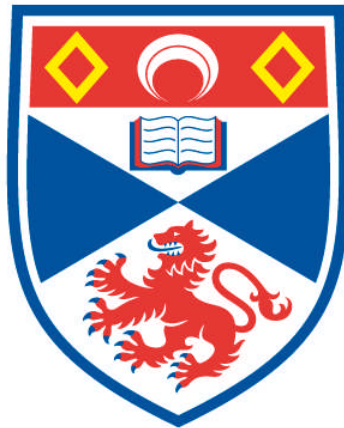


**ASPECTS OF ENGLISH LAW CONCERNING PIRACY  
AND PRIVATEERING, 1603-1760**

**Toby Gane**

**A Thesis Submitted for the Degree of MPhil  
at the  
University of St Andrews**



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1603 - 1760

TOBY GANE  
UNIVERSITY OF ST ANDREWS

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AND PRIVATEERING,  
1603 - 1760**

A DISSERTATION SUBMITTED AS PART FULFILMENT FOR  
THE M.Phil (Mode B) DEGREE IN MARITIME STUDIES.

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# ASPECTS OF ENGLISH LAW CONCERNING PIRACY AND PRIVATEERING 1603 - 1760

## **PREFACE**

Piracy and Privateering are certainly much written about subjects, and there is indeed extensive literature concerning many aspects and facets of the complicated history of the subjects. A glance at the Gosse Collection on piracy at the National Maritime Museum or a search through the archives of the British Library will illustrate this point admirably. It came to my attention, however, that one aspect of piracy and privateering that had not so much been overlooked, but had never really been treated as a separate subject, was the law. Surprisingly even Charles Wye Kendall of the Middle Temple and Barrister-at-Law, in his work *Private Men-of-War* had only scantily covered this area, homogenised into the whole text of his book. There is no doubt that both piracy and privateering have had differing effects on trade and commerce in seventeenth and eighteenth century Europe and Anglo-America and hence had a wide social context and significance. As a result historians have taken the subjects, especially privateering, seriously although it has often been overshadowed by the historian's preference for writing about the Navies of Europe. As a result of this social significance it was only a matter of course that a myriad of laws and statutes sprung up to control, inhibit, deter and prevent, around these controversial ways of life.

It has been my intention, therefore, to try to give an account of the main aspects of the law as it reacted to the post-Elizabethan period of piracy and privateering up until its decline in the eighteenth century. Two limiting factors must be born in mind by readers, firstly time: it has been scarcely six months from conception to completion; and secondly the length of the essay has considerably reduced the scope of the work.

As a result I do not pretend to have covered anywhere near the full scope of the topic, and there is indeed much more work that could be done to throw light on this subject. Nor do I pretend to have got it completely right, and would welcome constructive criticism. It is hoped that I have shed some light and I would venture to suggest that, if nothing else, I have pooled some knowledge of an aspect of piracy and privateering that has not been pooled in such a way before. The sources of information I have used are a mixture of primary and secondary. The manuscripts and the acts of Parliament I have used all came from the National Maritime Museum as did some printed works dating from 1726 to the present. Other printed books came from the British Library.

Thanks are therefore due to the staff of both the National Maritime Museum and the British Museum. Special thanks go to Dr Colin Martin and Professor Christopher Smout for their concern and help at very short notice.



## **INTRODUCTION**

Piracy, and its sister occupation, Privateering, have captured the imaginations of millions of people as a romantic and daring occupation, made familiar to us by the literature of the 18th and 19th centuries and, given a Hollywood facelift, piracy could appeal to almost anyone.

The harsh reality of this often cruel way of life could not be more different. Piracy in the 17th and 18th centuries was a barbaric and dangerous occupation that would have demanded steel nerves and a total lack of remorse. It was a hazardous and cruel life as a sailor on the high seas, but pirates and privateers doubled the danger and often took their lives in their own hands, and took those of others without thinking twice. The lure of riches was a strong one indeed for anyone who could take the hardships. Fortunes were made and lost in this way.

The reason for which I have isolated this period of study is that the period saw an interesting change in England's overseas policy. Privateering had seen great days at the latter half of the 16th century with the rise of such infamous figures as Francis Drake and John Hawkins. This period of entrepreneurial venture and free-for-all treasure hunting in the form of legal private warfare was to draw to a close at the start of the 17th Century (Senior 1976, 7). This change was dominated by the Succession of the Stuarts over the Tudors. Elizabeth's reign had been earmarked by 20 years of sporadic war with Spain, which, although it had been a very costly exercise had also served to give wealth to many enterprising privateers. Suddenly with the succession of James Stuart, England was thrown into a long period of peace. This ultimately led to a massive increase in piracy. Now British privateers had no legal enemy, and a rapid degeneration into piracy was their only alternative if they wanted to keep a healthy income of Prize (Senior 1976, 7-11). An agreement with Spain was made that the English privateers might be kept out of the West Indies and that if they should fall into the hands of the Spaniards they might be put into the hands of the Spanish Inquisition, much to the distaste of the English seamen (Macintyre 1975, 29). This allowed the British and the French to freely ship contraband. This in turn forced the Spaniards to move from the north and west coasts of Hispaniola. The English and French then settled, and hunted the cattle and pigs that had been left behind and gone wild, and by 'boucanning' or smoking the meat they could preserve it and sell it, and the hides, to the seamen in the Caribbean. These men became known as 'Buccaneers' and often turned their hands to piracy when the cattle ran low.

But the early period of the 17th century was not the only time that saw an increase in piracy due to political events. The Civil War was to provide the germination for the seed that had been waiting for its chance. Too many years of peace had made pirates or even merchants ready to jump at the chance to hunt for prize legally. British merchant shipping had suffered during the Civil War from the

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privateers of both the Commonwealth and Royalist factions “as well as from the usual pirate craft that lay off the African Coast” (Crump 1931, 92), while the English could do little to protect merchant shipping. The end of the Civil War brought a near end to this period of Royalist privateering, and the new government was posed with the problem of monopolising English trade in the West Indies and securing this trade against piracy and privateering. This can only make one think they could have bitten off more than they could chew, as whilst they clearly reduced the level of piracy and privateering, they served only to cause friction with the Dutch whose trade suffered considerably.

This set off a chain of events out of which the privateers and pirates could only have benefited. Firstly, a war with the Dutch inevitably came about, once over a war with Spain ensued.

*“These years of naval war saw an enormous growth of privateering and piracy, the natural corollary of privateering. Much of the fighting in the West Indies was carried out by private men-of-war sailing under letters of Marque, and the profits were sufficiently great to attract capital and men in considerable numbers. When letters of Marque could not be obtained, such privateers frequently turned pirate, so that peace at home did not mean peace at sea. Thus, the policy of the Commonwealth led to an increased need for machinery to enforce trade laws and to deal with prize and piracy”* (Crump 1931, 93).

The Commonwealth’s emphatic need to establish itself in the divided colonies, and to monopolise (i.e. hold most of the trade, and allow the Dutch as little as possible) the trade had led inadvertently to war, through which an increase in private and illegal war, meant an increase in piracy. It was partly because of this that with the Restoration and Coronation of Charles II in 1660, that a new special appointment was made that was to extend the power of the Admiralty to the Colonies. This appointment was that of Lord High Admiral of the Plantations. *“for the greater part of the period 1650-1697, there was in existence a body of men responsible for administering the colonies”* (Crump 1931, 93). More of which is given in later chapters.

By the end of the 17th century this body of men had developed into the Board of Trade (established 1696). This Board would meet four times a week to discuss colonial problems, one of these problems being, of course, piracy. As a result, in 1697, a campaign was begun to curb piracy and illegal trade (Steele 1968, 42-59).

One of the first large scale anti-piracy events that took place was the planned attack on Santa Maria, in the East Indies, a notorious pirate stronghold, but although a fleet was despatched to deal with this den of iniquity, no attempt was made due to administrative problems. The Board also had a large



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hand in dealing with the changing of laws concerning the punishment of pirates, which were at the time wholly inadequate. At that time for acts of piracy, although a capital offence, few offenders were punished due to the inadequacy of the Judicial system, so it was apparent that admiralty and vice-admiralty would need power to try and execute pirates if an effect was to be seen (Steele 1968).

In the early 18th century, so called Anglo-American pirates are said to have implemented an “*Imperial Crises*” with their plundering of mercantile vessels for a whole decade (1716 - 1726) despite partially successful attempts to remove piracy from the seas (Rediker 1987, 254). There appeared, at this time, a great increase in the amount of pirates roaming the seas in search of prey. Why should this be? The most probable answer was the radical changes that took place in the Royal Navy at the end of the War of the Spanish Succession (1713). The manpower of the Royal Navy plummeted from almost 50,000 to as little as 13,500 in just two years (Lloyd 1970, 287). To worsen the situation, all the privateering licences, the letters of Marque, would have been invalid with the commencement of peace - perhaps doubling the amount of unemployed seamen looking for ways to make a living.

*“The surplus of labour at the end of the war had extensive, sometimes jarring social and economic effects”* (Rediker 1987, 282). Such an effect was a lessening of seamen’s wages over the next few years, creating a rush for the comparatively well paid ‘profession’ of piracy. Government action was needed to soften the effect that piracy was having on trade, and pardons were offered to pirates in 1711 and 1718 (Davis 1962). This failed miserably and the royal officials decided to turn again to harsher tactics, which involved more hangings as a deterrent, coupled with laws that “*criminalised all contact with pirates*” (Rediker 1987, 283).

