now his judgments are not only in some degree the law of the United

States, but of all British dominions which have come to manhood since his time, and in which Prize Courts have in recent times been established. During the present war his decisions have guided the judges of British Prize Courts from Egypt to Canada, from the Cape of Good Hope to Hong-Kong.

CHAPTER V

SOME ILLUSTRATIVE JUDGMENTS

For the full appreciation of Stowell's work we must examine with some particularity a few at any rate of his decisions. Reference has already been made to a notable judgment on the subject of blockade, one which in the Napoleonic Wars was of much importance alike to belligerents and to neutrals.

Stowell, as has been narrated, took his seat as Judge of the Prize Court at the end of October, 1798; at this time on the law of blockade there was a complete absence of British juridical authority. This is not altogether surprising, for maritime warfare had, until the wars of the eighteenth century, consisted almost entirely in the destruction or capture at sea by one belligerent of the ships of the other. Stowell soon filled this legal gap, and within seven months of his appointment, that is by the end of May, 1799, several leading and important principles on

this branch of prize law had been formulated, explained, and established.

The basis of the action of a belligerent in reference to a blockade, and the foundation and justification of this maritime action, was thus enunciated in January 1799: "A blockade," said the Judge, "is a sort of circumvallation round a place, by which all foreign correspondence and connection is, as far as human effort can effect it, to be entirely cut off. It is intended to suspend the entire commerce of that place, and," there follows one result, "a neutral is no more entitled to assist the traffic of exportation than of importation."[1] Such being the elementary rights of a belligerent, it was Lord Stowell's object to uphold them without injustice to neutrals whose freedom of commerce was obviously, but necessarily, diminished by the exercise of this modern form of maritime warfare.

For the proper protection of the belligerent's rights it was declared that the knowledge of the master of the ship which broke a blockade affected her owners, that a blockade continued to be legally in existence although the winds did occasionally drive off the blockading squadron, and that the intention, if clearly proved, to break a blockade rendered a ship and cargo which belonged to the same owner

[1] The *Vrouw Judith*, 1. C. Robinson, p. 150.

liable to confiscation. On the other hand a notification of a blockade without a sufficient investment was declared not to found a legal blockade, and a notification of a blockade being an act of High Sovereignty, a commander of a belligerent ship could not extend it. It was also laid down that it is the duty of a belligerent country which has instituted a blockade immediately to notify the discontinuance of it. These are by no means the whole series of Stowell's rulings on this one subject, which are to be found in the volumes in which his decisions are preserved, but they clearly illustrate the rapid and remarkable change which came over English prize law almost as soon as he became the Judge of the Court. In a few months there were publicly enunciated not academic propositions but judicial sentences which were binding both upon the British as belligerents and upon neutral countries whose subjects were parties to prize proceedings, and which dispelled all doubts on the subjects which they covered. Multiply the seven decisions on blockade delivered within seven months by the succeeding and similar spaces of time, and it is possible to realize the extraordinary performance of Lord Stowell. It was one which proceeded week by week, month by month, until, to a large extent from the

peculiar nature of English law, namely, its judge-made character, it resulted in a firm and permanent mass of law—of international custom and practice explained by and based on reason—which was destined to endure and to be the guide and light of British, and of American, judges to our own time.

One cause of Stowell's judicial influence was his intuitive capacity to state legal propositions or axioms on conduct in illuminating phrases. Much has recently been heard of the doctrine of continuous voyage, which has certainly been carried beyond the range which Stowell gave to it. But his decisions on this subject, allowing for changes in modern commerce, are sufficient to justify the modern application of the principle to contraband.

Briefly stated, a voyage from A to C was illegal, but a voyage from B to C was legal. It is unnecessary to refer to the manner in which the question arose out of certain regulations in regard to trade between French and Spanish colonies; the importance of it arises in regard to the continuation of a voyage—for in order to try to evade the law a vessel sailing from A would unload the cargo at B and then reload it, a further and additional quantity perhaps being added. It was then contended by the cargo owner that the voyage was from B to C and therefore legal. The

question arose in the Prize Court—Was the voyage from A to C a continuous transit? The test which Stowell applied was contained in one of his felicitous phrases: "It is an inherent principle . . . that the mere touching at any port without importing the cargo into the common stock of the country will not alter the nature of the voyage which continues the same in all respects and must be considered as a voyage to the country to which the vessel is actually going for the purpose of delivering the cargo at the ultimate port."[1]

The pregnant words, "importation into the common stock of the country," have become classical because they express so much in a single phrase. The Supreme Court of the United States incorporated them in a unanimous judgment of that Court during the Civil War. "Neutrals," said Chief Justice Chase, "may convey in neutral ships from one neutral port to another, any goods, whether contraband of war or *not*, if intended for actual delivery at the port of destination and to become part of the *common stock* of the country or of the port."[2] In the case of the *Kim* Sir Samuel Evans observed: "As to the real destination of a cargo, one of the chief tests is whether it was consigned to the

[1] The *Maria*, 5. C. Robinson, p. 364.
[2] The *Bermuda*, 3. Wallace, p. 514.

neutral port, to be there delivered, for the purpose of being imported into the common stock." [1] These historical words are, therefore, sufficiently extensive to cover in principle the case of goods of a contraband character passing through a neutral to a belligerent country, provided that the port of discharge is not to be considered as the ultimate destination. Stowell is careful also to use the words "ultimate port," and if these be regarded as containing the principle that the actual destination of the goods, be it a maritime port or an inland city, is to be looked to, then Lord Stowell's decision in effect covers the modern development of the doctrine of continuous voyage.[2]

Stowell was not the man to be bound by mere precedents. If he had not possessed an ample legal outlook and a good deal of confidence he would never have been able to construct the spacious legal structure which is his permanent memorial. Under different conditions it is certain that he would have applied accepted principles of the law of nations to each new set

[1] 1. *British and Colonial Prize Cases*, at p. 481.

[2] "That he [Stowell] did not regard a neutral destination of the ship as conclusive against a condemnation of contraband goods on board her appears in the *Rapid*, Edwards 228, which was the case of a ship carrying a dispatch addressed to a hostile minister" (*The Collected Papers of John Westlake on Public International Law*, p. 466). It may be doubted if the *Rapid* has quite the effect which the late Professor Westlake attaches to it, but his view is of interest on the point of Stowell's probable action under modern conditions.

of circumstances, and have shown that the prize law of Great Britain is capable, not less than the common law, of an evolution which enables it to correspond with contemporary needs. Once, for example, that it is admitted that a belligerent may prevent certain articles, which are classed as contraband, from reaching his enemy, it follows that he is entitled to take such measures as will effect this object—measures which are suitable to new conditions. To confine principles to circumstances peculiar to a past generation is in effect to negative the application of those principles.[1] It is one of the advantages of a case law that it enables such application to be made with less friction than a rigid code.

The value of Lord Stowell's clarifying capacity can best be understood by an illustration from the case of the *Emmanuel*.[2] The vessel in this affair was a neutral ship carrying an enemy cargo and was captured in the coasting trade of Spain, that is, of a belligerent. The cargo having been condemned, the owner of the ship claimed freight from the captors. The Judge first of all considered the case on principle, and promulgated the general rule that "where a capture is made of a cargo the property of

[1] See Appendix II.

