NAVAL COURTS MARTIAL

The taking of the *Crescent*

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by

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Cambridge:
at the University Press
1914

CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town,
Singapore, São Paulo, Delhi, Tokyo, Mexico City

Cambridge University Press
The Edinburgh Building, Cambridge CB2 8RU, UK

Published in the United States of America by Cambridge University Press, New York

www.cambridge.org
Information on this title: www.cambridge.org/9781107677968

First published 1914
First paperback edition 2011

A catalogue record for this publication is available from the British Library

ISBN 978-1-107-67796-8 Paperback

PREFACE

THE purpose of this book is to make, from the reports of Courts Martial, some picture of what the old Navy was down to the end of the Napoleonic wars. Those reports are preserved in the Admiralty papers, Secretary's In-Letters beginning with volume 5253 and the year 1680, on to volume 5452 and the year 1815 inclusive. The series does not stop at volume 5452, and there was of course no sudden change in the Navy at the beginning of 1816. Yet the signing of the second Peace of Paris marks the end of an epoch, and from it is to be dated the beginning of a new world.

Earlier statements of the mere fact that trials had been held and sentences given are to be found in State Papers, and such journals of officers of the time as have been preserved. But these notices are of no value for our purpose. We need the testimony of the witnesses given in what at least professes to be their own words. For years after the Court was established no care was taken to preserve the records of its proceedings. That this was the case is shown not only by the absence of documents, but from the terms of an order in Council of the 6th February, 167$\frac{5}{6}$. The Duke of York had then been driven from office by the Test Act of 1673, and the King was making an effort

to govern his Navy with the help of a Council. A Captain Stout had accused his Lieutenant, Butler, of disrespect, and the case was referred to the King. An order was given that in future the minutes of the evidence were to be transmitted with the sentence*.

King Charles II, as the loyal Dartmouth told Pepys, was good at seeing what ought to be done, and at giving directions, but was negligent in enforcing obedience. This order was no better observed than many others. When the collection of Court Martial papers begins in 1680, the earliest consist of statements of sentences passed, transmitted from the squadron stationed in the Straits—by which was then meant the whole western Mediterranean. The eastern was known in the language of seamen as the Arches, short for Archipelago, and the Levant. Arthur Herbert, the Lord Torrington of Beachy Head, was in command. The minutes of the evidence began to be given after James II had inherited the throne.

It was long before the reports began to be drawn up in any regular form. The Deputy Judge Advocate, who was commonly the Admiral's secretary, or a purser, but was occasionally a chaplain, and to whom the duty fell, discharged it as he thought fit. He did not always in earlier years think it necessary to give the names, or state the number, of the officers forming the Court. Sometimes the charge is not definitely stated. The signatures of the members of the Court to the sentence are not rarely lacking. The documents are of all sizes, ranging from scraps of paper three inches square to foolscap sheets. The

* *Naval Collection MSS*, Vol. 2, p. 116. Admiralty.

handwriting is now and then beautiful, but it too often varies from bad attempts to write the Court hand to vile scrawls. It will easily be believed that the officers who drew up these papers displayed all the indifference of their generation to consistency in spelling proper names. One form appears in the list of members of the Court written by the Deputy Judge Advocate or his clerk. The man himself uses another when he signs the sentence. The Captain "Cole" of the list, writes himself "Coall." Shovell who generally, but as it seems to me not always, signs Clowdisley Shovell, is written down "Clously" in the list. In both cases the spelling was phonetic. But this is a small matter. If it were not for the Deputy Judge Advocate, we would often be at a loss to know who signed the sentence. The signatures show exactly what Sir Horace Mann meant when he said that a note sent him by Admiral Mathews was written with "the claw of a great lobster" for a pen. What we are to deduce from that touching the education and breeding of the old sea officers is not so clear. After the Revolution of 1688, when the Navy rose suddenly from the thirty-eight ships put in commission by King James, to seventy-four, and then again doubled with equal speed, it was found necessary to call in numbers of merchant skippers. Some of them no doubt were ignorant men, though they might also be of gentle birth. The younger sons of the County families of good pedigree were not seldom bound apprentices in the merchant service. But a good deal of this appearance of rough illiteracy may well have been mere affectation. Gentlemen took up with a humour of tarpaulin airs, and some of the signatures have

a look of deliberate extravagance. What I say here applies mainly to the early volumes and becomes less and less true as the series goes on.