By 1725 a number of changes had been made in the way privateering was carried out. Letters of reprisal were no longer issued if the subject of the letter was of a nation that England was not at war with. Most trading vessels carried letters of marque but were not privateers in the predatory sense, and were authorised to attack enemy ships but not to go out of their way to find them (Kendall 1931, 156).

One of the most interesting stories tells of a privateer, Captain Robert Jenkins, who in 1731 sparked off a chain of events that ultimately led to a minor war with Spain. Whilst in the West Indies his ship *Rebecca* was stopped by the Spanish *Guarda Costa* and searched for contraband. Not content with the legality of his ship - which held no contraband - they cut off his ear. Jenkins complained to the King, and appealed to the House of Commons, which drove the government to the attack on the Spanish Colonies, which was known as the ‘War of Jenkins’ Ear’.

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Little happened in this episode but this war heralded the “*last great phase of privateering*” (Kendall 1931, 176). From this episode we can determine that at that time privateering was an economic force to be reckoned with, and it must have held considerable influence in the Government. It was still a comparative money spinner for the Crown and a number of influential people had attained high social positions due to the wealth it had brought them.

One story that illustrates this point is that of a carpenter called Baker who tried his hand at shipwrighting and built a ship for the merchant service. His work was so poor, however, that no-one would buy his ship. He then had little option but to equip his ship as a privateer. As the *Mentor* sailed off down the Mersey, the opinion of the experts was that she was a ‘cranky’ vessel and that she was likely to capsize. But on her way south she came across a French East-Indiaman, the *Carnatic* which although seemingly more powerful than the *Mentor* was suspected of having a number of false guns. After a brief engagement the *Carnatic* was Baker’s. He had his fortune, built a palatial residence and eventually became the Mayor of Liverpool (Jameson 1923).

By the end of the first quarter of the 18th century England had decided to deal with the pirates in an effective way and a growing hostility, and tightening of procedures, such as financial penalties, was made toward privateering. As the 18th century progressed the effectiveness of this policy grew and eventually, but the end of the 18th century piracy was almost outlawed, and privateering was treated in a strict and restricting manner. Perhaps the highest factor in the reduction of piracy, especially in the Caribbean, during this century was the increase in the power of the Royal Navy. It was by effective patrolling, the vast increase in naval vessels, and a no-nonsense policy, that the Royal Navy systematically reduced piracy, often by force. Indeed, from 1756 to 1760 the naval expenses of Great Britain doubled (Bromley 1987, 500). Pirates were hanged twenty or fifty at a time instead of the usual four, and by the middle of the century the campaign had been effective, and the period of our history that has become known as “the golden age of piracy” had come to an end (Ritchie 1986, 19).

## **THE ADMIRALTY AND VICE-ADMIRALTY COURTS**

Piracy had been a problem for many years before attempts were made to establish an Institution to deal with those seamen who believed that robbery was a viable career. The establishment of the Admiralty Court appears to have taken place around the middle of the 14th century. It has been observed that, although there is a large amount of contemporary documentation on the subject of the Courts, there appear to be no actual word for word accounts of the hearings of pirates themselves. It has been suggested that this is due to the fact that the proceedings were already written and there was little for the Court to do apart from brief the jury and come to a conclusion (Berckman 1979, 5).

During the majority of the 17th century, the laws and courts for dealing with piracy were wholly inadequate, especially those that were established in the Colonies. It was not until the end of this century that the addition of two important Statutes changed the effectiveness of the Law Courts in the Colonies, by giving them “parliamentary recognition” (Crump, 1931). The establishment of these Courts was due to the inadequacy of the Common Law Courts in dealing with maritime cases, and to start with, commissions were issued to take care of piracy or other disputes, provided they were below the high water mark, which was the limit of the Admiralty’s jurisdiction (Crump 1931, 3).

Originally, in the 13th century, it would have been up to the King himself to make decisions about the legal questions at sea, and these cases would have been tried before the King in Council (Marsden 1915, IX Vol. 1). Not only was this time-consuming, and costly but it also totally failed to meet the required number of cases. So there was always a backlog.

The next step meant that the Common Law Courts took over the maritime affairs but as the admirals of the fleets became more powerful in connection with the law, the Common Law Courts began to lose their power of exercising routine jurisdictions.

The final step was to appoint someone to take over the maritime affairs of the Common Law Courts. The task naturally fell to one of the three admirals that controlled the fleet in the 14th century.

The first man to be appointed as the Commander of all the fleets of England was Sir John Beauchamp, between 1340 and 1360. The Royal patents issued to him give him the right to hold Admiralty Courts, hear pleas and to appoint a deputy if the need arose. He not only held control of the navies, but was also responsible for, among other things, the suppression of piracy, and the collection of Royal Dues (Marsden 1915, xlii Vol. 1). This individual held an immense amount of responsibility and an obviously busy and important job.

## THE ADMIRALTY AND VICE-ADMIRALTY COURTS

At the beginning of the 16th century, the Admiralty Court was having problems with the convicting of pirates in these courts, due to the civil law. Witnesses against these crimes committed at sea were rarely alive to give evidence, or if they were alive they might have sailed for distant parts, which meant that a pirate might “*only be condemned by his own confession*” (Crump 1931, 12). Because of this, Parliament passed a law that these cases should be heard under common law by commission of the Great Seal. These cases, however, were to be held by the Lord Admiral or his subordinates, indicating that the common law was not to be relied on too heavily.

By the middle of the 16th century the trade and commerce had grown sufficiently to render the Admiralty Courts incapable of coping with the flow of cases that were to fill their books. One way of enlarging the capacity of the Admiralty Court was to produce ‘sub-courts’ that would be established around the country. Coupled with this was the fact that as the role of the navy became more important, the one effect was to give problems to the judicial side of the Admiralty (Crump 1931, 12-23). To cope with the new, and large, amount of administrative work, the role of the Vice-Admiral was created.

These Vice-Admirals were to hold courts in their allotted areas, and, if they were judicially untrained, were to have a deputy who was both civilian and trained in the law (Crump 1931, 13).

These Vice-Admirals were of course responsible for dealing with piracy, but the case is different: these officials “*not only proved to be inept at curbing the piratical inclinations of the coastal inhabitants; many were similarly inclined themselves. The extent of admiralty corruption was outstanding, even in an age in which a certain degree of financial dishonesty was an acceptable concomitant of most official posts*” (Senior 1976, 127).

The Vice-Admiralty Courts tended to travel around the district, which might have included one or more counties, and would set up their court in the major town, whilst drawing a jury from the surrounding ports and towns (Pares 1938, 77-84). This was known as “going their Rounds”.

From the surviving documentary evidence we can piece together the manner in which these courts were held. Firstly the witness would give his statement, which could be rather lengthy, and apparently uninterrupted from questions. At this point the witness was examined by the judge in the “Interrogatory”, which involved “*a merciless review of every statement the witness has made, with the most grinding and detailed inquisition concerning it*”. It seems that each member of the jury could read and write, and it may have been that the jury was handed a copy of the “Juratores”, or the accusations. This could have served as a reference for any jurymen who were unsure of their verdict,

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and it may even be that such men might have had the chance to ask witnesses questions to help them decide (Berckman 1979, 7-9).

Eventually this vice-admiralty jurisdiction would spread to the colonies in North and Central America. During the first half of the 17th century there was a tide of emigrants seeking new lives in the New World. With them went their lifestyles, religions and even their laws. New settlements were founded, and while the hard work was being done, there was little time, place, or money for the tribal life and petty bureaucracy of 16th century law. But once established, the English law system was to take its hold. Perhaps from the 1620s and 30s onward, vice-admirals were establishing their jurisdictions and gaining control of the plantations and other trade (Crump 1931, 25).

By the end of this century vice-admiralty courts had been established in the Colonies and were practising English law. They did, however, have a number of vital weaknesses, and they were severely limited in the powers that they could exercise. Not only did captured prize vessels have to be sent back to London to be judged by a prize Court, but also pirates arrested had to be sent back to London to be tried, and could not be dealt with by the vice-admiralty courts set up in the Colonies (NMM 1730, 30). This was not only inconvenient, but costly and often proved disastrous as witnesses refused to travel or died in transit, prisoners escaped or died in transit, and often many months passed between arrest and trial. Despite this, there were certain individuals who believed that there was little need for an admiralty court to take over the responsibilities of the Colonies. Sir Thomas Lynch, Governor of Jamaica, implied that there was little need for an admiralty court at that time to deal with such specialised cases as piracy.

During the middle of the 17th century, Jamaica was making a lot of money from privateering and the admiralty court in London was overwhelmed with condemning prizes she had brought in. As a result in 1662 instructions were given to establish an admiralty court in Jamaica, this island being the only place considered viable for such a court (Crump 1931, 109).

From that point onwards the admiralty court sat when the need arose. One such occasion being a trial held by Sir Henry Morgan, acting as Admiral's Judge, a position deemed important enough to hold such a court in Jamaica. It seems that the governor of the island held the power to authorise the court to be held.

But there is the possibility that the Jamaican Admiralty Court was by no means legitimate. The High Court of the Admiralty in England itself could try prize, but piracy was dealt with by a Special Court, that of Oyer and Terminer (more of which later), as decreed under a Statute of Henry VIII (NMM 1730, 25-33), while the Jamaican Court of the Admiralty liberally entitled itself to both prize and

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piracy. The reason as to why this must be is presumably because of the cost and inconvenience of sending back prisoners and prize to England, while the Governors that acted as judges in Jamaica believed that it could be done efficiently, cost effectively and as fairly as in London, despite the fact that the Jamaican admiralty court was presumed a mere equal of the lesser vice-admiralty courts.