[2] 1. C. Robinson, p. 296; 1. *English Prize Cases*, p. 141.

an enemy carried in a neutral ship, the neutral shipowner obtains against the captor those rights which he had against the enemy." Then he stated the exceptions to this general rule, one of which, it was contended, was the fact that the vessel, as in this instance, was engaged in the coasting trade of the enemy. The authorities on the point were in conflict: in three instances the Prize Court had decreed payment of freight "under an intimation of the very learned person who preceded me." On the other hand "a case before the Lords seems to convey a different opinion upon this subject of the coast trade of the enemy, the case of the *Mercurius* in which freight was refused." Stowell decided the case before him by refusing to allow the claim for freight, but the judgment was not a bare determination of the issue, it contained reasons for holding that freight was not payable by the captor: "As to the coasting trade (supposing it to be a trade not usually opened to foreign vessels), can there be described a more effective accommodation that can be given to an enemy during a war than to undertake it for him during his own disability? Is it nothing that the commodities of an extensive empire are conveyed from the parts where they grow and are manufactured to other parts where they are wanted for use? It is said that

this is not importing anything into the country, and it certainly is not; but has it not all the effects of such an importation? Supposing that the French navy had a decided ascendant, and had cut off all British communication between the northern and southern parts of this island, and that neutrals interposed to bring coals of the north for the supply of the manufactures and for the necessities of domestic life in this metropolis; is it possible to describe a more direct and a more effectual opposition to the success of French hostility short of an actual military assistance in the war?" [1]

It may be that the reasoning which Stowell applied to the case of a neutral vessel engaged in the coasting trade (which was a more distinct business in the eighteenth century than it is in modern times) of a belligerent might very well be applied to one trading with the enemy at all. Be that as it may, Stowell's decision in 1799 put the particular point beyond question for the immediate future at any rate, and, under the circumstances, of the age.

No better example of the decisive and determining effect of Stowell's judicial influence could be noted than its effect on the law of contraband. On no subject was there less certainty, which was quite natural, for "two

[1] 1. *English Prize Cases*, p. 144.

opposite tendencies have never ceased to divide the world on the subject, the one pointing to a more restricted prohibition of neutral commerce, the other to a prohibition at once larger and not definitely limited." [1] These adverse views had been more than once embodied in treaties, that of Whitehall between England and Sweden in 1661 being the most important from the point of view of a belligerent. When Stowell took his seat in the Prize Court, it had been established that certain articles were unmistakably absolute contraband, but there was no little uncertainty in regard to conditional contraband, and, what was more important, there were not to be found any decisions which, by laying down definite rules, could be employed as tests on application to given facts. Certain goods, as oil and saltpetre, had been declared free or confiscable, but without a word of elucidation or reasoning.[2] Within six months after Lord Stowell had become Judge of the Admiralty Court he had delivered a judgment which went far beyond the actual articles—cheeses—which were the subject of discussion. The Judge first established the legal existence of a class of goods which were conditional contraband, and skilfully dwelt on the confusion

[1] Westlake, *International Law*, Pt. II. p. 278.

[2] *E.g.* the *St. Jacob*, 1. *English Prize Cases*, p. 6 (oil, free); the *Jesus*, 1. *English Prize Cases*, p. 6 (saltpetre, confiscable).

in which the subject was, at the moment, involved. "If it could be laid down as a general position, in the manner in which it has been argued, that cheese being a provision is universally contraband, the question would be readily answered; but the Court lays down no such position. The catalogue of contraband has varied very much, and sometimes in such a manner as to make it very difficult to assign the reason of the variations, owing to particular circumstances, the history of which has not accompanied the history of the decisions. In 1673, when many unwarrantable rules were laid down by public authority respecting contraband, it was expressly asserted by Sir R. Wiseman, the then King's Advocate, upon a formal reference made to him, that by the practice of the English Admiralty, corn, wine, and oil were liable to be deemed contraband. 'I do agree,' says he, reprobating the regulations that had been published, and observing that rules are not to be so hardly laid down as to press upon neutrals, 'that corn, wine, and oil will be deemed contraband.'

"These articles of provisions, then, were at that time confiscable, according to the judgment of a person of great knowledge and experience in the practice of the Court. In much later times many other sorts of provisions have been condemned as contraband. In 1747,

in the *Jonge Andreas*, butter going to Rochelle was condemned; how it happened that cheese at the same time was more favourably considered, according to the case cited by Dr. Swabey, I don't exactly know. The distinction appears nice; in all probability the cheeses were not of the species which is intended for ship's use. Salted cod and salmon were condemned in the *Jonge Frederick*, going to Rochelle, in the same year. In 1748, in the *Joannes*, rice and salted herrings were condemned as contraband. These instances show that articles of human food have been so considered, at least where it was probable that they were intended for naval or military use.

"I am aware of the favourable positions laid down upon this matter by Wolfius and Vattel, and other writers of the Continent, although Vattel expressly admits that provisions may, under circumstances, be treated as contraband. And I take the modern established rule to be this, that generally they are not contraband, but may become so under circumstances arising out of the particular situation of the war or the condition of the parties engaged in it. The Court must therefore look to the circumstances under which this supply was sent."

Then the Judge goes on not to decide

abruptly, as his predecessors were in the habit of doing, and without reason, that the articles were not confiscable, but to propound a rule by which the character of the article could be judged. "The most important distinction is whether the articles were intended for the ordinary use of life or even for mercantile ships' use, or whether they were going with a highly probable destination to military use. Of the matter of fact on which the distinction is to be applied, the nature and quality of the port to which the articles were going is not an irrational test. If the port is a general commercial port it shall be understood that the articles were going for civil use, although occasionally a frigate or other ships of war may be constructed in that port. *Contra*, if the great predominant character of a port be that of a port of naval military equipment, it shall be intended that the articles were going for military use, although merchant ships resort to the same place, and although it is possible that the articles might have been applied to civil consumption; for it being impossible to ascertain the final use of an article *ancipitis usûs*, it is not an injurious rule which deduces both ways the final use from the immediate destination; and the presumption of a hostile use, founded on its destination to a military port, is very much inflamed if

at the time when the articles were going a considerable armament was notoriously preparing, to which a supply of those articles would be eminently useful. . . ."

"Attending to all these circumstances, I think myself warranted to pronounce these cheeses to be contraband, and condemn them as such." [1]

Stowell thus crystallized this rule of law in this particular point, leaving it at once flexible and clear. Are the articles "going with a highly probable destination to military use"? It is this military use which makes them noxious from the point of view of the belligerent, and when this is clear the Court has no difficulty; but where the circumstances are obscure then certain presumptions may be decisive in affecting its decision. The law to be applied in the future was thus rendered clear not only for Great Britain but likewise for the United States, which, says Westlake, "maintain the British view on contraband which they have inherited"—an inheritance which was in a great degree made possible by the decision by which in 1799 Stowell illuminated the law.

On an earlier page (p. 32) the subject of joint capture was enumerated as one of those

[1] The *Jonge Margaretha*, 1. C. Robinson, 189; 1. *English Prize Cases*, 100.

which fall within the jurisdiction of the Prize Court. Stowell was never more at home than in deciding between the rival claims of gallant seamen, to whom his decision was often of no little pecuniary importance; for a share in a rich prize meant that a substantial sum of money passed into the pocket of the commander of a ship, of a ship of the Royal Navy, and lesser amounts into those of his subordinates. In these cases Stowell always endeavoured, as was his wont, to enunciate some principle, so that a single decision frequently governed other disputes arising on somewhat similar facts. A case called the *Forsigheid* [1] is an excellent illustration. This vessel was actually captured by a ship of war called the *Dictator* and other vessels; another detachment of the Admiral's fleet was eight miles distant, but, owing to fog, was not in sight of the actual captors when the enemy vessel surrendered. Still they claimed to be entitled to a share of the booty. The Judge laid down that when vessels are associated together by public authority the whole fleet is entitled to share in the proceeds of the capture, although some of them might be out of sight at the time. "The fleet so associated is considered as one body, unless detached by orders, or entirely separated by accident, and

[1] 3. C. Robinson, 311.

what is done by one, continuing to compose in fact a part of that fleet, enures to the benefit of all." No accidental separation was suggested in the *Forsigheid*, and Stowell decided that the whole fleet was therefore entitled to share, as well as those in sight at the time of capture. Decisions such as this made the name of Stowell a familiar word in every British ship of war; for the judgments that he gave on the thorny subject of joint capture were based on principles of equity and on common sense, so that they commanded general approval in the fleets.