For the procedure of the first times, we have the guidance of Mr Philip Foster who wrote to the Admiralty from Doctors Commons on the 12th February, $16\frac{8}{9}\frac{8}{0}$. He had acted (at some loss to himself he says) as Judge Advocate in the Channel from June to October 1689. "In which office I have been as exact in making of informations and depositions as the proceedings of a Court Martial will permit. The witnesses being examined sometimes *vivâ voce* as well as in script; there can be no full transmission of the Depositions. The sentences are drawn up conformable to the Civil and Maritime Laws." Mr Foster was stating a counsel of perfection. The reports conform but loosely to the obligation to give Authority, Time and Place, the names of the Parties between whom the matter was in dispute and the matter of Fact, though they give the Condemnation.

The whole mass of the papers is large. The two hundred volumes from 5253 to 5452 must contain from 12,000 to 15,000 cases. A complete analysis of them would fill several volumes the size of this. The Index and Summaries of cases from 1755 to 1805 prepared for the Admiralty fill six folios of MS. The entries are written large and widely spaced, but even with firm compression they would fill half the number. No useful purpose would be served if we aimed at completeness. Much may safely be neglected as being of the nature of mere repetition. It is for instance quite enough to note once and for all that cases of embezzlement and desertion were frequent—and no less

monotonously dull. And there is one class of case of which I shall not be expected to speak at all. To ignore the fact that it is there would be dishonest. To dwell on it would be an outrage.

It is easy to know what to do with these parts of our subject. The difficulty begins when a selection has to be made from Courts Martial which deal with matters which are not insignificant, and do not defy quotation. The course I have decided to adopt, is to give a preference to what illustrates the life and character of all ranks. It follows that what may be called " Military Court Martial," the trials of Admirals for mishandling their fleets, or of Captains for not coming roundly into their stations in battle, will hold a very subordinate place in this book. They are commonly in print and easily accessible, for the simple reason that the public interest in " Naval miscarriages " was eager and angry. They will not be ignored, but I shall in all cases lean towards taking from them only what illustrates the ways, the character, the morality, and the language of the whole seafaring body. To me and for my purpose cases of " mutinous assembly," of desertion complicated by the " piratical seizure " of a ship's boat, or murder, in a guard boat, on the lower deck, or in the wardroom, are more illuminative than the inquiry whether Byng did or did not bring his line well into action. We have more to learn from Courts Martial which show to what extent the British Navy recruited foreigners, and compelled the service of prisoners of war, than from the unending (and I fear we must add uncandid) inquiry into the conduct of Gambier in the Basque Roads. I have to give my sincere thanks to Captain Charles N. Robinson, R.N.,

to Mr Perrin, Librarian of the Admiralty, and to the officials of the Record Office for much kind help, and also to Messrs Parker of Whitcomb Street for the loan of the following plates: the *Taking of the "Crescent,"* the *Portrait of Richard Parker*, the *Revolt of the Fleet*, the *Execution of Richard Parker*, the *Revenue Cutter* and the *Portrait of Sir Isaac Coffin*.

D. H.

20 *May*, 1914.

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INTRODUCTION

THE Naval Court Martial was created as a necessary part of the organization of the Royal Navy. The way was prepared by Parliament, the Council of State and the Protector during the Civil War and the Commonwealth. The work was completed in all essentials during the first years of the Restoration.

The origins of the Navy, its government, and its tribunal lie far back in the history of England and do not belong to our subject. The development of a pure fighting ship, the proved inferiority of vessels built for trade when used for military purposes, and the growth of national wealth which permitted of the maintenance of a permanent fleet, combined in the end to compel a separation in character and function between the military and the trading or fishing navies. The process was complete when Charles II returned from exile in the twelfth year of his nominal reign. The " navigium regis " which had once been composed of all the ships and shipmen of the realm, was finally differentiated into the military navy and the merchant and fishing navies. The military became emphatically the Royal Navy.