There was in 1684 objection at the fact that in the colonies (Jamaica at least) pirates were being tried by their own admiralty court. They argue that according to the Statute of 28 Henry VIII, they should be tried by Oyer and Terminer (NMM 1730, 25). The law was merely manoeuvred around by the implication that the Statute of Henry VIII did not extend to the colonies (Crump 1931, 113).

By the end of the 17th century a very important Act had been passed that was to have a great effect on the power of the Vice-Admiralty Courts in the colonies. This was “*An Act for the more effectual Suppression of Piracy*” of 1698 (NMM: 1699). This enabled the pirates in the colonies to be dealt with in the country where they had committed the crime. Not only did it give the various vice-admiralty courts the authorisation to try piracy by Oyer and Terminer, (more of which later), but it also issued vice-admiralty jurisdiction to the naval commanders of anti-piracy expeditions. (NMM: 1699). Therefore these vice-admiralty courts abroad received Parliamentary Recognition.

The reason why so much has been written about, and why so much material remains, about the Jamaican Admiralty Court is neatly summed up by Helen Crump (1931, IIS-6):

*“It was in Jamaica that an admiralty court first came into full life. From the turmoils of naval war from the prizes of the buccaneers and the spoils of pirates, in all of which Jamaica was more closely concerned than were other colonies, its admiralty court had drawn its life, its successive officers their emoluments.”*

Of course there was also much trouble with piracy and privateering in other colonies as well and it was just a matter of time before vice-admiralty courts appeared in other locations. Certain vice-admirals were put in charge of the Barbados Islands and Tangiers, but often the warrants were re-noted by the 18th century and it was felt they were not needed. But the courts that were later to be established in New England were to become busy with the passing of prizes that would litter the ports in years to come.

The eventual suppression of piracy in the middle of the 18th century finally lifted the pressure off the

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courts in the colonies, so that they could deal with the more pressing matters of prize cases from which both the admiralty and the government earned a great deal in revenue. But of course piracy had not been quashed completely, and as long as there were letters of Marque issued to privateers during periods of war, many of them would need an occupation to turn to in peace time, and this was inevitably piracy. So although the flow of piracy cases was lessened, it had by no means diminished completely.

## THE LAW OF PRIZE

One of the most important aspects of privateering that was looked after by the admiralty courts was the law of prize. It was a complex subject, and prize courts were set up especially to deal with the vast flow of hearings that were to be made, mainly during periods of war.

The importance of prize jurisdiction had been increasing over the last fifty years in the High Court of the Admiralty, and it was being realised that prize law would have to take over from the outdated system of Common Law, despite opposition.

The year 1627 saw the prize court take on the form which was to govern it for the next century and *“Marks an important step in the evolution of the prize court by the appointment of Commissioners to receive, make an inventory of, and sell all goods adjudged lawful prize”* (Kendall 1931, 69).

A step forward was made in 1649 with the passing of an act entitled “An act for the appointing Commissioners for the sale of Prize-goods” (NMM 1649, B7384 Laws, Statutes, etc.) The act stated the names of 19 people who were authorised as commissioners, collectors and treasurers for the sale of prize goods, and contained instructions as for the storage and sale of such goods. For convenience the Act also abolished the use of Latin in hearings to speed up the procedure. *“Thus did the English Prize Court become a properly constituted legal tribunal of far reaching commercial, financial, and international importance”* (Kendall 1931, 69). Prize goods in this case constituted *“any ships, goods vessels, arms, ammunition, wares and merchandise whatsoever, and of what kind condition etc., i.e. goods taken by ship in service of parliament or the King which by seizure or capture should lawfully belong to the parliament or the King, (depending on whether it was during the Commonwealth Interlude), unless the Court of Admiralty shall (where they find the goods perishable, and not preferable till sentence) make some order or decree for appraisement, and sale or delivery there-of, to the best advantage”* (NMM 1649, B7384).

The prize aspect of privateering is the single most important factor governing the motivation of these enterprising seamen. Their sole aim was to plunder an enemy's shipping for financial gain despite the political and commercial harm (or good depending on what angle you look at it) it was doing. During times of war the government would encourage private men-of-war because they added to the sea power of the country, without straining the resources of that nation. Because the admiralty took a share in prizes, privateering could often increase its budget (or line the pockets of certain admirals). While the politicians strove to increase the power of the state, it seems that merchants and seamen sought after personal wealth in a *“seemingly symbiotic relationship”* (Jan De Vries 1976, 239-240). Not only did this form of warfare increase wealth and keep state costs low but it also wore down and weakened the enemy's trade and sea power.



## THE LAW OF PRIZE

At the end of the 17th century and the beginning of the 18th century there was a considerable drop in the amount of piracy, especially in the Caribbean “*because the Rule of Law was beginning to be maintained by the exercise of naval power*” but it had by no means been removed completely. (Kemp & Lloyd 1960, 75). However this had no effect on privateering which continued to expand well into the 19th century, but only in a form that was very strictly governed by law and limited to a great extent in that very few commissions were issued. This period of privateering bore little resemblance to that which took place in the 17th and 18th centuries. Once into the 18th century this increase in prizes taken led the admiralty to believe that prize could be an important economic factor, and they began to treat the subject with more respect.

The history of prize jurisdiction goes back as far as 1242, when England, under Henry III, was at war with France. As was customary, he ordered the ships of the Cinque Ports to be fitted out against the enemy. Henry ordered that the ships could keep all they captured apart from a fifth, which was the King’s due (NMM 1930, 88). It was this that set the standard rate of “taxation” on prize goods for the future, although this system changed at various periods in history.

It was not only privateers that took prize for profit, the Navy has, during certain periods, shared prize with the admiralty, and often it was the only way a naval officer could make any real money. In 1659, during King William’s war, a tenth part of enemy prize was supposed to be paid to the treasurer of the Navy; this money was kept aside and used for the payment of “*Medals and other rewards, for officers, mariners and seamen who should be found to have done any singal or extraordinary service*” (NMM 1730, 104).

In the Dutch war of 1664, encouragement was given to the privateers and Men-of-War alike in the form of a payoff for captured ships. They were given ten shillings for every tun of captured ship, and 6 pounds, 13 shillings and four pence for every piece of ordinance. On top of this for every gun on a destroyed man-of-war, 10 pounds was offered (NMM 1730, 90) However it was probable that the men would not have seen much of this money, while the officers lined their pockets.

During the next Dutch war in 1672, the system had again changed, and this time a sum was given according to the amount of guns a captured or destroyed ship had. For example, for a ship of 20-30 guns the captors would have received 200 pounds, a ship of 50-60 guns was worth 800 pounds and that of 90 and upwards was worth 1200 pounds to the captors. The regulation of this money meant that it would have again gone to the officers of the ship, not the crew. The common men had to make do with the proceeds of the goods captured on board “*upon or above the gun deck*”, so long as it was not jewels, bullion or plate (NMM 1730, 90). A rather unfair offer, one might feel. But in

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1686, during a war with Barbary, King James offered a proclamation that allowed captors all that they took, but later when the admiralty lacked money they reverted to the 1664 rules.

During the 4th and 5th years of William III (1693) certain regulations concerning prize were made by Parliament. These regulations had been in force for many years, abroad and at home, concerning privateers, but the new regulations encompassed men-of-war as well as privateers. They stated that all prizes were to be brought into port, and delivered to the Commissioners of Prizes to be "*condemned, the goods sold and the Customs paid*" (NMM 1730, 91). If the ship was taken by privateers, then four-fifths of the proceeds would go to the captors and one-fifth to the King, while "*the ship and all her furniture belonged to the captors*". If the prize happened to be taken by a man-of-war, then only one-third of the goods went to the captors, while one-third went to the treasurer of the navy for care of injured seamen, and one-third went to the Crown. It might seem unjust that naval personnel received less prize money than privateers, but it must be remembered that privateers usually agreed to serve by the "no prize, no pay" rule, while naval sailors had a wage (albeit sporadic). The government had also to encourage private enterprise where men-of-war were concerned, as privateers were an important way of strengthening sea power, and by offering attractive prize percentages more ships would be fitted out and increase sea power of the state. Although ten pounds per gun was allowed for men-of-war, pillage was forbidden, unlike the rules for the privateers (NMM 1730, 92).

This Act was rendered invalid at the Peace of Utrecht in 1713, but during the war with Spain in 1718, it was again put into force, apart from one or two minor articles, due to the admiralty being short of money.

Again in 1702, £10 was offered to any privateers per gun on men-of-war destroyed. It was this year that had seen the death of William III, and England declared war on France (Cook & Stevenson 1988, 156). It was therefore in the interest of the Government and the admiralty that they should encourage the use of privateers to weaken the enemy. The war of the Spanish Succession lasted until peace was made in 1713 at the Treaty of Utrecht, during which time Marlborough made his crushing defeat of the French land forces while Admiral Sir John Leake defeated the French at Marbella, and Spanish territory was captured by the English fleet. This period must have been a prosperous one for the English (and French) privateers, and probably letter of Marque ships as well, (more of which we shall see in a later chapter).

