'*INTER ARMA ENIM SILENT LEGES*?' IMPRESSMENT AND THE SCOTTISH COURTS IN THE LATER EIGHTEENTH CENTURY

Abstract
This is the first article to examine legal pleadings in Scottish cases involving naval impressment in the period 1778-1795. The Session Papers provide a rich source of both law and fact and these cases, as well as reflecting on Admiralty practice across Britain, demonstrate reliance by counsel on English sources – including pre-Union statutes – alongside Scots law. Impressment sparked constitutional debate concerning the relationship between the crown prerogative and the liberty of the subject, while the detail of the cases reveals much of the social context behind the practice of impressing men to serve the crown.

Key words
Impressment; Admiralty; Court of Session; royal prerogative.

This discussion focuses on the major cases concerning naval impressment which came before the Scottish central courts between 1778, the year in which the American Revolutionary War at sea intensified following the French declaration of war against Britain, and 1795, when the first of the Quota Acts shifted the burden of naval manning to local authorities.[1] Only five such cases appear in Morrison's *Dictionary of Decisions*, but many more have traces in the archives, reflecting the evidence of one naval lieutenant, with knowledge of *habeas corpus* cases in England, that 'complaints to courts of law are more frequent at Leith than in London'.[2]

The 1790s, in particular, was a period of perceived national crisis, and town councils began to offer bounties in newspapers to those voluntarily enlisting in the Navy through the regulating officer at their nearest port.[3] Fear was so widespread that even church ministers and probationers in East Lothian sought permission to carry arms in case of invasion.[4] The press gang developed in response to the Royal Navy experiencing sustained and regular shortages of manpower, particularly of skilled sea-

[1] J R Dancy, *The Myth of the Press Gang* (2015), 10. The year 1795 has been chosen partly because of this legislation (on which see infra, note 15), but also because (1) by the end of 1795 there was, according to some historians, a change of tone in the 'ideological' war against France and a shift in attitude towards internal security; and (2) the legal attitude in Scotland had been fully defined by the cases heard by the end of 1795. On political attiudes see P. Schofield, 'British politicans and French arms: the ideological war of 1793-1795' 77 (1992) *History*, 183, esp. 184, 197-9.

[2] Advocates Library Session Papers [ALSP], Arniston Collection, vol. 194, no. 13, *The Petition of Sir George Home, Bart. Regulating the Service of Raising Men for this Majesty's Fleet at Edinburgh*, 15 May 1795, Appendix, p. 7. Over 60 cases, covering both army and navy in the period 1744-1790, have been identified during this study.

[3] N A M. Rodger, *The Wooden World* (1988) 153; an example is Linlithgow, National Records of Scotland [NRS], B48/9/14, Linlithgow Town Council Minutes [TCM], fo. 173. The regulating officer commanded the Navy's office, known as the 'Rendezvous', in ports.

[4] NRS, Records of the Justices of the Peace for the County of East Lothian, Minute Books, Quarter Sessions, JP2/2/4, fos 182-3.

faring men, at a time of existential threat.[5] It raised profound legal questions about the role of the prerogative and the liberty of the subject.

The cases examined also demonstrate, once again, the utility of the Session Papers, revealing the quality of debate in the contemporary Court of Session on a vital question of public policy. Counsel's arguments contain much of interest, revealing not only attitudes towards the prerogative and the role of common law in restraining it, but in providing underlying moral and legal justifications for both allowing and limiting a controversial practice.