From the twelfth century we can see the officials who governed the Royal Navy—that is to say the whole body of the King's seafaring subjects when

engaged in their proper functions whether in peace or in war. They were known by many names and they were administrators whose judicial character was much more emphasized than their military. They were not seamen and they might be churchmen. But whether they were " ductores et gubernatores totius navigii regis," or " justiciarii navigii regis " or " constabularii " or " Captains and Admirals " on this or that coast, or of this or that fleet, or admirals of all the fleets, they governed the seamen who were " a people by themselves " by the civil law and the " custom of the sea " as embodied in the " Laws of Oleron " which are a collection of " customs." The title of admiral does not appear till the fourteenth century, and then in combination with " captain." The Lord High Admiral became a permanent officer of state in the fifteenth century. It is not necessary to say anything here of the process by which his general jurisdiction was transferred to the royal courts. But he had a very direct connection with Court Martial, and that we cannot ignore.

In so far as the admiral was a commander of an armed force in war, he performed the functions which on land were discharged by the Constable and the Marshal. He " stayed " ships to serve the King, he levied the mariners to form the crews, he put his fighting men into them, and he both pronounced and applied the " laws of war " by himself, or by his delegates. From him come the " articles of war," and the Court Martial. The law he promulgated and enforced was what its purpose and the nature of the work to be done dictated. Sacrilegious acts and blasphemous words were forbidden by a religious age. Gambling

and quarrelling were incompatible with discipline, and contrary to the very nature of a force collected to fight an enemy, for they led to murder, and neglect of duty. Cowardice, or self assertion in presence of the enemy, were all alike to be suppressed. The man who confusedly rushed at the enemy might be less contemptible than the poltroon, but he was destructive to orderly fighting. The substance of all laws of war must always have been the same, whoever promulgated them. But the point at present is that these laws were pronounced by each admiral for his own command, and were based on his authority. And "Admiral" does not mean only the Lord High Admiral, but any man commanding a fleet for the sovereign, or with the royal approval and licence, even when engaged on a private venture of exploration or trade. Hawkins when he sailed on a slave smuggling venture to the Spanish Main, and Raleigh when he left home on his last cruise, drew up "laws" for their commands, precisely as did Lord Wimbledon when he was commissioned by King Charles I to lead the attack on Cadiz in 1625.

When we ask by what process this authority was enforced we enter a very obscure region. And inevitably so, for we are dealing with a "customary" thing which had not been fixed by statute. When our subject is the origin of Naval Court Martial we cannot learn anything from the trial on shore of prisoners charged with offences committed within the jurisdiction of the Admiral. They were held, at any rate after the reign of Henry VIII, by the King's Judges and by the process of the English law. Nor can we go by such examples as the trial and execution of Doughty at Port Julian during Drake's voyage round the world,

and the trial of a sailor condemned and hanged for murder at Firando in the Sea of Japan by the officers of the East India Company. In both cases a jury was summoned, but these are not examples of a true Court Martial, held in a royal force, and by royal officers. The proceedings against William Borough who served as second in command with Drake in the cruise on the coast of Spain in 1587 may be taken as an example of what Court Martial meant, or could mean, before it was regulated by statute.

William, brother of the better known Stephen Borough, was a somewhat older man than Drake. He had spent his early years in the hard navigation of the North, in opening the way for English trade to Russia, and in protecting it against pirates. He was a skilled navigator and writer on navigation. In an age when no regular corps of naval officers existed, such a man was naturally recruited for the service of the crown. He was successively Clerk of the Ships and Comptroller of the Navy, and had held important commands at sea. In 1587 he was named Vice-Admiral to Drake, who was sent as the Queen's "Admiral at the Sea"—that is to say Commander-in-chief of a fleet under the authority of the Lord High Admiral—to the south coast of Spain. The force consisted, as was then always the case, of a smaller number of vessels belonging to the Queen (four in all) and of a larger (twelve) owned by merchants of London, and seven small craft. The political object of the expedition was to disturb the ill-directed efforts of Philip II to collect a great armament for the invasion of England. But profit by prize money was an object with the Queen, then as always, and the ships of the London "adventurers,"

i.e. speculators in privateering, were there "on the plundering account."