In 1708, parliament had to issue a proclamation to solve the problems of who would receive prizes and in what order. They decreed that a Captain of Marines shared with lieutenants and Master of the Ship; a marine lieutenant with the warrant officers and a sergeant of marines with the midshipmen

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and petty officers. This was not all they did in that year; the Prize Act of 1708 gave parliament and the admiralty unofficial control over the privateers.

It removed power from the Crown to give discretionary power to grant Commissions to privateers. Because it removed the prize commissioners, it also stripped the Crown of power to dispose of prize goods, and it lost its power in the proceedings of the Prize Court (Pares 1938, 64-66). This was an important act for it gave the admiralty much more freedom to exercise its power and put paid to any interfering royal proclamations.

In the case of the quadruple alliance against Spain in 1718-20, a similar line of encouragement was given to the privateers who sought their fortune, but it seems only to have been extended to men-of-war, although this may have meant private men-of-war as well (NMM 1730, 98).

During further conflict with Spain in 1729, a bill was passed that included an article for the “*more effectual suppression of piracy*”. It was stated in this act that all prizes taken from the enemy should be given solely to the captors; again it seems that the admiralty had plenty of funds coming from elsewhere at the time and had no need for the extra money (NMM 1730, 93; NMM 1729, B1020).

Prize adjudication was a very important aspect of the prize law process. During the 18th century this jurisdiction was controlled by the admiralty courts. During part of the 17th century there was only one place where prizes could be judged and this was the High Court of the Admiralty in London. Ships taken overseas therefore had to be brought all the way back to England. “*Naturally neither governors nor privateers wanted this in the Caribbean, but neither did they wish illegal sales to keep down prices at the auctions of prizes, nor to find that ships could be arrested on their voyages because of imperfect titles*” (Crump 1931, 97). As a consequence, due to the cost of this journey many privateers did not bother to declare goods captured, which resulted in the goods not being legally theirs. In 1626 this was changed to allow “*outward bound merchantmen with letters of Marque*” to take their prizes into foreign neutral ports (Pares 1938, 77). By the end of the 17th century an admiralty court had been set up in Ireland, a number of vice-admiralty courts overseas, especially the East and West Indies, could be used for prize adjudication. Admiralty courts were not necessarily prize courts, and were apparently only automatically so during periods of war (Pares 1938, 78). The prize courts were very important to the privateers in times of war. Ships and goods captured had to be passed through the courts to make sale of the vessel legal. Without a special certificate issued to the captors stating that the ship was legally theirs, and registration in the custom house, there was no way the ship and goods could be sold “*such copy being as necessary as the conveyance writings of an Estate*” and without these papers “*the former proprietors may seize them wherever they find them, and they will be adjudged to them*” (NMM 1730, 104). Goods that were sold before their declaration

to the prize courts were held against the law (*"Bona Piratarum"*) and were deemed to be the property of the Lord High Admiral (NMM 1730, 105).

Under normal circumstances, the Judge of the high Court of the Admiralty could not undertake the adjudication and condemnation of prizes without the authority of the King under a Commission of the great Seal.

It was important that those admiralty courts authorised to deal with prize cases were to keep detailed accounts of sale of prize goods which were to be sent to the admiralty periodically. This account was to be *"given to the publick, when required; and therefore when an exact list of all prizes taken is necessary to be known, send to the registrar for it"* (Crump 1931, 95-98; NMM 1730, 108). This was presumably to allow any ship-owner who felt he had been wronged, to check where, and to whom, his ship had been sold, and secondly to discourage embezzlement of funds, both admiralty and public, by periodic check-ups. There was, no doubt, a certain amount of corruption within the ranks of the courts that dealt with prize, and it seems probable that some "privateers" who did not have valid letters of Marque would be allowed to take prizes if they paid certain members of the courts or officers "a modest sum". Corruption even managed to get into this strict legal system.

The court proceedings for prize cases went very much along the lines of criminal proceedings as we have seen in the chapter on the admiralty courts. The first things that takes place in the court are the examinations, "from three or four of the principle persons belonging to the prize". These examinations were supposed to prove that either the ship or cargo was the property of the enemy (Berckman 1979, 6-8; NMM 1730, 109). The procedure now differs slightly from the criminal cases in that there is a section for the use of persons wishing to state a claim in either the ship or cargo. This is known as the citation. *"It is open to all manner or persons that have, or pretend to have, any right title or interest in the prize, to appear in the High Court of the admiralty on a certain day, then and there to show cause, if any they have, why the ship, her tackle apparel and furniture and the goods taken therein should not be pronounced to belong at the time of capture to persons other than the King and not to be taken as good and lawful prize."* Of course prizes were often unlawfully taken and were handed back to the original owners or the admiralty after the court hearing. On the other hand the admiralty could lose prizes should a judge so decree. For instance, the anonymous writer of the manuscript in the National Maritime Museum, c.1730 (NMM, 123; Pares 1938, 108-132) tells us of the British privateer that in 1704 captured a neutral ship laden with French wines in Weymouth Road. The cargo was *"condemned as perquisite of admiralty because she was seized in the road"*, while the ship was returned to its rightful owners. The captors were not too happy with the loss of their cargo, the value of which came to over £2000, and applied to have the verdict reassessed, after

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which the cargo was taken from the admiralty and given back to the captors (after having the admiralty one-tenth deducted).

In 1711, it was decreed that if the captain of an English privateer or man-of-war came across an enemy ship and plundered it and then afterwards allowed the ship to go free that this “is little less than treason and corresponding with the King’s enemies.” However if the prize was unseaworthy to such an extent that it would be impractical to bring her back to port, or due to the extent of damage she would be difficult to sell, then the Commander might have taken the decision to ransom the vessel.

There were also laws that were made to protect British trade and goods from foreign privateers, and to prevent the capture of those goods, and from becoming the prize of another nation. During the reign of Charles II piracy was having an adverse effect on “*the trade and navigation of England*”. It had been noted in many cases that the ships had been allowed to be boarded without any attempt to defend themselves on behalf of the merchantmen. As a result piracy took away a large proportion of the net profits, not only of the small trading companies, but also the large ones such as the East India Company and the Royal African Company (Cook & Wroughton 1980, 169-171; NMM 1726, 24-30). As a result in the 22nd and 23rd of Charles II (1671) Parliament passed an act entitled “*an act to prevent the delivering up of merchant ships and the encrease of good and serviceable shipping.*” This act stated that any ship of 200 tuns or upward carrying 16 or more guns, of which the master does “*yield up the said goods to pirates without fighting*” he was to be tried in the High Court of the Admiralty and banned from taking charge of any ship as master or commander; if he did so he was imprisoned for six months for each offence. It was also stated that any seaman who refused to fight against pirates “*shall lose his wages due to him; together with such goods he has in the ship with him*”. Likewise “*every mariner who shall have laid violent hands on his commander, whereby to hinder him from fighting in defense of his ship and goods committed to his trust shall suffer death as a felon*” (NMM 1726, 24-30). It was hoped that this would make the crews of ships fight off pirate attacks but it is not known whether this act had any effect in the taking of cargoes and ships by pirates as illegal prize. It was usually the case that the crew of a cargo vessel had no stake in the cargo itself and were only employed to take that cargo to another port. As a result the pirates often appealed to the crews not to fight and that if they did not they would not be mistreated. The merchant seamen often obeyed the pirates by allowing them on board to take the cargo, knowing it would be the merchants that lost out, and not themselves. Why should they risk their lives for someone else’s cargo (Ritchie 1983, 11)?

The evolution of the law of prize was a gradual process that seemed to respond to events as they happened. By the end of the 18th century however, the system had grown old and defunct. Prize

courts and officers were accused of delayed distribution, under selling and corruption, among other things.

## LETTERS OF MARQUE AND REPRISAL

Privateers have been around, in a commercial sense, since about the 13th century and since that time the privateer had need for some form of warrant or licence to distinguish him from those detested criminals, pirates, and it would have been this licence that would have saved him from execution as such. This period had no real form of international law and licences were given to private ship-owners to fit out vessels as men-of-war and to “*compensate themselves for injuries suffered at the hands of a foreign but not an enemy country*” (Kendall 1931, 4; Macintyre 1975, 1-4). These licences were known as Letters of Marque (sometimes spelt Mart) or Reprisal. The earliest known English letter of Marque comes from the reign of Henry III, dated February 1243 and its opening line is “*Relative to annoying the King’s enemies*” Claws 1897, Vol II). This would suggest that their role, as far as the country was concerned was to disrupt enemy trade routes and weaken their merchant shipping. But the last line read “*and they are to render to the King, in his wardrobe, the half of their gain*”. So apart from providing the country with useful ferries and supplying the King with a substantial income, these privateers provided for themselves a viable commercial venture. There were two types of letter of Marque during the 17th and 18th centuries. They were the General and Special Letter of Marque. Special letters of marque were basically letters of Reprisal and to avoid confusion they have been called letters of Reprisal in the past. This however is slightly misleading, and I believe that it would be better to categorise Special and General Letters of Marque as such. This is because the only thing that really separated the two were periods of warfare and periods of peace, as will be explained in due course. Special letters of Marque were hard to come by. A ship-owner had to have a very good reason for obtaining one of these licences. To obtain one the subject had to have been attacked and/or robbed by a foreign aggressor, whose country was not at war with England. He must then have tried to receive compensation in the courts of that country “*where if justice is denied or vexatiously delayed, he is to make proof of his losses in the admiralty court here*” (NMM 1730, 56). If the court was found to be satisfied that the claimant had gone about trying for compensation lawfully, then a letter of Reprisal was issued to him, against that nation, whether or not England was at war with them. These Special letters remained valid until the holder had “*recovered full satisfaction for their injuries, together with costs in getting it, all which is ascertained in the admiralty court*” (NMM 1730, 57). In this way personal grievances could be sorted out against foreign countries whilst at peace with them.