These decisions have now lost their legal value, but they are still interesting reading; for they are concise descriptions of stirring, if forgotten, incidents in the maritime warfare at the end of the eighteenth century, the smaller details of which have been necessarily overshadowed by great encounters. They tell, in fact, of the constant encounters which made up the daily life of the Navy in time of war. They are not less illustrative of Stowell's judicial sagacity. They were, too, of commercial importance; for privateers were fitted out by the merchants of Liverpool and of Bristol as business speculations, and the result of a judgment of Stowell might, therefore, make all the difference between a fortunate and a disastrous venture. They had some-

times even a larger application; for a decision, for instance, which stated a general rule that the being in sight by a privateer of a capture by a ship of war did not entitle a privateer to share in the prize, settled the claims of many owners and crews of private ships of war, and prevented a maritime practice by small privateers of hanging on His Majesty's ships to pick up the crumbs of the captures. In fact, Stowell had to act as a kind of dispenser of discipline over the numerous brave and not too scrupulous privateers.

CHAPTER VI

THE STOWELL CASE LAW AND THE DECLARATION OF LONDON

It has already been observed (*ante*, p. 38) that one important result of Stowell's work was to assimilate British prize law in form and in character with English municipal law, and to impress on it some marked national features. During the Crimean War of 1854 this body of law, formulated by Stowell, was tested, approved, and enlarged by a later generation of lawyers, so that at the beginning of this century Great Britain was the only Power which possessed a complete system of prize law at once reasoned, definite and well tried—one which was in harmony with the national traditions of English jurisprudence, and easy of application to facts.

One must now mention that in 1907 there had assembled at the Hague an official international gathering known as the second Peace Conference, which approved the creation of an international Court of Appeal.

The seventh article of the Convention, which was a result of this meeting, states that when, in any particular case brought before the International Court, the question at issue is not governed by a treaty binding upon the parties, the Court "shall apply the rules of international law. If no generally recognized rules exist, the Court shall give judgment in accordance with the general principles of justice and equity." A stipulation of this nature was unanimously decided by all the Powers represented at the second Peace Conference to be an essential feature of any system of international jurisdiction in matters of prize which could have practical value.[1]

Though obviously a Court composed of jurists of different nationalities needed some definite code of law, if it was to be of practical use, yet it was equally clear that this miscellaneous Court would not be guided by British prize law, which was in effect the only systematic and authoritative prize law in existence. Thus, rightly or wrongly from a British point of view, the next step was to formulate the rules of international law relating to prize, and to arrive "by common agreement at a uniform definition of the main principles of the existing law to whose spirit

[1] *Correspondence and Documents respecting the International Naval Conference, held in London, December 1908–February 1909*, p. 20.

all nations are without doubt anxious to conform." [1] For this purpose an international Conference assembled in London in 1908 and 1909, which produced the instrument which, under the title of the Declaration of London, has since been so much and so often discussed and criticized.

The Preliminary Provision of the Declaration of London stated "that the Signatory Powers are agreed that the rules contained in the following chapters correspond in substance with the generally recognized principles of international law." But the Declaration was not ratified by Great Britain—the causes of this non-ratification it is unnecessary to discuss, for it is the position of the Stowell case law *vis-à-vis* the Declaration of London which is of practical and juristic interest in these pages.

It is unquestionably remarkable that a nation with a body of prize law such as Great Britain possessed, which was binding on every Prize Court within the world-wide British dominions, should, whatever were the motive, have so lightly set forth to supersede it by a new code of rules, which were, in form, at variance with the general body of English law, and which were necessarily less adaptable to variable groups of facts than the decisions of the Stowell system, under which, for practical

[1] *Correspondence*, p. 22.

purposes, must now be included subsequent decisions of the Prize Court and of the Privy Council,—those which were delivered during the Crimean War. For a code has an apparent clearness only, since it is a bald and necessarily brief statement of legal conduct, and not an enunciation of reasons in consequence of which a certain line of conduct is declared to be legal or illegal. It cannot therefore, except in reference to a limited number of facts, be as effective a legal instrument as a series of judicial precedents the reasons for which can be applied to new and unexpected groups of facts.

The pontifical announcement of the legal truth of the Declaration of London contained in the Preliminary Provision has been quoted; it was a singular statement, because in many parts the rules which were formulated were the results of a compromise. In spite of it, however, the non-ratification of this instrument rendered the Declaration of doubtful legal value. "As an article of the Declaration it has no force,"[1] said Sir Samuel Evans. "The matter stands in this way. The Declaration of London, 1909, is not a binding document on any of the nations of the world, and when the war broke out the matter was at large."[2] Accordingly, soon after the out-

[1] The *Sorfareren*, 1. *British and Colonial Prize Cases*, p. 589.

[2] Sir John Simon, A.-G., in the *Katwyk*, 1. *British and Colonial Prize Cases*, p. 282.

break of war an Order in Council[1] "adopted and put in force" the Declaration with certain important additions and modifications. The accuracy of the Preliminary Provision was thus at once contradicted and the legal authority of the Declaration was weakened. In a country in which administrative Orders can be regarded as valid without question, no criticism could be levelled against an instrument so promulgated. But the Order in Council of October 1914, by throwing over one part of the Declaration of London, cast a doubt on every part which could not in itself be supported by some authority. The first Order was followed by further variations of the Declaration.[2] Next came the almost dramatic refusal of the Government to regard the Declaration as possessing any official weight. "He had constantly," said the Under-Secretary for Foreign Affairs (Lord Robert Cecil) in the House of Commons on March 9, 1916, "told the House that in his view the Declaration of London as an instrument had

[1] Order in Council adopting during the Present Hostilities the Provisions of the Convention known as the "Declaration of London," with Additions and Modifications, *Manual of Emergency Legislation*, 1914, p. 143.

[2] Order in Council, October 29, 1914, *Manual of Emergency Legislation*, p. 78.

Order in Council, March 30, 1916. In this Order it is stated that it is no longer expedient to adopt Art. 19 of the Declaration of London, and that doubts have arisen as to the effect of Art. 1 of the Order of October 1914.

no binding force whatever. Certain parts of it had been selected by the Government of the day on the outbreak of war as embodying what they believed to be the principles of international law between belligerents and neutrals, and they thought it convenient to refer to the Declaration as embodying those principles; but the Government never intended—certainly the present Government did not intend—to be bound by the Declaration of London apart from and so far as it differed from the principles of international law which prevailed at the time of the outbreak of the war. There was much doubt among lawyers whether the issue of an Order in Council stating that the Government intended to adopt the Declaration of London would bind the Prize Court, and whether that Declaration contained principles which were not in accordance with the principles of international law; but whether that were or were not so, the policy of the Government was to abide by the principles of international law, whether they were in our favour or not, and to adhere to them and to them only. Only so far as the Declaration embodied those principles had the Government any intention of being bound by it."[1]

[1] While this book was passing through the Press, it was officially announced that the British and French Governments would no longer continue their partial adoption of the Declaration. See Order in Council, 8th July 1916.