Sir Francis Drake was at the height of his renown in 1587. His raids on the Spanish Main, his voyage round the world, his success in the expedition to the West Indies in 1585, had marked him out as the man to lead the attack on the Spanish coast. He undertook it with zeal, and he brought with him a number of "followers" whom he trusted. Followers, that is to say men who attached themselves to the fortune of some rising officer and supported him from affection and interest, have ever been a known element in our navy. Borough brought trusty followers with him, and fortunate it was for him that he did.

During the operations Drake behaved to his second in command in a way which Borough, conscious of long and honourable service, found offensive. He showed him no confidence. The custom of the time required a commander-in-chief to hold councils of war and consult his subordinates, and so did the custom of the sea. Councils of war have a bad name, but at a time when there was no code of signals, and therefore no means of giving an order in action except by sending a boat with a message, there was a great advantage in collecting the more important officers before a fight and settling what everyone was expected to do. Drake called his officers together, in order to give himself the appearance of complying with the custom, but he never spoke on service except to his own "followers." He treated Borough with a show of good humour, and the substance of insolent indifference. His Vice-Admiral resented his attitude as hotly as Hood resented the haughty aloofness of Rodney.

At last, when Borough heard that Drake was resolved to attack the castle at Segre near Cape St Vincent, he thought he saw a good opportunity for giving his uncivil superior a lesson. He wrote a long and grave letter of serious expostulation concerning the treatment he had received. The sting of this in truth somewhat pompous epistle lay in a few sentences. Borough told Drake that the taking of Segre would be at best useless, for it could serve no other purpose than to enable him to boast that he had put his foot on the King of Spain's territory, and perhaps to make booty of a few guns. If the castle was garrisoned, as it well might be, the attack might be repulsed. The criticism was perfectly just for Segre was neither a good anchorage nor a port where stores were to be found, nor did it give access to supplies. Even if the fleet had orders to winter on the coast, Segre would have had no value whatever as a " basis of operations." But its truth did not make the criticism more acceptable, and Borough's taunting reference to the vainglory for which Drake was noted was calculated, and was, we cannot but think, intended to sting. Sir Francis was a dangerous man to provoke. He was vindictive, and when offended unscrupulous. He retaliated by displacing Borough and confining him as a prisoner in his ship the *Golden Lion*. One Captain Marchaunt, a " follower " of Drake's, was sent to command the ship.

The crew of the *Golden Lion* were discontented. They complained of lack of rations. There was, too, among them an element of " prime seamen " whom Borough had brought with him. It is clear that these followers of his were angry at the way their patron had

been treated, and there is every reason to believe that the grievance of the men was real, and that they attributed it to the spite of Drake and his followers. All history of mutiny bears testimony to the influence which the "prime seamen" exercised over the less competent members of a crew, which always consisted to a large extent of so-called sailors who were not "sailormen," not, that is to say, men bred to the sea. These true masters of the business, who could go aloft in the storm and the dark, who were the leaders and the salvation of others at all times of peril, were looked up to and obeyed. We may be very sure that Borough's followers worked on the *Golden Lion*, and that it was at their instigation that the whole crew came aft and presented a protest to Marchaunt. They insisted on leaving the fleet and going home at once. The ship was at the time some distance from the flag, and the captain was helpless. Only a dozen of the "gentlemen" in the ship were ready to stand by him, and they, who were always disliked by the sailors as not being of their own "art and mystery," were helpless. Marchaunt was reduced to the rather ignominious necessity of appealing to Borough. He for his part would do nothing, and had the satisfaction of seeing his jailer turned out of the ship. The *Golden Lion* then bore up for England.