General letters of Marque were issued upon or during a war with a foreign state, whereby the Lord High Admiral was empowered by the King to grant commissions to privateers, to fit out ships at their own cost “*to annoy the enemy*” hence a country’s sea power could be increased without burdening the national budget or the admiralty, whilst men made their fortunes through this hazardous occupation and supplied the admiralty and Crown with an additional income. Everyone a winner!

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These letters of Marque were often all that stood between the holders being privateers or pirates, in all probability letters of Marque did not even do that as corrupt officials may have issued letters of Marque for a fee, and often their behaviour was very similar. Not only would a ship carry a letter of Marque but also the way that a privateer conducted itself could be subject to rules laid down in the regulations of the letter of Marque. By overstepping these rules, the privateers could, at worst, be treated as pirates and executed, or at best lose all the prizes that they took to the original owners. An example of Special instructions for letters of Marque comes from 1637 in a declaration of Charles I that stated that “*noe violence shall be done to the persons of the french subjects, excepte in case of resistance. And after [their] blood hath byn spilled, the hurte or wounded shal be used with all convenient offices of humanity and kindness*” (Berckman 1979, 117).

In 1603 at the start of James I's reign, there was a sudden drop in the amount of letters of Marque issued, indeed it is possible that none were issued at all during his reign. He apparently totally refused to issue letters of Marque under any circumstances. As C.M. Senior has observed: “*James was a Scot with little appreciation of the concept of privateering, which to him seemed to be not far removed from piracy*”. There was, indeed, considerable support for such a view. The main aim of privateers - the acquisition of booty - was the same as that of pirates. The only difference between the two was that the privateer's depredations were supposed to be governed by the limits of his commission: in practice, however, many privateers acted no better than pirates, “*pursuing their booty at will and committing spoils which would never be justified by their commissions.*” (Senior 1976, 8).

In 1629, the adventurous Earl of Warwick was commanding privateers for profit. He was given a Special letter of Marque in this year “*to recover his losses against the King of Spain, his subjects, or the subjects of any prince or potentate which is not in league and enmity with us, or who shall not be during the said whole voyage*” (Kendall 1931, 64). This commission gives the Earl of Warwick an abnormally wide scope for a letter of Marque, especially a Special Commission, and it is undoubtedly his rank (he was Lord High Admiral at the time) and proximity to the King, that allowed him such comparatively unrestricted privateering. He was later to be involved with the construction of the first English ‘frigate’, which he helped finance and which had been copied from a French privateer, and was subsequently named “*The Constant Warwick*”, the money for which probably came from his privateering exploits. Had the Commission not come from such a high authority this episode might have been bordering on corruption.

Although James' reign ended in 1625, his doctrine concerning privateering seems to have held sway into Charles' reign, and despite the Earl of Warwick's ventures, it was not until 1634 that any real revival of privateering took place, and letters of Marque were issued against the French and Spanish.



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Although Charles Wye Kendall (1931, 65) states that both special and general commissions were issued, it is more likely that only special letters were issued. When one considers that peace had been made with Spain and France 4 and 5 years earlier, respectively (Cook & Wroughton 1980, 155).

But it is in this year (1634) that the important definition between letters of Marque and letters of reprisal is first made. From this point onward it was essential that the applicant for a Special letter of Marque had proof of loss, and as a result it became increasingly difficult to obtain such a licence (Kendall 1931, 65). It would not be until the restoration that obtaining a 'vendetta licence' would become common practice again. But in 1638 four years after this distinction had been made, English ships were being piratically taken to be used by the French Navy against the Spaniards, and as a result Special letters of Marque were issued against the Duke d'Espemon who had been conducting the thefts (NMM 1730, 56).

An Act of Parliament was passed in 1649 stating, once again, that those who had been wronged by foreign states should receive Special letters of Marque. However the act received little use and few letters were granted as a result. It was evident that this method of receiving compensation for private losses was receiving less attention than in the past (Kendall 1931, 68). The reason for this is perhaps that international law had produced a fairer system for dealing with compensation to those of another nation who claimed for damages.

By 1645 New England privateers were being issued letters of Marque, not from England but from their own General Councils, to privateers who would sail against the enemies of the New World, such as the Turkish pirates who had been disrupting New England trade. But letters of Marque were still being sent across the Atlantic upon the outbreak of wars. In 1653 four letters were sent to Boston due to the outbreak of the first Anglo-Dutch War, which was the result of the Navigations Act of 1651 (Kendall 1931, 77; Cook & Wroughton 1980, 155). By 1666 England was at war with Holland, France and Denmark. As a result English merchants trading with the Hanse towns wanted letters of Marque so that they could supplement their trade profits. The Admiralty decided to send a number of blank General letters of Marque for Sir William Swan, the Ambassador for England in Hamburg, to issue as he felt was required. In the next century, Sir Henry Penrice, Judge of the High Court of the Admiralty (1715 - 1751) opposed this practice and had it stopped.

In the same year it was decided that letters of Marque could be used for security in the payment of loans and in lieu of the payment of the King's 10th or 15th of prizes taken (NMM 1730, 66).

Commissions were often revoked when letters of Marque were misused. One such case in 1665 occurred when a number of English captains of ships tried to supplement their incomes by ransoming ships they had captured without bringing them into any port, and even did so to ships of nationalities

England was not at war with, and this was strictly against their instructions with their letters of

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Marque. This practice was doing the British authorities no good as far as international relations went, and it was in their interest to revoke the licences and proceed against the scandalous captains in the Admiralty Court. Captains could also be reprimanded and have commissions revoked for *'injust seizures'* and for showing cruelty to the crew of a captured vessel, which happened to a Captain Holman, for his seizure of a Swedish vessel in 1692 (NMM 1730, 7). The instructions that were to go with letters of Marque were issued by the King under his signet and were sent to the Lord High Admiral *"to be observed by such who have letters of Marque or Commissions for private men-of-war. During the war of the Quadruple Alliance with Spain" (1718-1720)* they ran thus (Cook & Stevenson 1988, 159):

1. *To take the Enemys ships and goods and other vessels and goods liable to confiscation, according to the treaties between England and other states, but to commit no hostilities within the harbours of Princes in amity nor in their rivers or roads within shot of their cannon.*
2. *To seize all ships of what nation so ever carrying contraband goods to the enemy.*
3. *To carry all prizes into some port of the King's dominions, to be adjudged in the admiralty's Courts; but in the Mediterranean they carry them into the ports of any prince in amity or alliance.*
4. *When a prize is brought into port, to send some of the principle company of the prize, whereof the master and pilot to be always two as likewise the ships papers to the judge of the admiralty to be examined.*
5. *The goods of the prize to be preserved 'till judgement is passed in the admiralty. Not to kill anybody in cold blood, nor treat them cruelly in forfeiture of the Commission.*
6. *Not to do or attempt anything against treaties or against the subjects of friends, but only against the enemy, and ships liable to confiscation.*
7. *After condemnation, they may disperse of these prizes as they think fit.*
8. *To aid and assist ships of subjects or allies in distress.*
9. *All adventurers conforming to these articles shall be under the King's protection.*
10. *Before taking out a commission, to deliver into the admiralty office or Court of Admiralty, a description of the shipowners etc. that the same may be registered in the Admiralty Court.*
11. *To correspond constantly with the Admiralty and give the secretary from time to time an account of their proceedings, and what Intelligence they learn of the enemy.*

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12. *Not to wear the King's Colours, but colours particular to letters of Marque, one third of their company to be landsmen.*

13. *To observe all such instructions that the King shall send them.*

14. *Such as violate these instructions, shall be punished, and make full satisfaction to all persons injured.*

15. *To give £3000 bail if the ship carries above 150 men; £1500 if a lesser number, to pay the tenths of the Lord High Admiral" (NMM 1730, 61-3).*

Prior to 1695 it was standard that one third of a ship's company should be landsmen. As to what was actually construed to be a landsman was, one would imagine, a fairly arbitrary matter, but presumably would represent any man who was not accustomed to life aboard a ship. In this year an order of council was made that stated that one half of landsmen should make up the crew of a privateer (NMM 1730, 66). This order stood well into the next century and, as C.W. Kendall has observed, "*strangely enough, does not appear to have diminished either seamanship or fighting powers of the privateers*" (Kendall 1931, 153). But on the other hand as one 18th century English admiral declared: "*No men fight so well as those which fight for a fortune*" (NMM 1726, 47), be they landsmen or seamen. There was, of course, an ulterior motive for putting forward so many landsmen for service, in one form or another, at sea. This was so that after the newcomers had been at sea for "*a voyage or two*", they would be "*fit for His Majesty's Service*" and could be pressed into a life aboard a man-of-war, rather than having the Navy's standards drop by pressing 'land lubbers' into service.

By the beginning of the 18th century, the Admiralty believed it was important that privateers should be able to be distinguished from men-of-war, despite the fact that privateers were often only armed with 20 or 30 light cannon, while men-of-war had as many as 100 large pieces. As a result in 1701 an article was added to the instructions to Governors of colonies, that stated that ships which have been granted commissions as privateers should "*wear a jack with a white escutcheon in the middle*" (NMM 1730, 72). No reason is given as to why this should be, but it seems probable that the division was made so that any privateers acting out of instructions or piratically could not be mistaken as men-of-war, and a slur made on the Royal Navy's good (?) name. Three years later this order was taken even further.