The Declaration also received a severe blow from the Privy Council,[1] which decided that a proposition of prize law could not be declared by an Order in Council to be binding on the Prize Court, and that this Court must base its decisions on the law of nations. For the purposes of the Prize Court the Stowell case law may be regarded as embodying the law of nations in relation to such facts as Stowell's decisions cover or to which they can now be applied. They may, like all other decisions, be, as the phrase is, "distinguished"—in other words, be found by the tribunal which is examining them not to be applicable to the case under discussion. But speaking broadly, the case of the *Zamora*, which will become historical, is a strong support to British case law as embodied in the decisions first of all of Stowell and subsequently in those of Dr. Lushington and Sir Samuel Evans, not to speak of the Privy Council, and a blow to the Continental system of enunciating law by administrative decrees. When, in 1811, the subject of the validity of Orders in Council was argued before Stowell, he ingeniously evaded any difficulties by assuming that the Order in Council which was relevant to the facts of the case was in accordance with international law,[2] though he also stated a dictum

[1] The *Zamora*, 2. *British and Colonial Prize Cases*, p. 1.

[2] The *Fox*, Edwards, p. 311 ; 2. *English Prize Cases*, p. 61.

as to the legislative rights of the King in Council which the Judicial Committee in the *Zamora* regarded as erroneous. Of course, if an Order in Council were based on an invulnerable decision of Stowell, or on an admitted principle of the law of nations not contained in a judgment of the Prize Court, it could not be impugned in the Prize Court, not because of its administrative character, but because it stated a legal truth.

The episode of the Declaration of London—and it is in the history of English prize law only an episode—has been briefly sketched not for the purpose of giving a narrative of this instrument itself and of the discussions which it has raised, but because of its importance in relation to the history of the Stowell case law. We have seen a Utopian and unpractical start, an apparent completion of an ideal, then the shock sustained by an academic structure suddenly plunged into the area of a state of war. We must add that we have also seen the Declaration of London finally and authoritatively reduced to the position of a mere compendium, the several parts of which are valuable to a British Prize Court only so far as they embody the principles of the law of nations which have to be ascertained by the Prize Court.[1]

[1] In the *Lorenzo*, 1. *British and Colonial Prize Cases*, p. 226, the

It is of some interest and importance to observe how the Declaration of London has fared in the Prize Court before Sir Samuel Evans. In three only of the decisions reported in the first volume of the *British and Colonial Prize Cases* of the Prize Court in London has the Declaration of London been discussed. In one, it was held that Article 43 was not applicable to contraband goods which were enemy property, and that it had therefore no bearing on the facts before the Court.[1] In an earlier decision it was held that a neutral vessel sailing from a neutral port with goods which became contraband after the date of sailing was entitled to freight.[2] In this instance the decision was based on a general principle, which can be found in many decisions of Stowell, that when there is no *delictum* or guilt in a claimant he cannot be deprived of his rights. In the *Kim*[3] the Order in Council of October 29 was regarded as enlarging the presumptions contained in Article 34 of the

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Prize Court of St. Lucia condemned an American steamer under Article 40 of the Declaration of London. In the *Hakan* (July 3, 1916) Sir S. Evans condemned a Danish vessel, not on Article 40, but on the ground that international law had changed on this point since the decision of Lord Stowell in the *Ringende Jacob* (1. C. Rob. p. 89; 1. *English Prize Cases*, p. 61). The rule of Article 40 was not based on any principle, and the question by it was reduced to one of a mere rule of thumb.

[1] The *Sorfareren*, 1. *British and Colonial Prize Cases*, p. 589.

[2] The *Katwyk*, 1. *British and Colonial Prize Cases*, p. 282.

[3] The *Kim*, 1. *British and Colonial Prize Cases*, p. 405, at p. 484.

Declaration of London, which in fact only created certain presumptions upon which the Court might act—that is, it varied the rules of evidence, not of international law. The unmodified Declaration of London might therefore, it is obvious, for all practical purposes have just as well been non-existent in August 1914, for all the influence it has had on the decisions of the British Prize Court in London.

It may be observed, though it is somewhat outside the range of this volume, that the Declaration of London has, on the other hand, been frequently referred to in the French Prize Court, which, as previously stated, has no definite body of law by which it is guided. In accordance with the usual practice in French procedure, the judgment commences with a preliminary recital, and in this, in many instances, appropriate articles of the Declaration are enumerated. Unquestionably as an addition to French prize law, the general state of which was described on an earlier page, the Declaration of London has been of value, and may now be regarded as containing many of the principles of that law, but, as the reader will by this time have realized, the state of the English and French prize laws in August 1914 was entirely different.

CHAPTER VII

THE STOWELL CASE LAW IN THE GREAT WAR

From the Declaration of London we must turn to the last phase in this impression of the judicial work of Lord Stowell in the Prize Court.

When war was declared on August 4, 1914, by Great Britain against Germany, it was but a year short of a century since the second Treaty of Paris, when Lord Stowell's judicial work in the Prize Court came to an end. One need not emphasize the differences which exist between maritime trade and international commerce at the beginning of the twentieth and of the nineteenth century. Nor is it necessary to dwell on the changes which have occurred in English law and procedure, or on the characteristics of modern English judicature as compared to those of a century ago. Unquestionably, however, there could be no sharper test of the value of Stowell's work than the manner in which it responded to the

examination of advocates and of the Bench during the present war. Through this it has passed with increased reputation, and it remains still the basis of English prize law, with its value enhanced in consequence of the respect which has attached to a decision of Stowell which in any way confirms or elucidates a judgment either of the Prize Court or of the Privy Council. It is further a tribute to Lord Stowell's sagacity, and to the form in which his decisions were conveyed, that they have been applicable to changed mercantile conditions. His judgments keep pace with us, they are archaic neither in reasoning nor in manner, they are, in fact, modern because they are true.

As this is not a treatise on prize law it is necessary only to examine in a few instances the relations between Stowell's decisions and those of the Prize Court in the present war. In 1804, for example, Stowell laid down an important and far-reaching principle—that the Prize Court would not recognize liens on an enemy vessel, and that consequently in the case before him the holder of a bottomry bond had no right to claim in the Prize Court against the proceeds of a captured vessel.[1] Bottomry bonds in the eighteenth century

[1] The *Tobago*, 5. C. Robinson, p. 218; 1. *English Prize Cases*, p. 456.

and in the early years of the nineteenth century were documents of much maritime importance —they were charges on a ship, and the holder of them had a lien or claim on the vessel for the sum of money which he had advanced. Under the name of respondentia bonds they were charges on cargoes. To-day one and the other have almost disappeared, for communication over all parts of the globe is so rapid that quicker methods have been reached for advancing money to the masters of vessels in distant parts of the world.

In connection with cargoes modern commerce has developed a far-reaching system of advances by bankers on the security of bills of lading. Cargoes are mortgaged to bankers, who thus finance sellers long before the cargo is actually delivered; millions are, in fact, lent on this form of security. The object of these transactions differs entirely from that of the old-fashioned advance on bottomry or respondentia bonds to a master of a ship who is without money in a distant part of the world. But the result of the transaction is the same: it creates a creditor's lien on the cargo. In these circumstances Lord Stowell's principle was sharply tested. In the case of the *Odessa*[1] the claimants were bankers who had accepted bills of exchange

[1] 1. *British and Colonial Prize Cases*, pp. 163, 554.

in favour of the sellers against the cargo, and received the bills of lading as security for the acceptances and for the money paid under them. This was evidently the kind of case in which decisions so mature as the *Tobago*, and of the *Marianna*,[1] which followed the earlier case, were certain to be attacked as inconsistent with modern commercial practice. The first words of the counsel for the claimants were on these very lines: "This case is of the first importance, as the bill of exchange on London is the general means all over the world of financing the owner of any cargo during its carriage; and bankers would have been in consternation if they had thought that in case of war their security would be gone." In spite of this protest the doctrine laid down by Lord Stowell was upheld by Sir Samuel Evans in the Prize Court and on appeal by the Privy Council. This tribunal more especially boldly based its decision on Lord Stowell's judgments in the *Tobago* and the *Marianna*. "The case of the *Tobago* is in point," said Lord Mersey in the judgment which he delivered for the Court. Lord Stowell, after observing that the contract of bottomry was one which the Admiralty Court regarded with great attention and tenderness, went on to ask: "But can the

[1] 6. C. Robinson, p. 24; 1. *English Prize Cases*, 518.

