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Loyola Law School, State Secrets, the American Revolution, the War of 1812: The Maritime Connections of the Middle Temple

Allen Shoenberger*

Although few Loyolan's are aware of it, Loyola Law School's first dean was a member of the Middle Temple Inn of Court of London, England. That temple, one of four London Inns of Court,¹ figures prominently in the history of the Americas, the American Revolution and the war of 1812. Indeed, five Middle Templars signed the Declaration of Independence, and seven signed the United States Constitution.²

Each year for the last 23, Associate Dean James Faught has led a group of law students to London on Loyola's Comparative Advocacy program, which commences with several days of meetings held in the Middle Temple.³

In the halls of the Middle Temple three large oil paintings depict great figures of Maritime History: Sir Francis Drake, Sir Walter Raleigh, and Sir William Scott (later Lord Stowell). The first two are familiar acquaintances of most Americans, the latter, Sir William Scott, a less well known figure. As discussed below, Chief Judge Scott headed the High Court of Admiralty during much of the Napoleonic Wars and also the War of 1812. Each of these figures will be discussed below.

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¹The Inns of Court train barristers who present cases in the courts of the United Kingdom. Such barristers have a high reputation for oral advocacy, which in the end is the power to persuade people, not only jurors but as we shall see Monarchs as well. Queen Elizabeth I figures prominently in the history of the Middle Temple. On its construction a great log was floated down from her palace to the Middle Temple to be cut into boards from which the great high table was made that sits in the great hall. It is in that hall that Queen Elizabeth heard the first performance of Shakespeare's Twelfth Night.

²Richard O. Havery, *History of the Middle Temple*, xxv (2011). The signatories to the Declaration of Independence were Edward Rutledge, Thomas Heyward, Thomas McKean, Thomas Lynch, and Arthur Middleton. Havery, 251, n. 57. (A member of the Inner Temple also signed it, William Pace.) The seven who signed the Constitution include William Livingston, John Blair, John Dickenson, John Rutledge, Cotesworth Pinckney, Jared Ingersoll, and Charles Pinckney. Havery, 1258. The first Continental Congress in 1774 was chaired by a Middle Templar, Peyton Randolph of Virginia, as President. Havery, 249. So was the last President of the Continental Congress, Cyrus Griffin of Virginia. Havery 249.

³Except for the first, I have been present at each of these programs.

Towards the front of the great hall in the Middle Temple is a table made out of a hatch of the Golden Hind. On the Golden Hind Drake circumnavigated the world after raiding the Spanish Main. Estimates of the value of the plunder from this voyage range as high as £500 million in today's value.⁴ On that "Golden Hind table," each person initiated into membership of the Middle Temple subscribes his or her name.⁵ What is uncertain is whether Sir Francis Drake himself ever became a member of the Middle Temple, even in an *honoris causa* nature. History does record that the Middle Temple was his favorite Inn of Court, and also that he was feted in a great banquet in that Inn in 1586.⁶ Sir Walter Raleigh was indeed a member of the Middle Temple, and it is quite possible that the favoritism displayed by Drake towards the Middle Temple reflected his appreciation of the nature of the fellow world explorers gathered by Sir Walter Raleigh in a house not far removed from the Middle Temple.⁷

Whatever the cause, two other mementos of Drake's circumnavigation cruise are on display in the Middle Temple. One is a replica of a ship's lantern from the Golden Hind. This lantern might indeed have been the lantern Drake turned off in a successful attempt to lure a Spanish ship into his ship's reach during a nighttime raid. The original lantern was destroyed by bombing during WWII as was much of the Middle Temple.⁸ The Middle Temple's restoration owes much to contributions from the American Bar Association.

The second memento is a world globe dating back to 1592.⁹ This globe reflects the orders of Elizabeth I to keep as a state secret the details of Drake's navigation of the northwest coast of the North American continent. Rather like soviet era road maps of Russia that deliberately misrepresented the location of roads and cities for purposes of secrecy, this 1592 globe shows the northwest coast of the United States about 1500 miles west of its actual location, and fails to show the islands off the northern reach of that coast. An earlier 1591 version of the globe was presented to Queen Elizabeth, but she had it draped with a cover reaching to the floor to conceal the nature of Drake's discoveries.¹⁰ That earlier globe was quite accurate for its time in depicting the western coast of North America, including the islands that stretch north along the coast. Loyola law students are thrilled to

⁴S. Bawlf, *The Secret Voyage of Sir Francis Drake, 1577-1580*, 191(2003).