In 1704 an instruction was given to ships carrying letters of Marque not to wear the union jack when in the company of Royal Navy men-of-war, or when in the proximity of any foreign men-of-war, or when in part. The reason for this was to prevent the men-of-war thinking that the privateer was a

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Royal Navy ship and so saluting that vessel (NMM 1740, 72; Kendall 1931, 156-7). There must have been a few red faces when mistakes were made before this instruction was issued.

In 1706, during the war of the Spanish succession, commissions were granted to foreigners “*to cruise against the common enemy*” provided that they adhered to the limitations and instructions issued with the letters of Marque. It seems that all the help that could be mustered was needed at this time. By way of tightening its grip on privateering the government issued additional instructions in 1744 that threatened privateers with the revoking of their commissions if they should break any of the instructions whatsoever.

It is at the beginning of the 18th century that we see a new era of ‘privateering’ emerge. Perhaps it should not strictly be called privateering, and, I think, that ‘opportunism’ might be a better word for this branch of our studies. The trading vessels of the large shipping companies, such as the East and West India Companies, had always been encouraged to defend themselves against pirates and enemy privateers and men-of-war as we can see from some of the Acts of Parliament passed to prevent masters from ‘delivering up’ their ships to pirates and to encourage them to fight off enemies. It seems that this encouragement did not work particularly well and so it became standard practice for armed trading vessels to carry General letters of Marque (by this stage Special letters of Marque were not authorised or issued).

This is the view of Charles Wye Kendall (1931, 156) and Evelyn Berckman (1979, 113-7). But there is evidence that runs contrary to their observations. There is a paragraph in the 1730 manuscript of the National Maritime Museum (77) dated January 7 -February 17 1712, that is an extract from a letter of a certain Dr Bramston to a Mr Burchett that runs thus:

*“You are not to grant commissions of Marque or Reprisals against any prince or state or their subjects in amity with us to any person whatsoever, without our special command.”*

This would imply that Special letters of Marque were still being issued at this time, but that stricter controls were starting to be used in their granting.

The carrying of general letters of Marque seemed to work by encouraging the crew to deal effectively with pirates or privateers when attacked in the hope of a share of the prize. These ships however did not go out of their way to look for prizes and so cannot be called privateers, but as their captains held Letters of Marque- to prevent them from being treated as pirates - they are generally called “Letter of Marque ships”.

The letter of Marque continued to be used throughout the 18th century in the same manner as had been slowly established in the last century. Letter of Marque ships continued to cruise with an eye

open to the possibility of making a fortune by taking a rich prize, while privateers continued to cruise as predators. It was through the letter of Marque that the government was able to keep control of the privateers by issuing instructions and without a valid letter no privateer could legally take prize. In 1708 a statute was made that provided that the admiralty should issue out letters of Marque to any who should apply for one. This was a mistake, and continued to cause problems, by having neutrals attacked by British privateers until the privateers act was made in 1759, which recognised that there were problems with the smaller privateers, and so set out discretionary rules as to the size of privateers allowed, in this case they had to be over 100 tons carrying 10 guns, and have more than 40 crew members (32 George II) "*as long as the government was free to grant commissions, it was free to revoke them*". (Pares 1938, 46), and in this way the government was able to keep a tight grip on the events of privateering in the 18th century.

The letter of Marque has seen a long history, and it came to be viewed as the symbol of legality concerned with privateering. The letter remained important to the privateer until the 19th century as the line that drew the distinction between legality and piracy, and as a result the line between his profession and death on the gallows. As the 18th century progressed the rules issued with letters of Marque were made stricter and more confining, and the number of these commissions issued grew fewer and fewer. The Privateers Act of 1759 was instigated because of the many breaches of instructions which meant that neutral parties were being attacked, and recognised the need to show discretion in the issuing of these letters, and control was exercised by the Crown and the Admiralty to reduce the piratical attacks of neutral countries by offending privateers. Although privateering continued in a restricted form the heyday of British privateering had drawn to a close.

## **THE SPECIAL COMMISSION OF OYER AND TERMINER**

Prior to the Statute of the 28th year of Henry VIII (1537) those crimes committed upon the sea, or in the jurisdiction of the Admiralty, were tried in the High Court of the Admiralty in London, which was complementary to the course of the Civil Laws of England. As the amount of crimes committed, that fell into the hands of the admiralty increased, it became too much of a burden on the High Court of the Admiralty to deal with these crimes. After 1537 it was decreed that those crimes would be tried in the vice-admiralty courts under a Commission of Oyer and Terminer. This was a special commission given to Judges, and in this case the vice-admiralty judge, to deal with “*treasons, piracies, felonies, etc.*” as far as the admiralty was concerned those which were “*committed upon the sea, or in any haven, river, creek or place where the Admiral has jurisdiction*” (NMM 1730, 25). Four persons had to be present to make up a court to carry out a trial by Oyer and Terminer, and these could be made up from the Lords of the Admiralty, the members of the Privy Council, the Chancellor of the Admiralty and the judges, the Lords of the Treasury and Commissioners of the Navy, the Aldermen of London and doctors of the Civil Law. These were all members of the Commission and any four of them made up a Court. A jury would have been summoned as well from the surrounding towns and ports of the county, by the Sheriff, to sit at the hearings. These trials were usually held on the county basis or within the jurisdiction of the vice-admiralty. The commissions were apparently handed out to all the counties of England to the judges that “go the circuit”, that is, travel around the different towns in their jurisdiction to hold trials, under the commission of Oyer and Terminer.

Since 1537 it had been standard practice to bring those committing piracy back to England to be tried, but as this had proved costly and troublesome, a statute was passed in Parliament in the 11th and 12th year of William III (1699) entitled “*an act for the more effectual suppression of piracy*”. This act stated that all piracies felonies and robberies in places remote to England (i.e. the Colonies) could be tried in any place either at sea or on the land “*in any of His Majesty’s islands, plantations, dominions, forts or factories, to be appointed for that purpose by the King’s Commission under the great or Admiralty Seal.*” This Court could be held by “*any Admirals, Judges of Vice-Admiralties or commanders of ships of war or any other persons whom the King shall appoint*” and “*Commissioners shall have full power, or any one of them, to commit to safe custody any person against whom information shall be given upon oath and to call and assemble a Court of Admiralty, which shall consist of seven persons at least.*” If seven such persons could not be found then three commissioners could assemble persons of their choosing to make up the numbers. (NMM 1700, B1013). It was stated in the Act that “*due to the cost of bringing them (pirates) to justice their numbers have recently increased.*” Trade and navigation in the East and West Indies tended to suffer when piracy got out of hand and this act was an attempt to deal with troublemakers on the spot. It is interesting that the

## THE SPECIAL COMMISSION OF OYER AND TERMINER

Statute of 1537 indicates the crimes as “*Treasons, felonies, robberies, murders and confederacies*” while the 1699 Act states only “*piracies, felonies and robberies*”, presumably even by the later Statute this would mean that treason, homicide and confederacies would have to have been tried in England.

It seems that in crimes other than piracy, the Special Commission of Oyer and Terminer was used only in exceptional cases, such as exemplary hangings or trials to deter other criminals from following in the footsteps of their comrades. For example, this method was used to suppress the peasants’ revolt in 1381 (Bellamy 1773, 95) and indicates that local Justices cannot deal with such situations where it is used. It was also used for dangerous offences, and piracy presumably comes into this category. The Commission was often petitioned for by Gentlemen, in counties where popular criminals (Highwaymen, Smugglers and perhaps even Pirates?) were getting out of hand and “*verged on insurrection against their authority*” (Hay *et al.* 1975, 31). From this evidence it would seem that piracy was taken seriously enough to have this special commission used against it all the time, not only when it got out of hand. As to whether or not it was an effective weapon against piracy it is difficult to say, but there is little doubt that many pirates were hung after trial by Oyer and Terminer.

## A PUNISHMENT TO FIT THE CRIME

Piracy was a capital offence during the 17th and 18th centuries, and hanging was the usual method of ridding society of these detested criminals. But the gallows were by no means the only method by which pirates were executed. There were a number of gruesome methods that were used in executions, which ranged from *peine forte et dure* (pressed to death) to being drowned. If pirates were lucky they might have got away with being publicly whipped or flogged, and some pirates even managed to get away scot-free due to surprising clemency during their trials. Straight piracy was usually followed by whipping, imprisonment or hanging, but with piracy complicated by murder, violence or cruelty, the sentence was invariably death. Pirates were able to get away without punishment if the jury could not come to a decision or if there was not enough evidence to substantiate a conviction (Berckman 1979, 36-52).