Court recognise bonds of this kind as titles of property so as to give persons a right to stand in judgment and demand restitution of such interests in a Court of Prize?" and he states that it had never been the practice to do so. He points out that a bottomry bond works no change of property in the vessel, and says: "if there is no change of property there can be no change of national character. Those lending money on such security take this security subject to all chances incident to it, and amongst the rest, the chances of war." Throughout the case the principles and their general application, as they are found in the judgments of Lord Stowell, were approved and the law as formulated by him was agreed to by Sir Samuel Evans and the Privy Council.

While these present-day decisions are a remarkable tribute to the permanent value of Stowell's judgments, one does not feel so sure that, under the altered circumstances of the age, he might not now have found some ground by which to limit the effect of his previous judgments. It is common knowledge that in the present war an official Committee has investigated claims, which have been rejected by the Prize Court, of those persons or firms, British or neutral, who have advanced money on enemy goods in the ordinary course

of business, that it has recognized in certain cases their claim, and that orders have been made by it for the payment of such claim out of the prize fund. It is not wholly satisfactory that—as the case is—the decision of the Prize Court should be considered as legally sound but indefensible from the point of view of commercial equity. In Stowell's time in most cases of capture the proceeds passed into the pockets of the captors, and it was largely to protect the captors, whose claim would have been defeated by the recognition of liens, that Stowell decided against such claims. But to-day the proceeds of prize—both of captures at sea and of Droits of Admiralty—fall into the Exchequer. One day therefore the Crown successfully opposes claims in the Prize Court, on another outside the Court it amicably recognizes them.

The continuity of British prize law as formulated by Stowell was, at any rate, sustained, and the flexibility and adaptability of the English juridical system was once more demonstrated.

This is but one example of the vitality of Stowell's work, which was again shown in the *Roumanian*,[1] in which case his decisions were relied upon both by Sir Samuel Evans and by the Privy Council. One of the main

[1] 1. *British and Colonial Prize Cases*, pp. 75, 536.

questions in this case was whether oil, which was admittedly enemy property and which had been landed at the instance of the Customs authorities, was the subject of prize, since it had not been seized at sea but when in tanks on land. Here again the luminous statements of Stowell in the *Two Friends*[1] and the *Progress*[2] were followed. "In neither case," to use Lord Stowell's expression, "was the continuity of the goods landed as cargo in any way interrupted." It was thus in fact a maritime seizure.

It has now been shown how, in two cases, in which questions of prize law widely apart were raised, the authority of Lord Stowell was regarded as of preponderating weight. A third instance,[3] which differs altogether from those previously selected, may be given in which the point was whether or not Russian shipowners, subjects of an allied Power, were entitled to claim from the Crown, as captors, freight upon the enemy cargo which was carried in their ship under a charter with a German firm. Sir Samuel Evans held that the reasons against this claim could not be more clearly enunciated than by a quotation from a judgment of Lord Stowell, it is grounded on broad principles which could be applied

[1] 1. C. Robinson, p. 271 ; 1. *English Prize Cases*, p. 130.
[2] Edwards, p. 210.
[3] The *Parchim*, 1. *British and Colonial Prize Cases*, p. 579.

to facts as they arose. This decision he in fact incorporated with and made the basis of his own decision. "The general principle," he said, "is nowhere better stated than by Lord Stowell in the *Neptunus*: 'It is well known that a declaration of hostility naturally carries with it an interdiction of all commercial intercourse; it leaves the belligerent countries in a state that is inconsistent with the relations of commerce. This is the natural result of a state of war, and it is by no means necessary that there should be a special interdiction of commerce to produce this effect. At the same time it has happened, since the world has grown more commercial, that a practice has crept in of admitting particular relaxations; and if one State only is at war, no injury is committed to any other State. It is of no importance to other nations how much a single belligerent chooses to weaken and dilute his own rights. But it is otherwise when allied nations are pursuing a common cause against a common enemy. Between them it must be taken as an implied, if not an express contract, that one State shall not do anything to defeat the general object. If one State admits its subjects to carry on an uninterrupted trade with the enemy, the consequence may be that it will supply that aid and comfort to the enemy, especially if it

is an enemy depending, like Holland, very materially on the resources of foreign commerce, which may be very injurious to the prosecution of the common cause and the interests of its ally. It should seem that it is not enough, therefore, to say that the one State has allowed this practice to its own subjects; it should appear to be at least desirable that it could be shown that either the practice is of such a nature as can in no manner interfere with the common operations, or that it has the allowance of the confederate State.'"

Further instances in the same sense might be multiplied; it is sufficient to give one in addition to those already collected. In this the point of law was short, namely, whether the Crown as captor of a ship was entitled to freight.[1] Here again an extract from the judgment of Sir Samuel Evans without comment will suffice: "The Crown claim to have a lien for the freight alleged to be payable in respect of the portion of the cargo released, and to have it paid before the release. The argument on behalf of the Crown is that the shipowners are, by the German commercial law, entitled to some freight in respect of this released cargo, although it was not, and cannot be, delivered in Germany at the port of destination, and that as captors they are

[1] The *Roland*, 1. *British and Colonial Prize Cases*, p. 188.

entitled to what the ship has earned as well as to the ship herself." This sounds quite logical, but the practice of Prize Courts (which has to deal with multifarious business affairs) shows that, although substantial justice is done, the results of what strict logic may appear to involve cannot always be attained. The old rule as to whether captors of an enemy vessel were also entitled to freight was quite clear.

Whenever a captor brought goods to the port of actual destination according to the intent of the contracting parties, he was held entitled to the freight, on the ground that the contract had been fulfilled, but in all other cases he was held not entitled to freight, although the ship might have performed a very large part of her intended voyage.

The rule was laid down in the *Fortuna* (1802) (4. C. Robinson 278; 1. Eng. P.C. 392) and the *Vrouw Anna Catharina* (1806) (6. C. Rob. 67; 1. Eng. P.C. 552); and some exceptions which emphasized the rule were dealt with in the *Diana* (1803) (5. C. Rob. 67; 1. Eng. P.C. 424) and the *Vrouw Henrietta* (reported in a note to the *Diana* at p. 75, and in 1. Eng. P.C. at p. 427).

No examples than those which have just been given could more clearly illustrate the fundamental position which Lord Stowell's

decisions occupy at the present day not only in British prize law but in that of the United States. In England they take the place which Government regulations hold in continental Courts, as, for example, in German prize law. "Since it had to be decided that the entire cargo of the vessel was subject to seizure as conditional contraband and to confiscation (Prize Order No. 42), the vessel was consequently also liable to be held up according to Prize Order 39 and confiscated as per Prize Order No. 41, Part 2."[1] This extract from a judgment of the Hamburg Prize Court shows how administrative decrees are used in the German Prize Courts. Whether they are in accordance with the provisions of international law is immaterial to the tribunal; what is written is accepted as law, whether sound or unsound, whether just or unjust.

The various results, political, economical, and legal, of the great war of the twentieth century will hereafter be chronicled by future historians. To the critical observer of English jurisprudence and of international law, it is, however, already sufficiently clear that the great achievement of Stowell, the several characteristics of which have been considered in the preceding pages, has, during the course

[1] The *Cocos*, Hamburg Prize Court, December 11, 1915; Lloyd's *List Reports*, January 26, 1916.

of the war, been at once tested and justified, and that it remains fixed more firmly than ever as the corner-stone of one branch of British jurisprudence.

