

THE EARLY HISTORY OF ADMIRALTY JURISDICTION

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1 Introduction

As regards the historical origins of Admiralty jurisdiction in Australia we must thank Dr Bennett whose researches have uncovered Royal Letters Patent of May 1787 under which the first court of Vice-Admiralty was convened in 1798.¹⁷⁶ Possibly it sat in old Government House not far from here in Sydney Cove. Admiralty jurisdiction in Australia was put on a firmer statutory basis in criminal matters at least with s 3 of the *Australian Courts Act 1828* (UK) replacing an earlier 1823 Act.

I am concerned in this paper, however, with *civil* admiralty jurisdiction as it originated in *England*. That was jurisdiction exercised by the High Court of Admiralty. Australian courts exercising Admiralty jurisdiction today are the successors of that court.

There was jurisdiction in maritime matters before there was admiralty jurisdiction. Holdsworth¹⁷⁷ speaks of many seaport towns having jurisdiction in maritime cases. But it would be jurisdiction exercised in a very informal way. He says: ‘The Domesday of Ipswich tells us that “the pleas yoven to the law maryne, that is to wite, for strange marynerys passaunt and for hem that abydene not but her tyde, shuldene be nyleted from tyde to tyde”.’ Yet the Court Rolls of Ipswich do not support a view at all that maritime work was very pressing.¹⁷⁸ Law in England, at this time, just after the Norman Conquest, is focused on property and thus on land. Property was the basis of wealth—not the sea.

The Admiralty Court came into being at a very early time

Dr RG Marsden in *Select Pleas in the Court of Admiralty* tells us that the court soon after its establishment sat at Orton Key, near London Bridge: sittings, he says, are also to be found mentioned in other places including Wool Key, Edgose’s Store and at the ‘High Berehouse’ near Horsleydown.¹⁷⁹ All these are locations near or on the Thames or an estuary or inlet of the sea. Then the court, it seems, sat in the Church of St Margaret-at-Hill in Southwark.¹⁸⁰ Finally, it became centrally located in Doctors Commons (the College of Civilians) near St Paul’s Cathedral where it existed over several centuries. Nearby was the Court of Arches. Doctors Commons—described by Dickens as ‘cosey, dosey, old-fashioned [and] time forgotten’ – was destroyed in 1867. But Doctors Commons may have been a rather cheerier place than Dickens makes out: I have in my possession a receipt dated July 31, 1746 for ‘Three pounds fifteen shillings ...for Musick for the Admiralty Court’ signed by a John Wakefield.

At first there were several admirals. Dr Godolphin, writing in 1685, says that in the year 1294:

William de Leiburne was made Admiral of Portsmouth, and the adjacent parts; John de Botecurts of Yarmouth, and the Neighbouring Coasts thereof; and a certain Irish Knight of the West and Irish Coasts.¹⁸¹

Out of the authority of the admirals, at some point in the distant past, came a curial authority to deal with civil cases. By a ‘natural evolution’, Roscoe says, ‘they became also arbitrators in maritime disputes’.¹⁸² I suggest this could likely have been in the mid- 1200’s.

One does not have to be a specialist Admiralty lawyer, therefore, to appreciate that the Admiralty Court is very old. The question when it may have come into existence is intriguing – to Admiralty lawyers especially.

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¹⁷⁶ JM Bennett, *A History of the Supreme Court of New South Wales* (Law Book Co, 1974) 153.

¹⁷⁷ WA Holdsworth in Goodhart and Hanbury (eds), *A History of English Law* (Methuen, London, 1903) vol 1, 531.

¹⁷⁸ See generally GH Martin, *The Early Court Rolls of the Borough of Ipswich*, (University College of Leicester, 1954).

¹⁷⁹ See RG Marsden, *Select Pleas in the Court of Admiralty* (Selden Society, 1894) vol 1, xxix.

¹⁸⁰ ES Roscoe, *The Admiralty Jurisdiction and Practice of the High Court of Justice* (Professional Books, 1987 reprint) 3.

¹⁸¹ J Godolphin, *A View of the Admiral Jurisdiction* (George Dawes, Chancery Lane, 2nd ed, 1685) 23.

¹⁸² Roscoe, above n 5, 2.