Marchaunt now betook himself to Drake's flagship, the *Elizabeth Bonaventure*, and reported to the Admiral. Sir Francis at once summoned "a general court holden for the service of Her Majesty," and composed of all the commanders, chief officers of the soldiers embarked in the squadron, captains and masters. He then called upon Marchaunt to explain how he came to lose the

command of the *Golden Lion*. Marchaunt produced the protest of the crew and told his tale. Then without further delay, Drake pronounced doom. "Although," he said, "I am not doubtful what to do in this case, nor yet want any authority, but myself have from Her Majesty sufficient jurisdiction to correct and punish with all severity as to me in discretion shall be meet according to the quality of the offences all those seditious persons which shall be in the whole fleet, yet for the confidence I have in your discretions, as also to witness our agreement in judgment in all matters, I pray you let me have your several opinions touching this fact which hath been declared in your hearing this day." The "general court" could be in no doubt what it was asked to agree with, for the Admiral, without waiting for an answer, proceeded to pass sentence of death on Borough and all the officers of the *Golden Lion*, and minor penalties on all the crew except the twelve who had offered to support Marchaunt. If any of the members of the court had dissented, they, unless they had been at least a substantial majority and prepared to defend themselves by force, would have been liable to be punished according to their offence as "seditious persons" by virtue of that unlimited authority to inflict all degrees of punishment at his own discretion which Sir Francis claimed to have received from the Queen. They remembered the case of Mr Doughty, and they knew that the *Golden Lion* was now out of reach, and moreover that the case would come before the Queen's Council. There was no dissent. On this occasion, as when he put Doughty to death, Drake did not produce his authority. Raleigh at the end of his life asserted that Drake had no

such powers as he claimed in Doughty's case. It is highly probable that Sir Francis was lying.

Borough took good care that the case should come before the Council. He appealed to Burleigh, and there was a confrontation of the parties at Theobalds. Drake produced a whole string of accusations against Borough, who retorted, at times in scornful terms, and always in a tone of superiority. A committee, including Sir Amyas Paulet, the resolute gentleman who refused to offend against the laws of God and man by murdering the Queen of Scots merely because he was told that Elizabeth would like him to do it, and an Admiralty Judge, was appointed to inquire into the whole case. We do not possess its report if any was made, but the fact that Borough retained his place on the Navy Board and served against the Armada shows that Drake's action was not approved.

What could a committee of shrewd men think of the case put before them? One passage may be quoted from the whole farrago as an example of its quality. The first of the "Further articles" presented against Borough runs:

> "First when it pleased our General [*i.e.* Drake] to call together the captains of Her Majesty's ships and the captains of the ships of London, asking every man's advice for our entering Cadiz, the wind being good and diverse fishing boats in sight, Mr Borough's advice and counsel was not to go into Cadiz that night, which if we had not the service had been lost."

Observe that even if the facts were as stated, they only prove that Borough was not of the same opinion as Drake. But it was his case that no council was held, and that the service would have been better performed if it had been executed in a more orderly manner. His answer is effective:

"This article is confirmed by Sir Francis Drake and 7 witnesses, whereof one was Isaac Marichurch the master of his ship, the rest his followers, but not one of the captains of the Queen's ships, which ought to be heard in that matter (and therefore I do humbly beseech your Honours that they may be examined, and willed to declare the truth touching this article before your Honours). Because the said Master is a man of experience and judgment, whom I hold to be an honest man that feareth God, and such a one as will not altogether be led to swerve from the truth and swear to it, to serve and please affection, I therefore desired your Honours the Commissioners, Sir Amyas Paulet and Mr. Secretary Wolley, that the said Marichurch might be brought to speak before your Honours where I might be present, for that I doubted not to put him in mind that he had overshot himself; whereupon it pleased your Honours to send for him. When he came before your Honours, the article being read and his hand showed, he confessed both. Then he was demanded of the first part, whether the captains of the Queen's ships &c. were called aboard by the General and their advice asked for entering Cadiz. He answered he knew no such matter. It was further demanded of him, touching the second point, whether he heard me counsel or advise the General that we should not bear into the Bay of Cadiz that night. He answered that he would not say it for a thousand pounds. 'But,' quoth he, 'I have set my hand only to prove that if we had not gone in that night the service had been lost.'"