Many reasons will have occurred to the reader for this result; they are, however, most clearly understood if we apply to the Stowell case law the test formulated by an eminent English jurist of our own age, that is to say, a modern test. "From the Peace of Westphalia," wrote Professor Westlake, "to the present day the great desideratum of international law has been the union of reason and custom in a satisfactory body of rules, satisfactory in the sense in which alone the term can be applied to arrangements made or accepted by man, as supplying a system capable of being put in practice under actual conditions and fairly meeting the needs which arise from them, without excluding improvement, or modification to suit changed conditions." [1] The Stowell decisions are "a satisfactory body of rules," they are "a system capable of being put in practice under actual conditions," they do "fairly meet the need" which arises from such conditions, and they do not exclude either improvement or modification under changed conditions.

[1] *The Collected Papers of John Westlake on Public International Law*, p. 66.

The preceding review of Stowell as a man and as a judge necessarily concludes with this note of the present authoritative position of the Stowell case law. It suggests, however, one or two further considerations. It is clear that an international Court of Appeal for prize cases is outside the range of possibility. The treatment of ships or goods taken as prize is admittedly a matter for national action in the prize tribunals of the belligerent powers. In England that action is based on a well established body of law administered in a judicial manner—more judicially than in any other European country, because the Court possesses reasoned and recorded precedents to guide it, and pronounces reasoned and recorded judgments. Under such circumstances no necessity exists for an appeal from a national to a non-national Court, an appeal which the experience of the present war shows would, even assuming the procedure to be organized, cause infinite delay and immense practical inconvenience both to neutral subjects and to the British Government. Apart, however, from this important consideration, it is certain that, since the Stowell case law, as administered and applied by Sir Samuel Evans and by the Judicial Committee of the Privy Council, has been found to form an admirable basis for many modern decisions,

no administration could now venture to supersede it, and such supersession is a condition precedent to the work of an international Court of Appeal. An assimilation of the prize law of other European countries to that of Great Britain can in the future only be obtained by the international recognition, as expressions of the law of nations, of particular reasoned British precedents, which have been increased in value and number since the outbreak of the war in August 1914. This is a course which can scarcely be regarded as probable unless it can be accomplished by a diplomatic arrangement. Be that as it may, it is unquestionable, from the experience of the present war, that this country will never consent to part with a body of law which has been so well tested as that which Stowell may be said, for all practical purposes, to have created, and which has continued to be applied impartially in the same spirit of justice as animated the famous jurist who presided over the British Prize Court at the end of the eighteenth and at the commencement of the nineteenth centuries.

CHAPTER VIII

STOWELL AS JUDGE OF THE HIGH COURT OF ADMIRALTY

THIS book is in the main concerned to give an impression of the personality of Stowell, and to reduce into some form the effect and the manner of his work as judge of the English Prize Court. It would, however, leave an inadequate idea of Stowell's wide judicial powers on the mind of the reader if a short space were not allotted to his achievements as an Admiralty judge. Though the Instance or civil jurisdiction of the Admiralty Court is primarily of limited and technical interest, it possesses also some international importance, for the Admiralty Court adjudicates on disputes between shipowners, underwriters, and mariners of all nations, and in mercantile estimation it stands higher than any other similar tribunal in the world.

Just as Stowell's long tenure of office as a judge of the Prize Court enabled him to impress his individuality on English prize law,

so the same cause gave him the opportunity of enunciating many important principles of purely maritime law with a breadth and lucidity which made them basic factors in the further development of British maritime law. Some only of these great judgments can be referred to in these pages, but a few illustrative examples will establish the place which Stowell holds in the development of English maritime law.

It is one thing to decide a particular point, it is another to explain the principles on which the decision rests, and to apply them to facts of the case under discussion, so that the latter may serve as an illustration of an abstract proposition. It was this rare gift which Lord Stowell possessed, and it is conspicuous when some of his most remarkable judgments are examined. It would not be easy to find one which better serves as an example than the decision in 1801, in the case of the *Gratitudine*.[1] The result of that judgment was the creation of the rule of law that the master of a vessel in a foreign port has power to bind the cargo on board by a respondentia bond, in order to obtain money to enable the vessel to prosecute her voyage. That rule has never since been questioned, and until steam, telegraphs, and

[1] 3. C. Robinson, p. 240. Some of these examples are substantially reproduced from my book, *The Growth of English Law*, London, 1913.

improved postal communication lessened in recent years the necessity for obtaining money by the hypothecation of ships and cargo, it was one of wide commercial importance. The legal power of the master to enter into a bond depended on his relationship to the owners of the cargo, and, therefore, Lord Stowell had, in order to establish a rule upon the point, to consider when, and under what circumstances, the master of a vessel became by virtue of necessity the agent for the owners of the cargo. Having established as a legal proposition that in cases " of instant, and unforeseen, and unprovided necessity, the character of an agent is forced upon him, not by the immediate act and appointment of the owner, but of the general policy of the law," and having illustrated the rule by examples, Lord Stowell then applied it to the circumstances under which it may be necessary to borrow money, not only on the security of ship and freight, but also on that of the cargo. Satisfied as to principle, the judge examined the authorities to discover what light might be thrown by them on the subject. These authorities were not only dicta to be found in English law, but the mediaeval codes, which have been preserved to modern times. The examination completed, Lord Stowell proceeded to consider whether the situation of the master was such in the case

before him as to authorize the exercise of this power. This particular case illustrates very well the peculiar and unique place which Lord Stowell holds in the history of English mercantile law as the formulator and the applier of legal principles. At the time of this judgment there was no reasoned decision on this question, one, as Stowell said, of extreme importance. Certainly, as he also pointed out, there existed a mercantile practice by which bonds given on the security of the cargo were regarded as valid, and there were instances of legal proceedings on such bonds. But the basis of this validity had never previously been judicially stated, so that until the decision in the *Gratitudine* it could not be said that there was any defined, precise, and reasoned enunciation of the legal foundation of a rule, which, in the circumstances of the eighteenth century, was of such far-reaching importance to the mercantile community.

This judgment has been referred to because it establishes a definite proposition of maritime law: it enunciates the principle on which it is based, and it has ever since been rightly regarded as an admirable and conclusive exposition of the duty of a ship-master in relation to the interests of the owners of cargo under extraordinary circumstances. As such its direct and indirect influence on the whole body

of English maritime law has been marked and important.

There is no branch of law of which the basis is now more thoroughly fixed than that of Salvage. For the earliest and clearest enunciation of many of its principles the judgments of Lord Stowell must still be studied, containing as they do the principles which have guided his successors and have established the law. For example, from time to time seamen fall in with derelict vessels. When they bring such ships into a place of safety, saving them from certain loss, they are clearly entitled to a high reward, to the value, indeed, of a large proportion of the property saved, though not necessarily to one half of its value. This was the effect of Lord Stowell's decision in the *Aquila*[1] so long ago as 1798, a decision which from that time forth became the leading authority on this particular point. Sixty-eight years afterwards, in the case of the *True Blue*,[2] the same point was pressed on the attention of the Court. But the tribunal considered that it was sufficient to refer to Lord Stowell's early decision, to take note of his research into the older authorities, and of his conclusion that the proper mode of deciding the question of the amount of reward to be

[1] 1. C. Robinson, p. 37.
[2] *Law Reports :* 1. Privy Council, p. 250.

given to salvors of a derelict vessel was "to consider all the circumstances, including the value of the property salved, and the risk to the property of the salvors."

Nor would it be easy to find a principle of salvage law more necessary for the interests of shipowners, and of those honestly desirous of rendering assistance to vessels in distress on reasonable terms, than that men who have taken possession of a ship as salvors have a legal interest in her which cannot be divested until an adjudication takes place in a court of competent authority. A second band of salvors therefore has no right to take away from men who are doing their best to save life and property the opportunity of earning a reward, unless it be apparent that these efforts are obviously powerless to effect their object. Twice Lord Stowell laid down these rules with emphasis and clearness; so that from the date of the two decisions—one in 1809, the *Maria*,[1] and the other in 1814, the *Blenden Hall*[2]—this proposition has been a clear rule of maritime conduct. One notes, as showing the character of naval life at the time of these cases, that in both instances those whom we may call the piratical salvors—the second band who tried to dispossess those who had first tendered their services—were officers and men of the Royal

[1] Edwards, p. 177.