We can be sure that the Admiralty Court *was* in existence in the 1300s. Evidence suggests, however, that it may have been in existence even at a much earlier time. If so, but even if it only came into existence in the 1300s, it must count as one of our oldest institutions. Admiralty lawyers and non-admiralty lawyers alike can both marvel at this. For, over the years, the Admiralty Court has contributed much to the learning of the law in many areas – particularly commercial and international law. So even modern day lawyers in other fields may often owe a debt of gratitude to the court for the wisdom of its decision-making.

When, then, did the Admiralty Court come into existence?

The conventional account, below, is that given by Dr RG Marsden. That account, however, upon analysis, seems at best doubtful in light of the evidence. Yet Marsden's account is one which has largely gone unchallenged.

2 Marsden's Account

The conventional account of the origins of the High Court of Admiralty is that of Dr Marsden. His claim in *Select Pleas in the Court of Admiralty* published in 1894 is that admiralty jurisdiction grew out of the authority of the High Court of Admiralty and that the origin of that court can be traced 'with tolerable certainty' to the period between the years 1340 and 1357.¹⁸³ Dr Marsden says that the institution of the court was intimately connected with Edward III's claim to be sovereign of the seas following victory in the Battle of Sluys in 1340. In the *Black Book of the Admiralty*,¹⁸⁴ Sir Travers Twiss QC writes:

No year was more memorable in the annals of the British Navy than 1340, when Edward III, having assumed the title and arms of the King of France, resolved to maintain his claim to the French throne by force of arms.

After the battle, which lasted at most about 12 hours, Edward wrote to his son, the Duke of Cornwall, on June 28, 1340 that 'God, by his power and miracle, granted us the victory over our ... enemies for which we thank him as devoutly as we can'. This letter from Edward, which is quoted in full by Sir Nicholas Nicolas in *A History of the Royal Navy: 1327–1422* (1847),¹⁸⁵ is said to be the earliest dispatch containing an account of a naval victory in existence.¹⁸⁶ A year after the battle a special gold coin was struck commemorating Edward's victory. The coin was called the 'noble' and it bore an image of the crowned king aboard a ship and the legend on it was from Luke 4:30: 'Jesus passing through the midst of them, went on his way.'¹⁸⁷ Interestingly there is a house still standing on a corner in the old city of Southampton despite being attacked by the French in 1338.

Marsden says that, after the battle, instituting a Court of Admiralty to deal with piracy and other offences committed at sea was the outward and visible sign of the existence of the sovereignty to which the kings of England laid claim.¹⁸⁸

The view, advanced by Sir Victor Windeyer¹⁸⁹ and others, is that soon after its establishment, the court made a 'bold bid' for business and shortly acquired extensive civil jurisdiction as well, so much so that it encroached upon the jurisdiction of the common law courts. Viscount Haldane LC referred to the 'sharp conflict' which developed between these courts and the Admiral's Court in *Owners of the SS Devonshire v Owners of the Barge Leslie*.¹⁹⁰ This led to two statutes passed in 1389 and 1391¹⁹¹ in Richard II's reign restricting the jurisdiction of the Admiral's Court to things done upon the sea.¹⁹² These statutes are still cited from time to time. They were cited, for example, by Lord Brandon in *The Goring*,¹⁹³ which held that admiralty jurisdiction could not be exercised in the non-tidal waters of the Thames. Until those statutes, Mr Justice Story in the famous US case of *De Lovio v Boit*¹⁹⁴ said that:

¹⁸³ Marsden, above n 4, xiv.

¹⁸⁴ Sir Travers Twiss QC, *Black Book of the Admiralty* (1871–6) (Professional Books, 1985 reprint) vol 1, xxxi.

¹⁸⁵ See NH Nicolas, *A History of the Royal Navy: 1327–1422* (Richard Bentley, 1847) 60–62; see also FR Sanborn, *Origins of the Early English Maritime and Commercial Law* (W.S. Hein, 1930) 267–268.

¹⁸⁶ Nicolas, above n 10, 60–62.

¹⁸⁷ See WM Ormrod, *Edward III* (Yale University Press, 2011) 244.

¹⁸⁸ Marsden, above n 4, xv.

¹⁸⁹ See VW Windeyer, *Lectures in Legal History* (Law Book Co, 2nd ed, 1949) 195.

¹⁹⁰ *Owners of the SS Devonshire v Owners of the Barge Leslie* [1912] AC 634, 643 (House of Lords).