When we remember how the trial of Raleigh at Winchester was conducted by trained lawyers, including the illustrious Coke, we cannot say that Drake's idea of judicial proceedings was notably outrageous for the time. Yet the story of "the General Court holden" in the *Elizabeth Bonaventure* and its consequences do show that what served for Court Martial then and later did not possess the first elements of a real court of justice.

No attempt to provide a regular process was made till the Civil War. The obligation to make good the deficiency was imposed on the Long Parliament by its own act. It had declared that the Martial Courts were unconstitutional. When it abolished a tribunal which could fine a gentleman for calling the swan on a nobleman's crest a goose, it destroyed the only known

machinery for keeping order in an army or a fleet. In 1644 an ordinance for the government of the fleet was drafted by the House of Lords, and was passed by the Commons in the following year. Power to hold Courts Martial was given to a General Council of War. Further powers were given in 1648 and in 1652, and the " Laws of War " were issued, and in 1653 the Admirals and Generals at Sea, Blake, Monk, Desborough and Penn issued their instructions for the formation of Courts Martial in future. They gave flag officers power to hold a court in their respective fleets, or divisions of a fleet, with a " council of war " which must not consist of less than three persons. A sentence which entailed loss of life or limb must be referred to the Admirals and Generals " the criminal being still secured," together with minutes of the evidence and defence to be " enregistered and kept on record " by the " Judge Advocate of the fleet." The Judge Advocate was an officer of the old Admiralty Court, and his presence serves to connect Court Martial with the ancient general jurisdiction of the Admiral. A divisional Court Martial could not cashier a captain without reference to the Admirals and Generals, or a master without the approval of the general of that fleet to which it belonged. Similar powers were vested in the commander of a detachment of not less than three ships. Every captain of a ship belonging to, or in the service of [*i.e.* pressed or hired by] the Commonwealth was empowered to hold a court with his lieutenant, if he had one, his master, master's mates, " clerk of the cheque " [*i.e.* purser], gunner, boatswain, and carpenter, for the trial of offenders belonging to that vessel, subject to the obligation to refer all sentences of life or limb, and for

the cashiering of any commissioned or warrant officer to "the commander of the party (if remote from the fleet) or to the flag commander of the division." These orders of the Admirals and Generals expressly authorize all Courts Martial to try and to punish offences committed "on shore in any place or harbour."

The report of a Ship Court Martial survives among the State Papers of the Protectorate*. The case is of no intrinsic interest. Three sailors of the *Centurion* then fitting out for sea at Harwich stole twenty-five shillings worth of the ship's stores, and with the help of a go-between of the name of Roger Shry sold them to a ferryman Edward Brassington, who acted as receiver of the stolen goods. But if the case is insignificant, we are interested in the Court, its constitution, its procedure, and its sentence. In point of lucidity of arrangement, handwriting, and the very quality of the paper used, the little handful of documents transmitted to the Judge Advocate by Captain Jonas Poole of the *Centurion* in Harwich Water, compares favourably with many of the slovenly scribbles of later times.

The Court sat on board the *Centurion* at Harwich on the 17th December, 1658. Its composition and the order in which the names of the members are written are both noteworthy. They are placed in two columns as follows :

Jonas Poole, Captn	James Jennifer, Lieut.
Richard Patton, Maser	John Withers } Master's
Robert Whitnall, Purer	Wm Collins } Mates
John Randall, Gunner	Henry Russell, Boatsn
	John Jordan, Carer

* S.P. Dom. CLXXXIV.

The gunner we see stands in the same column as the captain, master, and purser who were " heads of departments." The lieutenant leads the column of mates and subordinate officers. The gunner of the seventeenth century was in fact relatively a more important officer than the gunner of the eighteenth century who held a warrant from the Board of Ordnance. If the age had been one of great development in armament, and of skilled gunnery, he would in all probability have become a commissioned officer, a member of the Ward Room Mess, and " a gentleman of the Quarter deck." He was rather what the gunnery lieutenant of to-day is than what the gunner of later times was and is. It was not without a struggle that he was reduced to the lower status of an officer who was not a gentleman of the quarter-deck.