There were a number of areas where the hanging of pirates took place, and these are usually in the very heart of where the sailors stayed when on land, such as near wharfs and docks, and lining the banks of ports. Hanged pirates were sketched by the famous, cartoonist Thomas Rowlandson in the Docklands of East London, the Isle of Dogs (Hay 1975, 644-5) and the Wapping and Southwark banks of the Thames were renowned for their public hangings and one dock at Wapping carried the name "Execution Dock". (Senior 1976, 104). Most hangings were treated as public spectacles, especially in the larger cities such as London, Manchester and Edinburgh, which served to deter other criminals from committing crimes by showing the pointlessness of breaking the King's laws and the state flexed its muscles in a display of staged inhumanity. The condemned man was usually allowed to make a last speech to the crowd that would have assembled to watch the event, which the authorities hoped would be a confession and denunciation or the criminal's evil ways while he warned any would be pirate to steer clear of robbery at sea. Because these executions were done on an essentially local nature, that is seamen were hanged at docks and wharfs, while housebreakers were hanged in urban areas and highwaymen were strung up along the roads - it was hoped that they would have a strong social effect on the local community and act as a "*spectacular reminder of the power of the State*" (Sharp 1983, 142). One such execution of a sea-surgeon, although not for piracy, demonstrates that the social effect can be quite effective when "some thousands of sorrowful spectators" turned up for his execution and he denounced his sinful way of life and gave a moral warning to those gathered there (*the true narrative of the Execution of John Marketman, Chyrurgian, of Westham in the County of Essex, for committing a horrible and bloody Murder* (1680, 3-4). Hanging was by far the most widely used method of execution during the 17th and 18th centuries in England but there is another method that needs mentioning (Beckman 1979, 53).

*Peine Forte et Dure* must surely have been a worse fate than the gallows. This method of execution involved being pressed to death. Luckily, this technique was reserved almost exclusively for those defendants that refused to plead one way or the other. What is puzzling is that they surely must have



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known what fate would be in store for them if they did not plead, and yet they chose to endure a painful and slow death, rather than the comparative swiftness of hanging, presumably out of “principle”.

There are a number of cases in the High Court of Admiralty (HCA) records where defendants accused of piracy refused to plead one way or the other. An example of the sentence to be passed on two pirates, Philip Ward and William Harvy, captured by a renowned pursuer of pirates, Charles, Earl of Nottingham, in 1605. Few of Charles’ victims got away after a court hearing:

*“for piratical depredations, spoil, rapine and murder of Nicholas Zouch and William Pope, Merchants: a hole shall be dug in which their (Harvy and Ward) respective bodies shall lie naked and shall be weighed down with stones and as heavy as can be. And while they live they may have the worst bread and water of that prison, neither clean nor running. And on the day they drink they may not eat, and on the day they eat they may not drink”* (HCA 1-5-75). No doubt many confessions were brought about in this manner.

After the accession of James Stuart there seems to have been a gradual trend in English law that made capital punishment more selective, so that criminals convicted of capital crime were increasingly being given corporal punishments, two of the most numerous of which were whipping and branding. It seems evident that the death penalty was used in cases where discretion on behalf of the judges deemed it necessary, either to be used on “*appropriate occasions, or inflicted on what were felt to be appropriate criminals: the majority of those convicted for capital offences were, in fact, escaping with lesser penalties*” (Sharpe 1983, 144). It is difficult to know why there is a “post-Elizabethan” leniency toward capital offences, but it is possible that the legal fraternity became aware that a harsh policy toward the common people and the excessive use of capital punishment might have been ‘counterproductive’. It is not known to what extent this affected the convictions of pirates, but there were several instances in the 17th and 18th centuries where pardons were given to pirates collectively, on the pretext that they would give themselves up: “*sometimes it is practised in England and other countries to issue out proclamations allowing 12 or 18 months time to their subjects (pirates) to come in and receive pardon. The French did so in 1719*” (NMM 1730, 11).

One of the most interesting features of the law courts up until 1705 was the concept of ‘Benefit of Clergy’. This was a method by which many criminals escaped the death penalty up until the loophole was blocked off. It had stemmed from an ancient form of ecclesiastical privilege during the 12th century struggle between the Church and the State, out of which developed the right of the Church to try clerks accused of felony. When this right was extended to secular clerks in 1350 the initial test of clerical status was rendered invalid, and from that point onward benefit of clergy was extended to the

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public, and as proof of clerical status, the ability to read was adopted (Sharpe 1983, 24). This meant that if the defendant could prove that he could read, usually by quoting a passage from the Old Testament, he could very often reduce his punishment from capital to corporal, so instead of being hung he would perhaps be branded or “*openly whipped on their backs till their bodies bee bloody*” (P.R.O. ASSI 35/96/1/1). This system was in use until an Act of 1706 (5 Anne C.6), which abolished the literacy test (McLynn 1989, xi).

One would have thought, therefore that there must have been a number of pirates that would have escaped the death penalty, especially when one considers that approximately 75% of merchant seamen were literate (Rediker 1987, 307). However when one examines the Statutes further, they show that the law courts were not going to let so contemptuous a criminal get away so lightly. An Act dated 1649, entitled “*an act for the punishment of crimes committed upon the sea*” (NMM 1649, E555), clearly states: “*and any such person or persons so found guilty of any crime or crimes aforesaid by verdict, confession or process, shall without allowance of benefit of clergy suffer such punishment by pains of death.*”

So pirates were exempt from this privilege, and, indeed, there was a whole list of crimes such as highway robbery, which were either originally “non-clergyable” or had been made “non-clergyable”. This shows a certain loathing of piracy among the established classes in Britain, while piracy remained, during certain periods, a “popular” crime, (i.e. it appealed to the public and was usually aimed against the rich) and yet the courts showed leniency toward crimes such as rape. There were obviously some strange attitudes towards morality during this period of history.

As the punishment and pressure against piracy was stepped up in the 18th century it had a rather negative effect and turned out to be counter-productive for a while. The bitter struggle against the pirates made them only more anti-establishment. Robert C. Ritchie (1986, 18) sums up their retaliation well:

*“In turn the pirates became more fiercely antisocial. They refused to take married men into the crew, they tortured all captured captains and merchants, unless the crew vouched for them as good men (any harsh captain was killed), and they changed the traditional bloody, or red, flag, for flags displaying skulls, bones, symbols of passing time, and weapons. The skull and crossbones was particularly significant because it was usually displayed to indicate that a death had occurred on board. The pirates were prepared to wage a bitter and bloody struggle against the societies that had rejected them”.*

## INTERNATIONAL TREATIES

During the 17th and 18th centuries there were a number of treaties made, between Britain and other neighbouring countries, which concerned piracy in one way or another, either directly or indirectly. These were made for a number of reasons, which could be that the pirates of one country could have been affecting the trade of another, or it could have been a mutual effort on behalf of the two countries to rid the seas of pirates and to “*give them no quarter*”. One such treaty was made on 29 August, 1610, entitled “*A Treaty of Alliance between great Britain and France, concluded in London*”, between James I and Louis XIII. It starts off by reconfirming past treaties still in force at that time and states that the new treaty “*is not meant in any sort to depart from the preceding treaties and alliances*” (Admiralty 1803, 6; Cook & Wroughton 1980, 160). There are a number of Articles within this treaty that deal with aspects of piracy that were believed to be having an adverse effect on the two countries’ trade, and to restore a “*Safe and free commerce*”. Article XXXIII ran thus:

*“That all the goods which shall be taken by the captains, and other officers of the one or the other prince, from pirates, shall be brought respectively to some port of the one or other Kingdom, and there put under good and safe custody of the admiral, vice-admiral, or other officers of the said ports; which officers shall be bound to answer for the said goods in their own name.”* and in this way these goods of the Navies of both France or Britain could be reclaimed by the said country. But the next Article takes this even further:

*“That all goods which shall be thus taken and recovered from pirates, whether they are in gold or silver money, or other merchandises appertaining to the subjects of either of the said Kings, shall be rendered and restored to the true owners and proprietors without any delay, they having first made legal proof of the property thereof”*

Thereby if a British merchant had lost goods and could prove that they were his property he could claim those goods back even if they were in a French port; and *vice versa*. Presumably this treaty would have held good until after James I’s death when a shipping dispute broke out in April 1626 and precipitated a war with France (Cook & Wroughton 1980, 155). This was carried on until 1629 when a treaty of peace was signed at Susa between Charles I and Louis XIII, that vowed to “*inviolably*” preserve the “*ancient alliances between the two crowns and open a safe and free commerce*” (Admiralty 1803, 7; Cook & Wroughton 1980, 161).

While England was under the control of Cromwell’s Commonwealth, a treaty was made, again with France in November 1655. Entitled “*Treaty of Peace between Oliver Cromwell, Protector of the Republic of England, and the King of France, concluded at Westminster*”. It was concerned primarily with the conduct of prize-ships and stated that the sea-commanders of either party were not

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to damage the ships and merchandises of the other. This could have been due to the supports of the Monarchy having established themselves along the coastline of Europe, including France, and were sending out privateers or pirates to attack Commonwealth ships, while in retaliation those Commonwealth ships were mistakenly attacking French merchant and naval shipping. But the most important passage, as far as we are concerned, comes from Article XIX and states “*that neither of the Confederates shall receive any pirates or robbers into any of their ports, havens, cities or towns; nor shall they permit them to be received by any people or inhabitants, or to be harboured, assisted, or supplied; but shall use their endeavours, that such pirates and robbers, and their piratical accomplices, partners and assistants, shall be pursued, apprehended, and duly punished, for a terror to others*” (Admiralty 1803, 15). The article goes on to say, in a rather lengthy manner, that ships and merchandise piratically taken were to be restored.