¹⁹¹ 13 Ric II, St 1, c 5 and 15 Ric II, c 3

¹⁹² See E Edwards, *Jurisdiction of the High Court of Admiralty of England* (William Benning and Co, 1847) 1.

¹⁹³ *The Goring* [1988] 1 AC 831, 846 (House of Lords).

¹⁹⁴ *De Lovio v Boit* 7 Fed Cas 418 (1815).

[T]he jurisdiction of the admiralty ... extended to all maritime contracts, whether executed at home or abroad, and to all torts, injuries and offences on the high seas, and in ports and havens, as far as the ebb and flow of the tide.

3 Criticism of Marsden's Account

There is no doubting the significance of Edward's victory in the Battle of Sluys. It is tempting to regard Marsden's account, written as it was in the Victorian era, as one, however, influenced by notions of Empire. The account does not give certain particular points the prominence they deserve and some others are neglected or overlooked. Taking all these into account, I suggest that the High Court of Admiralty most probably came into existence quite some time before 1340 and certainly long before 1357. Plainly there is no strong basis whatever for Lord Justice Willmer's claim that the history of the court 'goes back to the year 1360',¹⁹⁵ although there is clear reference to the Admiral's court in a case in 1357.¹⁹⁶ Laing's claim that 'Admiralty jurisdiction was exercised before Admiralty courts were created' seems illogical or absurd unless by 'Admiralty jurisdiction' he meant *maritime* jurisdiction more generally¹⁹⁷

In essence, Dr Marsden's account seems doubtful for the following reasons.

3.1 Learned Writings

First, that there was an Admiral's Court in existence *before* 1340 to 1357 is supported by learned writers of great antiquity. William Prynne, in his *Animadversions On the Fourth Part of the Institutes of the Lawes of England Concerning the Jurisdiction of Courts*,¹⁹⁸ mentions him having actually perused the *Black Book of the Admiralty* (the original) and having found in there 'an Ordinance made at Ipswich in the reign of King Henry the I by the Admirals of the North and West, and other Lords, and of DIVERS KINGS before that time'. He says: '(Nota) containing the manner of outlawing and banishing persons attainted of felony or trespass in the Admiral's Court', by which he says:¹⁹⁹

[I]t is apparent, that there was an Admirals Court, and proceedings in it even in Criminal and Capital causes, relating to Mariners and Seamen, (as well as in Civil) in the reign of King Henry the I.

Dr John Godolphin in *A View of the Admiral Jurisdiction*,²⁰⁰ published in 1685, said:

Whereas it is universally acknowledged, That the Admiralty of England is very Ancient, and long before the Reign of Edward the Third, who ever consults Antiquity shall find it far more Ancient and even time out of mind before the said Edward the First.

It was the Lord High Admiral who presided over the High Court of Admiralty; yet, of this high office, Dr Godolphin says:

[T]he Lord Admiral's Jurisdiction is very Ancient, and long before the Reign of Edw 3, and that there hath ever been an Admiral, time out of mind, as appears not only by the Laws of Oleron, but also by many other Ancient Records in the Reign of Hen 3, Edw 1 & Edw 2.

Marsden dismisses these references as 'apocryphal' but does so without giving any specific reasons for saying so. Perhaps they simply do not fit in with his account. There appears to be nothing 'apocryphal' about them at all. We might not agree with Godolphin 'that there hath ever been an Admiral' but Prynne seems very clear and bases his view on having actually seen the original *Black Book*: this does not seem 'apocryphal' in any way. In that regard. Twiss's account of the origins of the *Black Book* are supportive of Prynne: for, he says, there 'can ... be no doubt that there are documents inserted in it, which were drawn up at a period antecedent to the reign of Edward III',²⁰¹

¹⁹⁵ See Lord Justice Wilmer, 'The Sixth Centenary of the Admiralty Court' [1960] *Journal of Business Law* 276.

¹⁹⁶ See TE Plucknett, *A Concise History of the Common Law* (Little, Brown and Co, 1956) 661.

¹⁹⁷ LH Laing, 'Historic Origins of Admiralty Jurisdiction in England' (1946) 45 *Michigan Law Review* 163, 164.

¹⁹⁸ William Prynne, *Animadversions On the Fourth Part of the Institutes of the Lawes of England Concerning the Jurisdiction of Courts* (Ratcliffe and Daniel, 1669) 106.