The sentence passed on the three offenders does nothing to support the supposition that a Ship Court Martial would be more tender to erring members of the crew, than were the Courts Martial composed wholly of commissioned officers of the times after the Restoration. It condemned Jasper Williams, whom it looked upon as the instigator of the theft and the misleader of the others, to receive " 30 lashes soundly laid on his bare back in a boat by the ship's side and in public view, and then to be cashiered without a ticket." This meant that he would not receive the pay ticket without which he could not obtain the wages due to him. Samuel Austin and Thomas Norris whom he had led astray were to receive 10 lashes each " at the capstan " in private and in the seclusion of their family, a less shameful punishment than the public correction of Jasper Williams. The Ship's Court Martial exercised

a wider jurisdiction than the Court Martial established by the 13th Charles II. It condemned the ferryman to make restitution to double the value of the stolen goods, and to enter into a bond of £500 for his future honesty. The Court Martial of later times would have had no jurisdiction over Edward Brassington.

The Restoration abolished the Courts Martial of the Commonwealth, if only by the mere fact that it re-established the office of Lord High Admiral in the person of the Duke of York (James II) the King's brother, to whom it had been destined from his infancy by their father. But even if the Restoration had wished to return to the anarchy of the days before the Commonwealth, it could not have done so. In fact, the Duke and his brother were very anxious to regulate the Navy as a great royal force. One of the earliest duties the loyal parliament of the day was called upon to perform was to pass " An Act for establishing articles and orders for the regulation and better government of His Majesty's Navies, Ships of War, and forces at Sea " —the 13th Charles II c. 89 of 1661. We shall be able to judge how far the parliament deserved the severe criticism passed on it by ministerial speakers in 1749 when the Act was revised, for the great haste and little thought with which it did its work, when we know what it put in place of the Courts Martial of the Commonwealth, and their " Laws of war and ordinances of the sea." The article which established the new Court Martial was the 34th, and runs :

" And it is hereby further enacted, that the Lord High Admiral for the time being shall by virtue of this act have full power and authority to grant Commissions to inferior Vice Admirals or Commanders-in-chiefe

of any squadron of ships to call and assemble Court Marshalls consisting of commanders and captains, and no Court Martiall where the pains of death shall be inflicted shall consist of less than five captains at least, the admiral's lieutenant to be as to this purpose esteemed as a captain ; and in no case wherein sentence of death shall pass by virtue of the articles aforesaid or any of them (except in case of mutiny) there shall be execution of such sentence of death without the leave of the Lord High Admiral, if the offence be committed within the Narrow Seas. But in case any of the offences aforesaid be committed on any voyage beyond the Narrow Seas whereupon sentence of death shall be given in pursuance of the aforesaid articles, or of any of them, then execution shall not be done but by the order of the Commander-in-chief of that Fleete or Squadron wherein sentence of death was passed."

A proviso was added in a separate schedule that nothing in the Act should be held to extend the "Power, Right, Jurisdiction, Preheminence, or Authority" of the Lord High Admiral except in the case of such offences as are specified in the Act committed by persons "in actuall service and pay of His Majesty."

Two of the terms used in the 34th clause of the articles of 1661 may mislead a modern reader. The "commander" who is to sit on Courts Martial with the captains was not the officer of that name, or the "Master and commander" of a small vessel who ranks immediately below the Post-captain. Officers of that rank were not allowed to sit till later. Here "commander" meant flag officer serving in a fleet or squadron under a commander-in-chief. The Admiral's lieutenant was not the second in command, but the flag lieutenant, whose position is assimilated to that of the captain-lieutenant of a regiment, who was a lieutenant commanding the colonel's company. When in the reign of William III Wilmot was commander-in-chief of an expedition to the West Indies, he began by refusing to allow the captain-lieutenant of his military colleague, Colonel Lillingstone, to sit on councils of war.

He was with some trouble forced to allow that the captain-lieutenant stood on the same footing as his own "Admiral's lieutenant."