[2] 1. Dodson, p. 418.

Navy, proving that sometimes, at the beginning of the nineteenth century, the wild and unscrupulous daring of the Elizabethan seamen was emulated by their modern successors.

Leaving this subject, though the various decisions in which Lord Stowell built up the modern law of salvage are far from exhausted, one may pass on to his judgment on the question of the sailor's lien on the ship for wages. The judgment delivered in the case of the *Neptune*,[1] in 1824, stands out just as remarkably as the decision in that of the *Gratitudine*, expounding and laying down as it does a principle of maritime law of vital importance. In the first place, it diminished largely the effect of the old maritime rule that freight is the mother of wages, confining that maxim to cases where a vessel has wholly perished. It also, while laying down the principle that a seaman has a lien on the ship on which he has served to the last plank, expanded it, so that while it gave him this privilege it prevented him from becoming entitled to any reward as a salvor. Lord Stowell viewed the matter from no narrow standpoint, and he decided the first point on the ground that "private justice and public utility range themselves decidedly on that side of the question which sustains the claim of the mariner." To have held, however, that

[1] 1. Haggard, p. 227.

a crew bound to do their utmost in the service of the owner if the ship is in peril, should be able to assume the character of salvors, so that in time of danger they should be seeking for extra remuneration, would obviously have dealt a blow to the sense of duty of seamen, and would have given opportunities for gross frauds on owners of vessels by unscrupulous officers and crews.

At the present time the increase of maritime commerce and of the size of vessels has very greatly increased the litigation arising out of collisions at sea and in port. The decision of such cases depends for the most part mainly on facts, and it has to some extent obscured the value of Stowell's work as an Admiralty judge. But the few decisions on general maritime law, which have been explained in the immediately preceding pages, have sufficiently indicated and illustrated the historical place which Stowell has obtained, and will continue to occupy, in the history of English maritime law.

APPENDIX I

REPORTS WHICH CONTAIN LORD STOWELL'S JUDGMENTS, AND NOTE ON SOME MS. NOTES BY HIM

Prize and Admiralty Judgments

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. By Chr. Robinson, LL.D. In six volumes. 1798–1808.

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, 1808–1812. By Thomas Edwards, LL.D.

Reports of Cases argued and determined in the High Court of Admiralty, commencing with the Judgments of the Right Hon. Sir William Scott, Trinity Term, 1811. By John Dodson, LL.D. In two volumes. 1811–1822.

Reports of Cases argued and determined in the High Court of Admiralty during the time of the Right Hon. Lord Stowell. By John Haggard, LL.D., Advocate. Vol. I., 1822–1825, and Vol. II. to p. 144.

Haggard, Vol. II., contains also Lord Stowell's judgment in the case of the Slave, Grace. This was an appeal from the Vice-Admiralty Court of Antigua, and raised the question whether a

slave, after residing in England for a year, lost her freedom on returning to the place of her birth and servitude, which question Lord Stowell decided in the affirmative—it has always been regarded as a decision of much importance.

Ecclesiastical Judgments

Reports of Cases in the Consistory Court of London, containing the Judgments of the Right Hon. Sir William Scott. By John Haggard, LL.D., Advocate. In two volumes.

Note on certain MS. Notes by Lord Stowell

Two MS. volumes of Lord Stowell's Notes are preserved in the Admiralty Registry. One is headed "Wm. Rothery. This contains a copy taken from an original book lent to me by Lord Stowell for that purpose, all in his own handwriting." These notes are arranged alphabetically and are on subjects connected with Admiralty and Prize Law. The other volume is headed "Presented to me by Lord Stowell, Judge of the Admiralty. Wm. Rothery." This volume contains opinions chiefly on ecclesiastical subjects, but at the end are twenty-nine pages of notes of prize decisions from 1710 to 1749. This volume is entirely in Lord Stowell's handwriting.

APPENDIX II

CONTRABAND AND BLOCKADE

Extracts from the Memorandum of the British Government of April 24, 1916. [Cd. 8234.]
See *ante*, p. 59.

I

18. THE next passage in the United States note (Paragraph 14) relates to the principle of non-interference with goods intended to become incorporated in the mass of merchandise for sale in a neutral country, or, as it is more commonly known, with goods intended to be incorporated in the "common stock" of the country. The United States Government urge with some force that trade statistics are not by themselves conclusive in establishing an enemy destination, and that such statistics require careful scrutiny. On the other hand, the mere fact that goods, no matter of what description or in what quantities, are ostensibly destined to form part of the common stock of a neutral country, cannot be regarded as sufficient evidence to prove their innocence or to justify the assertion that any attempt to raise questions as to their ulterior destination is unwarranted and inquisitorial. It is a matter of common knowledge that large quantities of supplies have since the war broke out passed to our enemy through neutral ports. It was pointed

out in Sir E. Grey's note of July 23, 1915, that it would be mere affectation to regard some of those ports as offering facilities only for the commerce of the neutral country in which they are situated. They have, in fact, been the main avenues through which supplies have reached the enemy from all parts of the world. In the case of goods consigned to these ports, the ships' papers convey no suggestion as to their ultimate destination, and every device which ingenuity can suggest, or which can be contrived by able and unscrupulous agents, is resorted to for the purpose of giving to carefully organised arrangements for supplying the enemy the appearance of genuine transactions with a neutral country. His Majesty's Government cannot bring themselves to believe that it is the desire of the United States Government that traffic of this kind should be allowed to proceed without hindrance.

19. The question whether goods despatched to a neutral port were intended to become part of the mass of merchandise for sale in that country is one of fact. Quite apart from the conclusions suggested by the figures, there is a considerable body of evidence that many of the goods which have been shipped to neutral ports during the war were never intended to become part of the common stock of that country, but were ear-marked from the beginning for re-export to the enemy countries. If they had been intended to form part of the common stock, they would have been available for use in that country; yet at one time in the early days of the Allies' efforts to intercept all the commerce of the enemy, when they found it necessary to hold up certain cargoes of cotton on their way to Sweden, it transpired that though the quays and the warehouses of Gothenburg were congested with cotton, there was none available for the use of the spinners in Sweden. . . .

22. Similarly several of the shipments which the Allied naval forces are now obliged to intercept consist of goods for which there is in normal circumstances no sale in the importing country, and it has already been pointed out in a recent decision in the British Prize Court that the rule about incorporation in the common stock of a neutral country cannot apply to such goods. The same line was taken in some of the decisions in the United States Prize Courts during the Civil War.

In the presence of facts such as those indicated above, the United States Government will, it is believed, agree with His Majesty's Government that no belligerent could in modern times submit to be bound by a rule that no goods could be seized unless they were accompanied by papers which established their destination to an enemy country, and that all detentions of ships and goods must uniformly be based on proofs obtained at the time of seizure. To press any such theory is tantamount to asking that all trade between neutral ports shall be free, and would thus render nugatory the exercise of sea power and destroy the pressure which the command of the sea enables the Allies to impose upon their enemy.

II

32. The second section of the United States note (Paragraphs 16-24) deals with the validity of the measures against enemy commerce which were embodied in the British Order in Council of the 11th March 1915, and in the French Decree of the 13th March, and maintains that these measures are invalid because they do not comply with the rules which have been gradually evolved in the past for regulating a blockade of enemy ports, and which were summarised in

concrete form in articles 1-21 of the Declaration of London.