¹⁹⁹ *Ibid.*

²⁰⁰ Godolphin, above n 6, 26–27.

²⁰¹ Twiss, above n 9, vol 3, x.

So these writers of great note – closer to a period in time when records still existed and had not been lost or destroyed – are uniformly of the view that the Admiral’s Court came into being long before 1340.

3.2 Origin of word ‘admiral’

Secondly, the word ‘admiral’ (derived it seems from the Arabic ‘*amir-al-bahr*’, meaning ruler of the seas)²⁰² itself is in use in England by 1295 – if not earlier. Marsden, himself, says that the word occurs in a Vascon Roll of 23 Edw. I (1295) where Berardo de Sestars (or de Sestas) is appointed admiral of the Baion fleet – ‘*Admirallum maritime Baion et capitaneum nautarum et marinrtorium nostrorum in ejusdem villa.*’²⁰³ This, however, seems to be contradicted by Marsden’s own statement that the ‘title of “Admiral” [is] not [to be] found before 1298’ (from which he reasons that ‘it seems clear that there was no Admiralty Court in the thirteenth century’).²⁰⁴ There are several subsequent similar references to others being appointed admirals before the close of the century and then, in 1300, as Marsden himself notes, Gervase Alard is called Admiral of the Fleet of the Cinque Ports. This is 40 years before the Battle of Sluys. Indeed, Dr Marsden even cites a case in 1295 when a ship is arrested for the King’s service but which departs Aquitaine without licence and, for this, the master is summoned before the ‘admiral’ and there fined.²⁰⁵

This indicates the existence of a court (perhaps of a very basic kind) exercising jurisdiction to fine even before the end of the 13th century despite Marsden saying it ‘seems clear’ that the contrary of this is the case. This is significant and especially so considering submissions of Serjeant Mutford made in a case in 1297 referred to below.

Dr Godolphin, however, says that the word ‘admiral’ is first encountered ‘about 150 years before that of *Ed I*’.²⁰⁶ There is no clear support for this in any other sources. But this, if so, could put first use of the word as having occurred in the early 1100s – which is very ancient indeed.

In saying a ‘court’ was in existence we should not necessarily expect a court like the ones we have in use today. It is very possible, for instance, that the little known Court of Shepway ‘was held in the open air, or in a tent prepared for the purpose’ and it was this court which was presided over by the Lord Warden and Admiral of the Cinque Ports.²⁰⁷ We should not believe the High Court of Admiralty was any less different at least very early on.

3.3 Early Maritime Courts

Thirdly, in the earlier part of the Middle Ages, Holdsworth tells us, the ‘courts which had jurisdiction in maritime matters were for the most part the courts of seaport towns’.²⁰⁸ Reference has been made already to Ipswich in this regard which figures prominently in records. Holdsworth points out that the court at Newcastle dated from Henry I’s reign. He mentions also that the jurisdiction exercised by these courts was supervised and controlled by the Crown. This is because these courts often dealt with matters involving foreign affairs, including foreign seafarers. In what better way, it might be asked, could the Crown have controlled their operations in such matters than by the central authority of a high official – the Lord High Admiral? Possibly what Godolphin wrote of the Lord High Admiral in 1685 was true also of the late 1200s or early 1300s. He wrote that the Lord High Admiral is ‘concredited with the management of all Marine Affairs, as well as in respect of *Jurisdiction as Protection*’.²⁰⁹ It certainly would make sense in principle for the Crown to exercise control over the courts of the seaport towns by having a single high personage dedicated to the role. This would ensure uniformity in decision making.

This, however, is merely suggestive for it is based on speculation about how the Crown ran its affairs in maritime law matters at a very early point in time and surviving records are few.

²⁰² See G Gilmore and CL Black, *The Law of Admiralty* (Foundation Press, 2nd ed, 1975).

²⁰³ Marsden, above n 4, xii.

²⁰⁴ *Ibid* xv.

²⁰⁵ *Ibid* xii-xiii.

²⁰⁶ Godolphin, above n 6, 24.

²⁰⁷ E Knocker, *An Account of the Grand Court of Shepway Holden etc* (John Russell Smith 1862) 43.

²⁰⁸ Holdsworth, above n 2, 530–533.

²⁰⁹ Godolphin, above n 6, 26.