When we take this article, as we must, together with the schedule, it is obvious that the great persons who shaped the Act had overlooked a contingency which the Commonwealth men had kept in mind. It was that an offence against "Martiall Discipline" might be committed by a man in the actual service and pay of the King beyond the jurisdiction of the Lord High Admiral. A sailor who knocked his officer on the head with an oar at high water mark, or assaulted him in a dockyard, or in the streets of a town, could not be tried by Court Martial. He could be brought before the ordinary courts at home, or in a British possession oversea, or if he offended in a foreign country he could be brought home for trial at the Old Bailey, but the Court Martial could not touch him. It was another and a slovenly oversight that no care was taken to limit the number of officers composing the court, nor to direct the way in which the tribunal was to be formed. We cannot fairly blame the authors of the Act for not foreseeing that the office of Lord High Admiral might be in commission and that a pettifogging objection might be taken to the right of the Commissioners to order a Court Martial to be held. But it was a manifest stupidity in them to make the right to order a Court Martial to be held personal to a specially authorized Commander-in-chief. If any officer or man had murdered the Commander-in-chief he might have been brought home and tried by Court Martial, or at the Old Bailey by a bench of judges including the Admiralty Judge, for a murder committed within the jurisdiction

of the Admiral, as Kidd was tried for killing his gunner on the coast of Malabar, but he would have destroyed the only authority empowered to try him there and then. They might have reflected that an officer serving abroad with a numerous fleet under his orders would often have occasion to detach a part of it for a long period, or that he might be killed in action, or die, or even only be compelled to resign his command by ill health. This case actually arose when Vernon gave up his command in the West Indies on the ground of health. His successor Sir Challoner Ogle was left for a whole year without power to hold a Court Martial. And it occurred in less conspicuous ways after the deaths of Wilmot, Neville and Hozier. The proviso that the authority of Court Martial should extend only to those in "actual service and pay" was no doubt meant to debar a court from trying persons not belonging to the Navy, but it had a consequence which cannot have been designed. In 1661 there was no half pay list. Officers and men alike then belonged to the Navy only during the commission under which they served. When half pay was established the words were understood to be equivalent to "active service and full pay." Therefore officers on half pay, though actually in the King's service and in the receipt of pay, were not subject to the Articles of War. But an officer on half pay could be tried by Court Martial for acts committed while he was on full pay. By the rule of the service pay ceased when a ship was taken or wrecked. Therefore the Admiralty had no power to try any of the crew —neither the commissioned officers, who would be entitled to half pay, nor the petty officers and men, who being no longer entitled to pay had no legal connection

with the navy*—for acts committed after the capture or wreck.

To every rule there are exceptions, and there are to this. Some naval men in the pay and service of the King were not subject to the Articles of War. Some seafaring men who received no pay from the King were so subject. Officers employed on the civil side of the government of the Navy—this is to say members of the Navy Board or Commissioners of Dockyards—were not liable to be tried by Court Martial though in service and pay. Yet the officers and men of privateers, who indeed sailed with a commission from the " Lord High Admiral " as represented by the Admiralty, were for the better maintenance of discipline declared to be subject to the Articles of War and liable to trial by Court Martial. And so were the officers and men of ships belonging to the East India Company.

Experience, too, showed that the limitation of the jurisdiction of a Court Martial to offences specified in the Act of 1661 and the clumsy wording of the clauses, left it without power to deal with some forms of violence and fraud, while the constitution of the Court was found to be open to a very serious objection. During a period of nearly ninety years several measures were

* Half pay was introduced by successive steps. It began by a special allowance made to a small list of Flag officers. It was extended to a limited list of captains and lieutenants. It was finally given to all who held commissions from the Admiralty, *i.e.* the lieutenants and upwards, and to some who held warrants, Masters and surgeons, from the Navy Board. Petty officers, including midshipmen and men, did not belong " to the Navy " in the full sense, but only to the ship in which they served during the continuance of the commission. When the ship was paid off they had no claim to half pay, and the Admiralty had no further power over them except the right to impress them when a press was authorized.