⁵Loyola students on our Inns of Court program are thrilled to touch this historic piece of history.

⁶Richard Hill, *The Maritime Connection*, in Havery, *supra*, note 2, at 112.

⁷*Id.* at 114.

⁸*Id.* at 113.

⁹*Id.* at 125.

¹⁰These globes were made by a famous globemaker, Emery Molyneux. Molyneux was the first English globemaker and these were the first globes made in England.

be privy to such a “state secret.” Among other items of nautical importance discovered by Drake is the nature of the prevailing winds off of the west coast of South America.¹¹ In the far south, the prevailing winds are southward along the coast. A couple of hundred miles to the west, however, the winds blow northward. In the era of wind powered ships this was very important information indeed.

Why did Queen Elizabeth I order such information, and indeed, all detailed information about Drake’s voyage kept secret? One of the most important parts of his voyage was an attempt to discover a northwest passage around the North American continent back toward Europe. Drake discovered Puget Sound and sent expeditions well inland along the extensive waterways.¹² Obviously he failed to locate such a passage, but in doing so his expedition gathered quite important geographical information including information about the Island he claimed for England and named *Novo Albion*.¹³ Such expeditions in search of trade routes were of vital importance in the world wide competition with Spain, Portugal, and France for new trade routes to the spice islands and other sources of treasure.

When Drake returned from his circumnavigation that took three years, he was uncertain of his standing with the Queen. During that time had a rapprochement occurred between England and Spain. If so, he might be condemned as a pirate and hanged for his effort. Instead of landing in England, he put into port somewhere near La Rochelle, France (and apparently offloaded a considerable portion of the treasure so that it could be shipped surreptitiously to England). After several months, learning it was safe to return, he did so. The Queen permitted him to keep 10,000 pounds of his booty for himself, the ship’s crew split 16,000 pounds among themselves, and the backers of the voyage received 46 pounds for every pound they had advanced.¹⁴ However, Drake expended enormous amounts of money purchasing a great landed estate, and most of the center of a small town (18 commercial buildings, included), so he certainly had far more treasure than he declared to the Queen!

Drake was knighted by the Queen while the *Golden Hind* was moored in the *Thames* at the docks constructed by Henry VIII. At that knighting it is reported that the Queen mused, perhaps she should cut off his head, but then she handed the sword to the French Ambassador for him to administer the ritual taps on the shoulders. This gesture was interpreted of a sign of affec-

¹¹Bawlf, *supra* note 4, at 276.

¹²Bawlf, *supra* note 4, 267 – 291.

¹³*Albion* is an ancient word for England.

¹⁴If one considers that an annual wage for the captain of a British man of war during the Napoleonic wars was only 40 pounds annually, these were enormous sums.

tion for the French government. After the knighting, it is reported Drake threw a great banquet for the Queen and others, a banquet the like of which had not been seen since the days of Henry VIII!¹⁵

Sir Walter Raleigh was a member of the Middle Temple, although it seems clear he never intended to practice law. His interests included exploration and potential settlements of land on behalf of England in the new world. One attempt at settlement of Roanoke Island failed; the surviving settlers were taken back to England by Drake in 1586.¹⁶ Drake was then returning from another raid of Spanish interests in South America and put into the colony because he had heard rumors that Spain was planning to attack the settlement. The next settlement attempt Raleigh organized, which once again landed on Roanoke Island, ended with the disappearance of all the settlers (1590). The only explanation left was the single word CROATOAN carved in the ruins of the colony.¹⁷ The nearby island of Croatoan was occupied by Indians who the settlers had attempted to befriend. Thus, the fate of the first child born to an Englishwoman in the New World, Virginia Dare, is unknown.¹⁸

Despite these setbacks, Raleigh persisted through advocacy, but the torch for exploration passed to other members of the Middle Temple, including Sir Martin Frobisher, Sir Thomas Norris and Sir Francis Vere, all of whom were admitted to the Middle Temple *honoris causa*.¹⁹ Frobisher had become famous for his attempts to discover the North West passage, and also had been a Vice Admiral in the fleet launched against the Spanish Armada. In 1594, Sir John Hawkins was admitted to the Middle Temple, *honoris causa*.²⁰ Hawkins was also a famous explorer and continued as the Treasurer of the Navy (he had already held this post for 15 years).²¹ Francis Drake had served as a captain under Hawkins in an expedition in 1568.²² That voyage involved the first transport of slaves by an English ship to the new world, nearly 450 men, women and children from the west coast of Africa.²³ This was the third voyage by Raleigh to the New World in connection with the Hawkins brothers.