A. THE AUTHORITY FOR IMPRESSMENT

Naval impressment was necessary because the combined demand of the merchant and military marine for skilled seamen outstripped the supply of volunteers. Its legal foundation lay in the crown prerogative, parliamentary statute, and the common law. Ultimate authority rested on the crown: 'the right of impressing is an ancient, legal, prerogative of the crown, coeval with our constitution, as being necessary for its defence'.[6] Given that this was a matter of public law, it seems never to have been disputed before the Court of Session that the pre-1707 English tradition of impressment was relevant in cases coming before Scottish judges. Article XVIII of the Treaty and Acts of Union had left the possibility that law may be made the same in matters of 'public Right, Policy and Civil Government … throughout the whole United Kingdom', but this was did not imply the wholesale acceptance of English constitutional principles.[7]

Scots counsel, *in arguendo,* cited approvingly the jury direction of the English judge, Sir Michael Foster (1689-1763), when he defined the legal basis of impressment in the following terms: '[t]he right of impressing mariners for the public service is a prerogative inherent in the Crown, grounded upon common law, and recognized by many acts of Parliament'.[8] These included pre-1707 English statutes as far back as a 1378.[9] While Foster correctly implied that legislation only indirectly authorised impressment, two Acts has particular importance.[10] The first, from 1703, contained provisions in respect of apprentices.[11] Poor parish boys aged 10 or over, with the consent of the local justice of the peace or other magistrates, could be

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[5] See, e.g., Dancy, *Myth of the Press Gang*; N Rogers, *The Press Gang: Naval Impressment and Its Opponents in Georgian Britain* (2007); B. Lavery, *Shield of Empire: The Royal Navy and Scotland* (2007), esp. ch. 6; and, from an American perspective, C P Magra, *Poseidon's Curse: British Naval Impressment and Atlantic Origins of the American Revolution* (2016), esp. ch. 2.

[6] ALSP, Miscellaneous Collection, vol. 3 (1774-1777), *Memorial for The Honourable Charles Napier, Regulating the Impress-service at Leith, Defender, Against James Chalmers, Merchant in Leith, Pursuer,* 4 Mar. 1778, p. 11.

[7] J. Ford, 'The legal provisions in the Acts of Union' 66(1) (2007) *Cambridge Law Journal,* 106, 108.

[8] ALSP, Arniston Collection, no. 194, no. 14, *The Petition of Cunninghams and Simpson, Silver-Platers in Edinburgh,* 16 Jun. 1795, p. 26. The quote, by William Tait, is from Foster's report of the case of Alexander Broadfoot which was published in 1758. On this case, see Rogers, *Press Gang,* 60-61.

[9] ALSP, Elphinstone Collection, vol. 40, no. 8, *Information for Robert Browning master, and John Browning, mate of the Letter of Marque Ship, the Liberty of Folkestone, Suspenders; Against The Honourable Captain Charles Napier, regulating the Impress Service at Edinburgh, Charger*, 1 Aug. 1780, p. 4 (per Alexander Elphinstone).

[10] Glasgow City Archives [GCA], Papers of Mitchells, Johnston & Co., T-MJ/337, Thomas Graham to Lawrence Hill, 18 Sep. 1777.

[11] 2&3 Ann. c.6, *An Act for the increase of Seamen, and better Encouragement of Navigation, and Security of the Coal Trade*.

forcibly apprenticed to the sea until the age of 21 (section 1). Such apprentices could not be impressed or voluntarily enlist in another ship until the age of 18 (section 4). To encourage young men to enlist voluntarily, anyone doing so gained a three-year immunity from impressment on another vessel and was entitled to a protection from the Admiralty free of charge (section 15).

In 1740, parliament exempted certain categories of person from impressment.[12] First, there was exemption for anyone aged under 18, or 55 or above, or any foreigner, who served in any merchant vessel, trading ship, or privateer owned by subjects of the British crown. Secondly, under section 2 of the Act, those of any age who 'use the Sea' were exempt for the period of two years immediately following their first going to sea. The phrase simply meant professional seamen.[13] Anyone who had not gone to sea but was bound as an apprentice to serve at sea, was exempt for three years from the date he was so bound. For 'the better securing' of these exemptions, the Lord High Admiral or three of his commissioners were authorised to grant a protection against impressment to anyone qualified in the above terms.[14]