33. These rules can only be applied to their full extent to a blockade in the sense of the term as used in the Declaration of London. His Majesty's Government have already pointed out that a blockade which was limited to the direct traffic with enemy ports would in this case have but little, if any, effect on enemy commerce, Germany being so placed geographically that her imports and exports can pass through neutral ports of access as easily as through her own. However, with the spirit of the rules His Majesty's Government and their Allies have loyally complied in the measures they have taken to intercept German imports and exports. Due notice has been given by the Allies of the measures they have taken, and goods which were shipped or contracted for before the announcement of the intention of the Allies to detain all commerce on its way to or from the enemy countries have been treated with great liberality. The objects with which the usual declaration and notification of blockade are issued have therefore been fully achieved. Again, the effectiveness of the work of the Allied fleets under the orders referred to is shown by the small number of vessels which escape the Allied patrols. It is doubtful whether there has ever been a blockade where the ships which slipped through bore so small a proportion to those which were intercepted.

34. The measures taken by the Allies are aimed at preventing commodities of any kind from reaching or leaving Germany, and not merely at preventing ships from reaching or leaving German ports. His Majesty's Government do not feel, therefore, that the rules set out in the United States note need be discussed in detail. The basis and justification of the measures which the Allies have taken were dealt with

at length in Sir E. Grey's note of the 23rd July,[1] and there is no need to repeat what was there said. It need only be added that the rules applicable to a blockade of enemy ports are strictly followed by the Allies in cases where they apply, as, for instance, in the blockades which have been declared of the Turkish coast of Asia Minor or of the coast-line of German East Africa.

[1] The most important passage in the note of July 23, 1915 [Cd. 8233, p. 13], is as follows :

" As a counterpoise to the freedom with which one belligerent may send his commerce across a neutral country without compromising its neutrality, the other belligerent may fairly claim to intercept such commerce before it has reached, or after it has left, the neutral State, provided, of course, that he can establish that the commerce with which he interferes is the commerce of his enemy and not commerce which is bona fide destined for, or proceeding from, the neutral State. It seems accordingly that, if it be recognised that a blockade is in certain cases the appropriate method of intercepting the trade of an enemy country, and if the blockade can only become effective by extending it to enemy commerce passing through neutral ports, such an extension is defensible and in accordance with principles which have met with general acceptance."

APPENDIX III

LIST OF LORD STOWELL'S PRINCIPAL PRIZE DECISIONS IN CHRONOLOGICAL ORDER

Case.	Date.	Subject.	Reference.			
Vigilantia	1798	National character of ship.	1. E.P.C.	31	1. C. Rob.	1
Santa Cruz	1798	Recapture. Rule as to restoration	,,	39	,,	50
Mercurius	1798	Blockade. Notification	,,	54	,,	80
Frederick Molke	1798	Blockade. Egress	,,	58	,,	86
Ringende Jacob	1798	Contraband, effect of carriage of on ship	,,	60	,,	89
Betsey (No. 1)	1798	Blockade. Evidence	,,	63	,,	93
Bernon	1798	Transfer of ship in time of war	,,	70	,,	102
Flad Oyen	1799	Recapture. Condemnation in neutral port	,,	78	,,	135
Jonge Margaretha	1799	Contraband. Destination	,,	100	,,	189
Hoop	1799	Trade with enemy; effect on cargo	,,	104	,,	196
Rebeckah	1799	Droits of Admiralty	,,	118	,,	227
Two Friends	1799	Jurisdiction of Prize Court	,,	130	,,	271
Copenhagen	1799	Freight on restored goods	,,	138	,,	288
Emanuel	1799	Freight on captured goods	,,	141	,,	296
Vrow Margaretha	1799	Transfer of goods in time of war	,,	149	,,	336
Maria (No. 1)	1799	Right of search	,,	152	,,	340
Vryheid (No. 2)	1799	Principles of joint capture	,,	179	2. C. Rob.	16
Walsingham Packet	1799	Jurisdiction of Prize Court	,,	189	,,	77
Hurtige Hane (No. 1)	1799	Blockade, breach of. Inevitable necessity	,,	205	,,	124

Welraart van Pillaw . . .	1799	Blockade. Liability of ship to capture till end of voyage	1. E.P.C. 207	2. C. Rob. 128
Packet de Bilbao	1799	Goods shipped by neutral consignor to enemy consignee. Liability to capture	„ 209	„ 133
War Onskan	1799	Prize salvage. Neutral property	„ 239	„ 299
Harmony	1800	National character. Domicile	„ 241	„ 322
Indian Chief	1800	National character of claimant. Residence	„ 251	3. C. Rob. 12
Daifjie	1800	Cartel ship. Exemption from capture	„ 273	„ 139
Juffrow Maria Schroeder . .	1800	Blockade. Relaxation.	„ 279	„ 147
Imina	1800	Contraband. Destination	„ 289	„ 167
Hiram	1800	Recapture. Freight	„ 295	„ 180
Neutralitet (No. 1)	1801	Contraband. Liability of ship to condemnation or loss of freight	„ 309	„ 294
Henrick and Maria (No. 2) . .	1799	Condemnation in neutral port	„ 339	4. C. Rob. 43
Madonna del Burso . . .	1802	Duties of captor	„ 370	„ 169
Carolina	1802	Unneutral service. Carriage of troops	„ 385	„ 256
Vrow Elizabeth	1803	National character of ship; determination by flag carried	„ 409	5. C. Rob. 4
Diana	1803	Right of captor to freight	„ 424	„ 70
Jan Frederick	1804	Transfer of cargo in contemplation of war	„ 435	„ 128
Elsebe	1804	Right of captor to prize. Historical survey of subject	„ 441	„ 173
Tobago	1804	Liens on captured ships	„ 456	„ 218
Boedes Lust	1804	Embargo; subsequent hostilities; nationality of claimant	„ 459	„ 233
Adonis	1804	Action of master binds owner	„ 467	„ 256
Maria (No. 3)	1805	Continuous voyage	„ 495	„ 365

LIST OF LORD STOWELL'S PRINCIPAL DECISIONS—*continued*

Case.	Date.	Subject.	Reference.
Maria Francoise	1806	Droits of Admiralty	1. E.P.C. 559 — 6. C. Rob. 282
Trende Sostre	1807	Contraband. Change of destination	,, 588 — ,, 391
Friendship	1807	Unneutral service	,, 599 — ,, 420
Atalanta	1808	Unneutral service. Carriage of despatches	,, 607 — ,, 440
Thomyris	1808	Continuous voyage	2. E.P.C. 6 — Edw. 17
Comet	1808	Blockade. Entry of vessel in ballast	,, 10 — ,, 32
Exchange	1808	Illegal destination of ship. Condemnation of cargo	,, 13 — ,, 39
Fortuna	1809	Capture. Freight	,, 17 — ,, 56
Prosper	1809	Capture. Freight	,, 25 — ,, 72
Fox	1811	Validity of Orders in Council in Prize Court	,, 61 — ,, 311
Belvidere	1813	Claim for advances on captured ship	,, 183 — 1. Dods. 353
Hunter	1815	Spoliation of papers	,, 208 — ,, 480
Acteon	1815	Neutral ship. Destruction by captor	,, 209 — 2. Dods. 48
Felicity	1819	Duty of captor on seizure of ship	,, 233 — ,, 381

APPENDIX IV

DOCTORS' COMMONS IN 1598

"On the west side of this streete, is one other great house builded of stone which belongeth to Powles Church and was sometime letten to the Blunts Lordes Mountjoy, but of latter time to a College in Cambridge, and from them to the Doctors of the Civill Law and Arches who keep a commons there, and many of them being there lodged it is called the Doctors Commons."—Stowe, *Survey of London*, Ed. 1908, vol. ii. p. 17.

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THE END

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