But this statement from Godolphin does indicate that by that time at least (1685) there was a clear split or division in the admiral's functions – 'jurisdiction' relating to court matters and 'protection' relating to naval matters. But that split or division in functions may have been recognised some three centuries before.

3.4 Statutes of Ric II

Fourthly, the proximity of the statutes of 1389 and 1391 to the period between 1340 and 1357 clearly seems to stand against Marsden's account. Once more though we must engage in a speculative exercise. Parliament was not as active in Richard II's reign as it is today or was in later times, and it is hard to accept that, in a period of about 30 or 40 years, a court sprang into existence and made such a 'bold bid' for business that it had to be contained not by one statute but by two. The 1391 statute commences with the Preamble:

[F]orasmuch as a great and common clamour and complaint hath been oftentimes made before this time, and yet is, for that the admirals and their deputies hold their sessions within divers places of this realm, as well within franchise as without, accroaching to them greater authority than belongeth to their office ...

This is suggestive (but no more than that) of long-standing and widespread dissatisfaction – longer than merely a period of, at best, say 30 or 40 years. It seems doubtful that any 'sharp conflict' which led to this statute was only of relatively recent origin.

The statutes of 1389 and 1391, in other words, do not themselves support a view that the Admiral's Court was but of recent origin. They suggest rather that it was of quite some antiquity—which is consistent with other evidence – and that, while it may have made a 'bold bid' for business, possibly or probably it did so at a much earlier time than either 1357 or 1340.

It is to be noted also that the 1391 statute speaks of 'the admirals and their deputies'. Blackstone in his *Commentaries* says the deputies of the admirals were the judges of the Admiral's Court.²¹⁰ So it would be the judges of a court who made that bold bid for business – but at that much earlier time. Of course it might not be exactly like a court which we would find today as I have mentioned but it would be identifiable as a court, nonetheless in respect of the *functions* it was exercising in resolving disputes between maritime claimants and disputants.

3.5 Prize Jurisdiction

Fifthly, there is also inconsistency in Marsden's theory (that the Admiral's Court emerged between about 1340 to 1357) with his analysis of early prize jurisdiction, for he wrote in 1909 that:²¹¹

The prize jurisdiction now vested in our high court of justice originated in the disciplinary powers conferred upon the admirals of the early fourteenth century by their patents.

This refers to the *early* 1300s. Almost certainly the first of these, he says, was Gervase Alard, mentioned above, who was Warden of the Cinque Ports and called Admiral of the Portsmen in 1300. How can it possibly be that it was another 40 years before an Admiral's court came into existence (more generally – and not confined to the Cinque Ports) to deal with piracy and spoil and, only 40 or 50 years after that, that its excesses were such that it was necessary to pass two statutes to curtail its authority? Especially if Marsden is himself citing, as above in the second point, a case in 1295 when a ship is arrested and its master fined before the Admiral.

3.6 Robert de Benso v William Crake

Sixthly, Dr Marsden mentions a case in 1297 which he notes is cited by Selden and Fitzherbert as evidence they say that an Admiralty Court was in existence in that year.²¹² The case is that of *Robert de Benso v William Crake* which went before Common Pleas (Bereford, Haward and Mettingham JJ). To put this case into perspective – when the case is decided it is still 45 years until Chaucer is born and Henry V's victory in the Battle of Agincourt on Saint Crispin's Day is 118 years away.

²¹⁰ See W Blackstone, *Commentaries on the Laws of England* (Oxford, 1769) 69.

²¹¹ RG Marsden, 'Early Prize Jurisdiction and Prize Law in England' (1909) 24 *English Historical Review* 675.

²¹² Marsden, above n 4, xii.

This is a most significant decision and the report of it has come down to us in Law French. Relying on Marsden's translation, the action was before the court for seizing a ship at sea – the ship being afterwards brought by the spoilers to 'Holtham' in Norfolk. Objection was taken to jurisdiction by Serjeant Mutford, for the defendant, on the ground of venue and on this ground:²¹³

[T]here is assigned on behalf of the King upon the sea an Admirall to hear and determine matters done upon the sea and we suppose that you are not minded to curtail their jurisdiction.

The reply of Bereford J is this:²¹⁴

We have general power throughout the whole of England, but of the power of the Admirals of whom you speak we know nothing. Nor are we minded to yield to them any of our power, if it be not so done by command of the King, of which you show us nothing.