Although Raleigh had been given considerable property while he was in favor with Queen Elizabeth, including a bishop's mansion, Durham House,

¹⁵Bawlf, *supra* note 4, at 195-196.

¹⁶*Id.* at 219-220.

¹⁷Hill, in Havery, *supra* note 2, at 122.

¹⁸*Id.* 122-123.

¹⁹*Id.* 123.

²⁰*Id.* 123.

²¹*Id.* 123.

²²Bawlf, *supra* note 4 at 12.

²³*Id.*

near the Strand and the Middle Temple, and despite his privateering riches, towards the end of the century his wealth substantially decreased. He lost £40,000 on the last failed expedition to the New World.²⁴ His secret marriage to a lady in waiting displeased the Queen, and she had both Raleigh and his wife confined to the Tower.²⁵ Although he eventually returned to favor with Queen Elizabeth I, his fortunes did not significantly recover. The new King James I had Raleigh tried on a charge of treason, and after a scandalous trial, he was condemned to death.²⁶ However, the death sentence was not immediately carried out: Raleigh was instead confined to the Tower.²⁷ In the Tower he continued his research and correspondence regarding exploration and settlement of the New World. Eventually he was released and sent off on another expedition seeking plunder from the New World. That expedition, largely self financed, however, was a failure.²⁸ Instead of seeking asylum in France, he returned to London and his fate. Despite a pardon from the King of Spain from execution in Madrid, the tainted English death sentence from 1603 was finally administered on October 29, 1617.²⁹

Sir William Scott was for thirty years the Chief Judge of the High Court of Admiralty. It was his decision in the case *The Fox*,³⁰ that determined that the Order in Council decreeing a blockade for all of continental Europe,

²⁴Sir Walter Raleigh, Knight, [http://www.tudorplace.com.ar/Bios/WalterRaleigh\(Sir\).htm](http://www.tudorplace.com.ar/Bios/WalterRaleigh(Sir).htm),

²⁵Id.

²⁶Hill in Havery, *supra*, note 2, 130-131.

²⁷Id. 130-131.

²⁸Id. 134-137.

²⁹Sir Walter Raleigh, *supra*, note. 24.

³⁰*The Fox* (British High Court of Admiralty). (1811) 165 Eng. Rep. 1121, 1121 (Adm.). In 1811, in *The Fox*, Sir William Scott ... (stated) "What would be the duty of the Court under Orders in Council that were repugnant to the law of nations?" He began by observing "that this Court is bound to administer the law of nations to the subjects of other countries in the different relations in which they may be placed towards this country and its government." "At the same time," he continued, "it is strictly true, that by the constitution of this country, the King in Council possesses legislative rights over this Court, and has power to issue orders and instructions which it is bound to obey and enforce; and these constitute the written law of this Court." A judicial practice operated to avoid conflict between "these two propositions, that the Court is bound to administer the law of nations, and that it is bound to enforce the King's Orders in Council": specifically, that "these orders and instructions are presumed to conform themselves, under the given circumstances, to the principles of its unwritten law."

Scott would not indulge the hypothetical question of what rule of decision a court should apply if the written law of England plainly did not conform to the law of nations in a given case. "This Court will not let itself loose into speculations as to what would be its duty under such an emergency, because it cannot without extreme indecency, presume that any such emergency will happen." Indeed, he answered this question as he expected a common law court would respond if asked to enforce an act of Parliament that contradicted "principles of natural reason and justice." This "is a question which I presume they would not entertain a priori, because they will not entertain a priori the supposition that any such will arise." "Bellia & Clark, *THE FEDERAL COMMON LAW OF NATIONS*, 109 Colum. L. Rev. 1, 25-26 (2009) (footnotes omitted).

In effect, Scott rejected the Judicial Review principle of *Marbury v. Madison*, for no written constitution constrains the British government.

although it almost assuredly violated the Law of Nations, was justified by “the extraordinary deviation from the common exercise of hostility in the conduct of the enemy.” In effect, his decision in *The Fox*, predated the extraordinary overreaction to 911 by several centuries. Scott justified unlawful action against neutral states such as the United States. This system directly contributed to the War of 1812, a war unfortunately fought in the absence of knowledge that the offending orders in council had been repealed in June, 1812.