A third Act of Parliament, in 1795, was an emergency response to the fear of invasion.[15] This imposed a quota on ports where a specified number of men had to be recruited in each place. One case in the Court of Session that emerged from this legislation, although it concerns voluntary enlistment, contains much discussion of impressment. It includes the fundamental assertion that 'the fact of our having *Hannibal ad portas*, cannot vary the common law of the land'.[16]

Impressment was particularly unpopular with merchants. In 1741 the Convention of Royal Burghs (the body which protected the interests of the major trading towns in Scotland) had objected to a parliamentary bill to increase the number of seamen.[17] The offending clause, requiring magistrates and constables to break down the doors of houses where they suspected a seaman was being harboured, was removed as being a violation of the liberty of the subject.[18] While politicians recognised the dire need for seamen, they also understood how carefully the law had to be framed, lest it led to such hardship as to provoke a reaction amongst the potential sea-faring population.[19] The Convention's members, through their London agent, William Hamilton, later obtained from the Admiralty a general protection against impressment for fishermen

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[12] 13 Geo. II, c. 17, *An Act for the increase of Mariners and Seamen to navigate Merchant Ships and other trading Ships or Vessels*.

[13] The definition is discussed by Lavery, *Shield of Empire*, 146-8.

[14] Signet Library, Session Papers [SLSP], 597:12, *The Petition of John Syme, ship-builder in Leith*, 4 Jul. 1780, p. 6. Those statutorily exempt, such as apprentices, were supposed to obtain a protection from the Lords of the Admiralty for the duration of their apprenticeship which they had to carry with them. Without this, there was a presumption for impressment: ALSP, Miscellaneous III, no. 39, *Information for James Chalmers, Merchant in Leith, Pursuer, against The Honourable Captain Charles Napier, regulating the impress-service for the Navy, at Leith, Defender*, 27 Feb. 1778, p. 4. Also found at Signet Library Session Papers [SLSP], 596: 13.

[15] 35 Geo. III, c. 9. *An Act for procuring a Supply of Seamen from the several ports of this kingdom, for the service of his Majesty's Navy*; SLSP, 597:12, *The Petition of John Syme, ship-builder in Leith*, 4 Jul. 1780, p. 6.

[16] *The Petition of Cunninghams and Simpson* (note 6), p. 24. 'Hannibal at the gates', suggesting a moment of crisis, refers to Cicero's first Philippic oration: Cicero, *Philippics 1-6*, ed. D.R. Shackleton Bailey (Harvard Univerity Press, 2009), 1.5 (p. 17).

[17] Edinburgh City Archives [ECA], Minutes of the Convention of Royal Burghs, SL30/1/1/11, fo. 276 (13 Mar. 1741). The Bill, entitled 'A Bill for the Encouragement and Increase of Seamen and the Speedier Manning of his Majesties fleet', was enacted as 14 Geo. II, c. 38.

[18] House of Commons Sessional Papers, *The History and the Proceedings of the House of Commons, The Seventh Session of the Second Parliament of King George II* (1740-1741), 18 Nov. 1741, 48ff.

[19] See the speech of the Jacobite-leaning Tory MP for Cambridge, Sir John Hynd Cotton, ibid., 433-4.

and others involved in the herring trade in the Firths of Clyde, Forth and Moray.[20] Notarial copies were sent to all the coastal burghs 'that they may show the same to the Captains of the Kings Ships and tenders stationed on their coasts'.

The lack of direct statutory authority for impressment led to some uncertainty on the part of local judges. Debtors were clearly not exempt from being impressed. If the debt was £20 or more, however, the debtor might be apprehended by the creditor and imprisoned, although it was unclear whether imprisonment trumped impressment.[21] The judge-admiral of Greenock, Thomas Graham, thought the law permitted judges to imprison pressed seamen for debt. At the same time, he was naturally concerned to rule out collusion between the pressed man and alleged creditor.[22] In his view landsmen were not specifically exempt, and there were instances of them being taken, yet 'it is generally supposed the general practice does not favour impressing them'.[23]

Graham, taking the view that 'practice is the best explanation of dubious law', wrote to his nephew Lawrence Hill W.S. in Edinburgh with queries to discover the practice in the High Court of Admiralty. The sentiment he expressed must have been familiar to every judge in an impressment case:

> On the one hand I consider it my duty to facilitate rather than obstruct his majestys service in so far as I legally can, on the other I must determine for the subject when the imprest man is in such circumstances as to bar his being impressed.