Nothing of moment appears to have been said by Haward J or Mettingham J. How much may we rely upon this case to show that an Admiral's court was in existence in 1297?

(i) In the first place we must note that we have only Selden's record of the case. The manuscript of the case (25 Ed. 1, fol.82, b) as Marsden points out²¹⁵ has disappeared or is no longer accessible. But Selden is quite clear about the accuracy of his transcription: 'I have transcribed the case according to the very letters of my copy',²¹⁶ he said. His transcription, therefore, seems to be one we can rely upon for its accuracy – if we can rely upon his assurance. But we have no better evidence.

(ii) Secondly, in the submissions of Serjeant Mutford, although they were rejected, the case is *highly* suggestive of the existence of admiralty jurisdiction or of an Admiral's court at least in 1297. This is how Selden regarded it and he added: 'Some cases in the old records justify it also.'²¹⁷ But Marsden says it 'appears to be giving too much importance to [Serjeant Mutford's] remarks' to draw this inference from them.²¹⁸ Marsden, however, nowhere explains why he says this is so and he makes no further attempt at analysis.

(iii) The remarks themselves seem unmistakeable and perfectly plain. Mutford speaks *as if* it is common knowledge that 'there is assigned on behalf of the King upon the sea an Admirall to hear and determine matters done upon the sea'. It is hard to imagine he *could* be mistaken about something as specific as this but it is *not* hard to imagine, on the other hand, the judge not understanding what he (Mutford) was referring to or not knowing anything about it. Mutford does not give notice that he speaks subject to correction (which may have been the custom at this time) so that his blunders would be harmless.²¹⁹ He was a serjeant at law – perhaps among the first 30 ever to enjoy that rank. Someone of that rank we can expect would not knowingly mislead the court. Moreover, the earliest year books show, it has been said, 'that the leading advocates [i.e. the serjeants] were men of technical skill and intellectual distinction'.²²⁰ We can be sure, therefore, that Mutford was one of those at the top of his profession. Public records in the National Archives, not previously referred to in connection with him, show, furthermore, that in the period between about 1307 and 1314 he was himself a justice of assize in Buckinghamshire. He was obviously very learned in law and an obvious mistake by him before Common Pleas – such as asserting to the court the existence of a non-existent jurisdiction – does not seem likely.

(iv) His submissions, which are considered ones, also give a sense of *court structure* to the admiral's jurisdiction. For the admiral, he submits, has authority on behalf of the King 'to *hear and determine* matters done upon the sea'. This appears to be very much a statement about *curial* authority or judicial inquiry. Cases are to be determined upon a hearing – judges in courts *hear* and *determine* matters. It is a developed submission – carefully expressed – going to jurisdiction which is put in a way by him that would not be out of place in a court today. Quite some thought may or must have gone into it. Something which was already in existence (or likely to be) may or must have driven the submission – unless indeed it did spring from nowhere which is not likely. In other words, an already existing body of learning underlay or may have underlain it. How old any such body of learning may have been or its actual content cannot now be known. And one would think that to be able to hear and determine matters, there must have been in place, *already*, structural features enabling this to occur and that they may or would have

²¹³ Ibid xvii.

²¹⁴ Ibid.

²¹⁵ Ibid.

²¹⁶ J Selden, jurisconsult, *Opera Omnia, Tam Edita quam Inedita; in tribus voluminibus. Collegit ac recensuit: vitam auctoris, praefationes & indices adjecit*, (London, 1726) vol 1, 1897.

²¹⁷ Ibid 1879.

²¹⁸ Marsden, above n 4, xviii

²¹⁹ JH Baker, *The Order of Serjeants at Law* (Selden Society, 1984) 9.

²²⁰ Ibid 10.

taken time – perhaps years or even decades – to develop and establish. We simply do not know. In such a setting, however, most likely, it would be the Lord High Admiral himself, or a deputy called the judge of the court, who would be presiding.²²¹ Again though, perhaps not in a court setting as we would expect it to be like today but nonetheless in a suitably formal place (perhaps a chamber or hall of some sort).