Sir William Scott joined the Middle Temple as a 17 year old in 1762.³¹ He then obtained a doctorate in law from Oxford University in 1779, and was called to the bar in 1780.³² His practice was in the Admiralty Courts. Practitioners in these courts were described as “civilians” because the law they practiced was civil law, not the common law. When he went into practice, there was a great deal of admiralty business, largely prize cases, many involving the American Revolutionary War. Scott was the only significant member of this admiralty practice from the Middle Temple, and perhaps partially because of that, he was appointed a judge in the High Court of Admiralty in 1798.³³

Scott was a meticulous judge, authoring many learned decisions regarding admiralty law. His excellent written decisions (an unusual practice for the English courts of the time), were frequently relied upon by Justice Story of the American Supreme Court for admiralty law issues.³⁴

Scott’s decisions in prize cases were models of clarity and impartiality. He described his role as “not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference that justice which the law of nations holds out without distinction to independent states.”³⁵ Prize cases were particularly important during the time he headed the High Court of Admiralty. A captured ship had to be of enemy character or in enemy service. Captured ships’ officers were required to answer “standing interrogatories.” If answered honestly, these interrogatory answers permitted an accurate determination of whether the ship itself, or part or all of its cargo were subject to confiscation.³⁶ For a blockade to be

³¹Hill in Havery, *supra*, note 2, 139.

³²*Id.*

³³Indeed, he was the only British Admiralty Judge in England, and was also the administrator of the whole Admiralty and Prize system. In foreign stations this was exercised through Vice Admiralty Courts.. *Id.* 144.

³⁴See, *The Mary*, 15 U.S. 123, (1817), *Hobart v. Drogan*, 35 U.S. 108, (1836), *The Pizarro*, 15 U.S. 227, (1817), *The Amistad*, 40 U.S. 518 (1841).

³⁵Hill in Havery, 140.

³⁶*Id.* 140-41.

valid under the Law of Nations it had to be both publicized and maintained. In one case, the defense was that the captain was inebriated and thus was unaware where he was going. Judge Scott rejected the defense:

[I]f such an excuse could be admitted there would be eternal carousings in every instance of violation of blockade. The master cannot, on any principle of law, be permitted to stultify himself . . . The owners of the vessel have appointed him their agent, and they must in law be bound by his imprudence."³⁷

Scott's full statement of principle by which a judge should comport himself has been cited as a model for jurists of international law. He wrote:

"I consider myself as stationed here, not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to administer with indifference that justice which the law of nations holds out without distinction to independent states."³⁸

In *The Maria*, Judge Scott founded his condemnation of the ships of a Swedish convoy, whose escort had offered token resistance to a superior British force, on numerous authorities, including French, Swiss, and Spanish authorities and even a Swede, Puffendorf.³⁹

One other major figure from the Middle Temple deserves mention. That is Sir John Popham, who was Lord Chief Justice of Kings Bench and notable for two events. He was the presiding Judge at the trial of Sir Walter Raleigh, and a prime mover for settlement of the new world.⁴⁰ The trial has been described as "that discreditable proceeding."⁴¹ The sentence of death was mentioned above, but not carried out for 15 years during most of which Raleigh was confined to the Tower of London.⁴²

Popham's participation in settlement activities merits more credit to the man, for he was the prime mover in the first permanent Virginia settlement.⁴³ Popham involved another Middle Templar, Edwin Sandys to draft the Charter of the Virginia settlement.⁴⁴

³⁷Id. 142.

³⁸Id. 141 citing *The Maria*, 1 CRob. 340 (1799).

³⁹Hill, *The Maritime Connection*, 141.

⁴⁰Id. 129.

⁴¹Id. 131.

⁴²Id. 130.

⁴³Id. 131.

⁴⁴Id.

That draft was the first bill of rights for an English colony in North America. Sandys' draft conferred upon the Virginia settlers "all the liberties, franchises and immunities of English subjects."⁴⁵

For good or bad, it is abundantly clear Americans owe a debt of respect, indeed, gratitude, to the members of the Middle Temple. Without its members activities, particularly Sir Walter Raleigh and associates such as Sir Frances Drake, settlement of North American could have taken a very different shape.

⁴⁵Id. Hill at 132.