This treaty is related to a letter (NMM 1649, 603/3) of 14 August 1649 from one John Bradshawe, who was at that time Chancellor of the Duchy of Lancaster (Cook & Wroughton 1980, 16) and apparently president of the Council of State, addressed to a certain Coll. Popham who appears to have been one of the first lords of the Admiralty from February 1649 to July 1660 (Cook & Wroughton 1980, 15). The letter informs Popham of the loss of British shipping that is taking place in the North Sea due to “pyratts” putting out from Ostend, and the ports of Flanders. Bradshaw required Popham to “*give order to two such ships that you shall judge fit for that service to ply off and on upon the Coast of Flanders to prevent the coming out of those pyratts, or else intercept them when they retorne thither with their prizes.*” Bradshaw goes on to tell Popham that this service will be a “*greate security to the ordinary trade between this place and Flanders.*” In all probability, these “pyratts” that Bradshaw mentions are in fact privateers commissioned by the executed king’s son, later to become Charles II, or his supporters to harass the trade of the Commonwealth. It is known that Cromwell made little use of the Navy to curb illegal trade and pirates and as a result the commerce of England suffered during the days of the interregnum, and French (and Netherlands) privateers, especially from Dunkirk, harassed the trade and navigation of Britain. It seems that Popham’s efforts to deter or ‘intercept’ the Ostend privateers had little effect and as a result, six years later, England had to make a treaty (1655) with France to help lessen the strain they were having on British shipping.

In May 1667 a treaty of peace and friendship was concluded at Madrid, in which it stated in Article XIII “*it shall be lawful for ships of either Confederate...to enter into any neighbouring port....being forced by stress of weather or danger of pirates....Provided she is not bound for an enemies port with ...Contraband*” (Admiralty 1803, 115).

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During the reign of James II another treaty of peace was made with France in November 1686 (Admiralty 1803, 31). It had the usual “neither party to molest the other” type of theme to it, but was also concerned with either side’s privateers, and indeed, pirates. Article XII stated that if the other party’s men-of-war or privateers damaged the goods of the other nation “*they shall be punished, and be moreover compelled to satisfy all costs and damages.*” Article XIV went on to state that both kings should “*give no assistance or protection to any pirates, of whatever nation they are, nor suffer them to have any retreats in the roads or ports of the respective governments.*” In Article XV was a clause concerning the Colonies, and this stated that “*No subjects of either king shall apply for or take any commission or letters of mart for arming any ship or ships to act as privateers in America, whether Northern or Southern, from any prince or state, with which the other shall be at war; and if any person shall take such letters of mart, he shall be punished as a pirate*”. This basically stated that any help given to either the enemies of France or England by the other signatory was a breach of treaty and so the offending ship’s crews could be tried as pirates. As a result, governments exercised a little more discretion in the issuing of commissions to privateers.

In 1713 perhaps the most important treaty of this period was signed. It was the treaty of Utrecht signed by Britain, France and Spain and the Netherlands. The French ceded Newfoundland, Nova Scotia, St Kitts and the Hudson Bay territory to England, and undertook to demolish the fortifications at Dunkirk, also they recognised the Protestant Succession, and agreed not to help the Stuarts (Cook & Stevenson 1988, 157). This new peace had the effect of allowing moves to discourage piracy by instigating civil government in the Bahamas and renewing the commissions for the trial of pirates (Steele 1968, 157). A new concerted effort by the Navy, especially in the Caribbean after the Treaty of Utrecht led to a lessening of piracy, as each war (in the past) had been followed by a new outbreak, which was in fact the privateers returning to their peace-time profession (Pares 1938, 434). Another rash of piracy was expected at the end of the War of the Austrian Succession (1739 - 1748) but the efforts by the Board of Trade and the Navy, coupled with the long peace that had followed the war of the Spanish Succession (1718 - 1720) had succeeded in reducing much of the piracy that had been endemic for so long.

## CONCLUSION

So now we have seen various aspects of law during the 17th and 18th centuries, what conclusions can we come to? We have seen that the law responded to both privateering and piracy while being governed by the different political attitudes during this period.

Piracy went through periods of popular appeal and disinterest, so that one era's hero, while being hanged at Wapping, might not have the least bit of attention paid to him a few years after "his time". The Government's view toward piracy also changed and for almost a century any attempts against it were half hearted and mostly ineffective. It was not until the end of the 17th century when the problem was getting out of hand that real efforts were made. The Government sent spies, such as Edward Randolph to the Colonies to report on the activities of pirates and privateers (NMM 1696, GOS/9). In his report he added a number of "*remedies for Suppressing Pyrates*". As his very first remedy he proposed "*that no person be made Governor in any of the proprietaries, until he be first approv'd of by his Majesties order in Council, as by this act for preventing frauds and Regulating abuses in the Plantation Trade.*" This would imply that there was widespread corruption amongst the governors of the colonies. The third remedy for suppressing pirates ran:

*"That all encouragement be given to discover what Money or Jewells etc has at any time bin given to any of the Governors or their Confidants in the plantations either by pyrates or by their agents..."* (NMM 1696, GOS/9). This makes it clear that there was good money to be made by Governors to supplement their income if they would turn a blind eye to piracy and perhaps even protect pirates from the Navy and the law. Presumably many pirates of the period received letters of Marque from their corrupt Governors that should not have been issued, so that they could pass as privateers if stopped, but considering the pirates probably used them out of their bounds and instructions, and did not declare prize, they cannot have been of much use to them.

Indeed Randolph is supposed to have "*complained to the home government that there were seldom less than four pirates on the Council at New Providence, and the Council of trade and plantations received notice that a member of the Bermuda Council had once been a fiddler aboard a pirate ship*" (Burg 1983, 99). How could the government use the law to concentrate on removing pirates from the seas when the foundation itself that the law rested on in the Colonies was corrupt? The answer is, with difficulty. Many writers in the past have concentrated on the Navy and the Board of Trade (for helping pass a number of Statutes) as the reason for the reduction of piracy in the 18th century, and they are right. But they have omitted to mention that those methods could only have become effective once corruption had ceased to continue in the Councils and Governorships of the Colonies, perhaps as a result of the suggestions made by Edward Randolph.

This must have been a gradual process and it was only as a result of the government of Britain becoming aware that there was a problem with corruption. While loyal Governors such as Thomas

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Lynch, Governor of Jamaica, strove to prevent piracy from hindering the trade and navigation of his colony by sending out ships of war against the offenders (NMM 1682, 605 5-6), it would have done little good had corrupt members of his Committee warned pirates or their associates about any impending action against them.

We have seen some form of corruption in almost every aspect of our studies, so although we can chart the evolution of the law in dealing with Piracy, it is my belief that it only became really effective, either by use of laws and statutes, or the use of force by the Navy or Armed Merchants in protecting themselves, when corruption had been beaten out of the British Colonial administrative system, at the beginning of the 18th century.

Privateering on the other hand was in a different category. It was not prone to corruption like piracy, quite simply because if they worked outside the law, any prize they had captured might be forfeited and, worse still, they may have been executed as pirates. Privateering could be a lucrative occupation when played by the rules, if not it could degenerate into piracy. We have seen that the role of privateers was not far removed from that of pirates and the boundary that divided the two was a thin one:

*“Between them (privateers) and Piracy lay their Commissions or letters of Marque, but when the authority of those Commissions was questioned, or when the privateer smen acted outside the limits of their Commissions, they easily slipped into the Pirates’ ranks”* (Maier 1980, 59-60).

As a result, there evolved many complicated instructions, laws, statutes and rules that were meant to keep the privateer in check and to stop them from collectively irreparably damaging a country’s reputation by acting outside their Commissions. These laws that governed the use of privateers are important in that they shift and alter according to the political and social climates of the time. At certain stages privateers were looked on solely as another group of loot seeking pirates, as is reflected in a letter of Governor Lynch which tells of a certain Captain John Coxon, who, while his ship and crew were in Honduras loading logwood *“was in danger of loosing his life and ship, his men designing to kill him and go a privateering with his ship”* (NMM 1682, 605/5-6). Had they done so, surely they would have been guilty, not only of mutiny, but of the piratical stealing of the ship, and without a letter of Marque, what Mr. Lynch glibly passes off as *“privateering”* would be none other than piracy in the first degree.

However it was recognised that privateering was an important asset to the State. As I have suggested earlier it was a method welcomed by Governments, merchants and those seeking a fortune while escaping the ordeals of Navy life. It increased the sea power of Britain, without burdening the national budget as all the finance came from private enterprise (Mrs. Thatcher would welcome

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privateering in the event of another war!). Yet the laws that governed it reflect a marked change of attitude toward it around the turn of the century (1700). They show a growing lack of tolerance toward privateering, while earlier on letters of Marque were handed out almost two a penny. A few years later and strict controls were being used in the issuing of commissions, and fewer and fewer were being given out. The reason for this could be that there was growing contempt from a growing Navy. The Navy (especially the officers) had always regarded the actions of privateers as stealing their rightful prize. And as the Navy grew in the late 17th/early 18th century, there was less and less space on the seas for the privateers to make a living from. Politicians too, saw little point of, what they viewed as half legal rogues roaming the seas, when the Navy could now do its job of keeping the seas free of aggressive foreigners, since its size had increased dramatically. But this decrease in privateers reflects an increase in the power of the State, although private war ships were relied upon in times of war into the 19th century. The reduction in privateering is also an important point when discussing the reduction of piracy. Fewer privateers in time of war simply meant fewer pirates in time of peace, and there seems little documentary evidence to suggest that the authorities of the time realised that this war and peace changeover existed to such an extent. So we can, to a certain extent, see that piracy and privateering were two sides of the same coin, which could be flipped according to the political circumstances.

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NMM = National Maritime Museum  
PRO = Public Records Office

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