(v) Mutford's submission also seems to be corroborated by the fact, referred to by Sir Matthew Hale in *On Admiralty Jurisdiction* (c. 1676), that *Robert de Benso v William Crake* 'came in question but three years after the name of Admiral came to be of use in England'.²²² Marsden's analysis would suggest it was only two years afterwards. Godolphin would suggest it was much longer than this even. But whichever is correct it is significant that the submission is made *after* the word is found to be in use – and perhaps soon after that. Moreover, Serjeant Mutford speaks of 'an Admirall' and not of the 'Admiral of the Cinque Ports'. And he would not or could not be referring to the latter – if in existence at that time – because the case would not have been of concern to the Admiral of the Cinque Ports: Norfolk was not one of the Cinque Ports.

(vi) Bereford J's reply is instructive in itself. It could be viewed as dismissive. Or, perhaps it could be regarded as one of genuine surprise – 'of the power of the Admirals of whom you speak we know nothing'. Intriguingly he uses the plural 'Admirals' although Mutford's submission is based on the singular 'Admirall'. Is it open to be said, therefore, that he is feigning ignorance? – he already knows there are admirals and not merely *one* admiral. Perhaps he was perplexed by this. Interestingly, he does *not* say their power does not exist. On the contrary: he says, nor 'are we minded to yield to them any of our power' unless by King's command. This is far from denying their existence. Indeed, he appears to be saying that, if they do exist, we (meaning Common Pleas) are not willingly giving up any of our powers unless by King's command. Then following on from this, it is as if he puts Serjeant Mutford to his proofs: referring to the King's command, he says 'of which you show us nothing'. Perhaps Mutford was caught out perhaps because it was just expected, among the serjeantry and others, that the King's command to the Admiral or to admirals 'to hear and determine matters done upon the sea' would be well known. But Bereford J does not say 'of which you *can* show us nothing'. He does not, in other words, appear to rule out the possibility that the King's command might be shown. He seems to leave this open. But he does not say to Mutford – 'that is wrong' or something to like effect. It is as if he is testing him in the way judges are often known to do to Counsel.

(vii) Interestingly also nor does Bereford J make any mention of the Admiralty Court of the Cinque Ports. The analysis undertaken by Miss K Murray in her *History of the Cinque Ports*²²³ establishes that the Admiral's Court of the Cinque Ports is not to be found mentioned by name as such until 1395 in any event and if this is right then Serjeant Mutford could not have been referring to the Admiralty Court of the Cinque Ports in any event.

Dr Phillimore in *The Lord Warden and Admiral of the Cinque Ports v HM in his Office of Admiralty*²²⁴ is correct, however, in saying there were at first several admirals each to himself exercising jurisdiction within his boundaries. Curiously perhaps Sir Nicholas Nicolas speaks even of a Sir William Clinton on 16 July 1333 being made Captain and Admiral of the Ships of the Cinque Ports and of all other places from the Thames westward.²²⁵

(viii) In light of this analysis, Dr Marsden's dismissal of *Robert de Benso v William Crake*, for no reason given, is hard to explain. For the case, it seems plainly, does strongly suggest that, by 1297, there was curial or judicial authority in the Admiral to hear and determine 'matters done upon the sea'. That is clearly a reference to matters which are maritime disputes. And it is suggestive also that such authority is of more ancient origin than that even – but perhaps not by much.

The submissions of Serjeant Mutford thus carry considerable weight. And they are reinforced, as Hale points out, by the word 'admiral' being in use before the time of the case – perhaps even long *before* that time, if Godolphin is correct.

²²¹ Blackstone, above n 36.

²²² See Sir Matthew Hale, 'On Admiralty Jurisdiction' in MJ Prichard and DEC Yale (eds), *Hale and Fleetwood on Admiralty Jurisdiction* (Selden Society, 1993), 31.

²²³ K Murray, *The Constitutional History of the Cinque Ports* (Manchester University Press, 1933) 121.

²²⁴ (1831) 2 Hagg 438 at 445.

²²⁵ Nicolas, above n 10, 7.

4 Additional Points

There are certain additional points to be made.

4.1 Shipmoney case

There is support for an Admiral's court (much earlier than Marsden would have it) in observations of Crooke J in *R v John Hampden*²²⁶ in 1637—otherwise known as the *Shipmoney* Case. Reviewing the records of King John's time he said:

Three of these are to arrest and make stay of ships, that they should not go out of the Kingdom, but to be ready for the King's service and the order was to bring Ships of Particular Towns to the mouth of the *Thames* for the King's service.

This is one of the earliest recorded references to an 'arrest' of ships as in a proceeding in rem. However, the 'arrest' being referred to appears to be more in the nature of a requisitioning. This is not referred to by Dr Marsden but he does refer to *Warner v Wheeler*, decided in 1542, whereby, by letters patent of Henry VIII, the Lord High Admiral is declared to have jurisdiction to arrest 'goods wares and things' found on ships or boats in the Thames:

And that by reason of such arrest as well the things arrested as the persons to whom such things belong were and are subject and liable to the jurisdiction of the court of the said lord our King his Admiralty of England.²²⁷

Nonetheless, Crooke J is quite specific in referring to an 'arrest' of ships (and arrest of ships was known as such in his time, as may be seen from *Warner v Wheeler* itself) and he puts this at a time in the reign of King John – that is in the early 1200s.

4.2 PRO manuscripts

There are also scattered references in significant documents to be found in the National Archives, which are obscure but available for public viewing, which raise further doubts about Marsden's account:

(i) One such document, which is Anglo-Norman in content, is headed: '*De Superioritate Maris Anglia Et Jure Officy Admirallatus in codem. Ano: 26 Edw Primi*'. This document appears to be an official report of some kind. It appears to be referring to the supremacy of the English over the seas (or the narrow seas) and the jurisdiction of the office of Admiral. It is undated but would appear to be referring to the year 1298 – year 26 of Edward I's reign. This is 40 or 50 years or more before the time when Dr Marsden says the High Court of Admiralty came into being. He attaches significance to the court's establishment in Edward III's claim, after the Battle of Sluys, to be sovereign of the seas. But this document, which does not appear to be referred to by him at all, indicates this was a claim being made half a century earlier.

(ii) A second such document is also undated but is similarly headed. This document, however, refers to Ordinances made on March 8, 1286 (or 1287) at Bruges, in the presence of Guy, Count of Flanders and Marquis of Namur, and Walter, Bishop of Chester and Treasurer of England, and Sir John de Berwick, Messenger of the King of England, and William de Leybourn (or Leburne), Admiral of the Sea of the King of England. This document may be one referred to by Dr Marsden but wrongly dated by him as 1297. It is a document of 1286 (or 1287) which puts the earliest use of the word 'admiral' at well over 50 years before Dr Marsden says the High Court of Admiralty was created – at the earliest. And it is a use of the word 'Admiral' 10 years before Common Pleas heard the case of *Robert de Benso v William Crake* in 1297. Why wait that period – until 1340 – to create a court of that name – given that, in the meantime, there were pressing needs to have an Admiral's court arising from cases of piracy and spoil? This does not seem supportable on the basis of anything advanced by Marsden.

Marsden's dating seems wrong based in particular on Dr Godolphin's view that William de Leybourn (or Leburne) was known as Admiral 'in the 15 of *Edw I*'²²⁸ – that is, in 1287. That, or 1286, happens to be the date of this second PRO document.

²²⁶ *R v John Hampden* (1637) 1 State Trials 505, 656.

²²⁷ Marsden, above n 4, 220–221.

²²⁸ Godolphin, above n 6, 24.

5 Conclusion

Analysis shows there is no strong basis for Dr Marsden's claim that the High Court of Admiralty can be traced with 'tolerable certainty' to the period between the years 1340 and 1357. It was in existence then (and certainly in 1357) but it seems it is traceable to a *much* earlier time. It is definitely traceable to the early 1300s – if not to the late 1200s indicated by Serjeant Mutford's submissions in *Robert de Benso v William Crake* in 1297. It may even be traceable to the early 1200s. No records can assist us further than this. They simply do not exist.

The Admiralty Court of today, and all Anglo-Admiralty courts abroad, are ultimately the successors of the High Court of Admiralty. We cannot be entirely sure how that court began – although, most likely, it *was* connected with the claims of the English kings to sovereignty of the seas, as Marsden says. But we can be sure that the court disappeared in the Judicature Act reforms of 1873 and 1875. The place where it conducted its business for centuries – Doctors Commons – disappeared also at about the same time or shortly before. But the body of law developed by the court, over the centuries of its existence, lives on – in Australia, as well, and elsewhere. In a way, Australian Admiralty lawyers are the inheritors of a system devised perhaps as much as 800 years ago. That in itself is something to truly marvel at.