The four queries Graham presented reflect genuine uncertainty and the officiating clerk of court responded to them. In regard to the question of creditors, the reply was that the Judge Admiral would normally grant warrant for apprehending an impressed seaman upon the application of a creditor who was owed £20 or more. He also noted that a seaman's marriage did not exempt him from being impressed: if the duty to aliment others could relieve him of impressment, that 'would materially hurt the service'.[24] Finally, a first mate impressed while on duty should be liberated but a common mariner in an outward bound ship could be impressed, unless he had a protection from the Admiralty, and no warrant for his liberation should be granted.[25]

B. ADMIRALTY INSTRUCTIONS

Command authority was held by a regulating captain and at the port of Leith the regulating captains against whom Court of Session complaints have been traced were John Ferguson (d. 1767), Charles Napier (1731-1807) and Sir George Home (1740-

[20] ECA, Minutes of the Convention of Royal Burghs, SL30/1/1/11, fo. 276.
[21] 1 Geo II., c. 14, s. 15; 31 Geo. II, c. 10, s. 28.
[22] GCA, Papers of Mitchells, Johnston & Co., T-MJ/337, Graham to Lawrence Hill, 18 Sep. 1777.
[23] Ibid. Cf. William Tait's argument that the king had no right to press landsmen and, unless specifically authorised by statute, they could not be made to serve without their consent: *The Petition of Cunninghams and Simpson* (note 6), p. 27.
[24] Ibid., Lawrence Hill to Thomas Graham, 19 Sep. 1777. The response was by return of post, though the clerk had asked for further time, and a copy of Graham's queries, in order to consult the procurators in the High Court of Admiralty.
[25] The Admiralty could order captains to ignore such protections, as they did in 1779: e.g. NRS, CS271/51280, *Replies for Jonathan Dixon Commander of the Leveret Privateer of London and Robert Verden Boatswain of the said Suspenders To The Answers for the Honourable Captain Charles Napier Charger*. This process contains an order to Napier dated 21 Jun. 1779 requiring him to impress men 'without regard to any protections' of earlier date. This did not authorise the impressment of anyone otherwise lawfully exempt.

1803). Every regulating captain held a general warrant from the Lords Commissioners of the Admiralty, to impress 'so many seamen, seafaring men, and persons whose occupations and callings are to work in vessels and boats upon rivers, as he shall be able, in order to serve on board his Majesty's ships.'[26] This warrant rested ultimately on the authority of the Privy Council and would be issued following an Order in Council. In addition, the captain often had private instructions direct from the Lords of Admiralty, upon their authority alone, which could be varied or recalled depending on prevailing military or political circumstances. Such private instructions circumscribed a captain's conduct but were not to be published to any court or private citizen. They typically began by directing captains not to refuse to receive pressed men, especially in time of war, 'under Pretence of their being Landmen … provided they are of fitting Age, and of able Bodies, so as to be capable of doing His Majesty Service at Sea.'[27]

In 1778 Andrew Crosbie had argued that if Admiralty instructions 'contained any thing contrary to the public law, they would have been void in any court of justice; and the Commissioners of the Admiralty, who pretended to sign them, would have been liable for the severest censures'.[28] Another counsel, William Tait, in 1795, noted that private instructions from the Admiralty had no different status to instructions from the War Office in the case of those recruited into the army and, as he put it, 'cannot make law'.[29]

George Abercromby, counsel for Captain George Home, argued that any exemption which appeared in a captain's private instructions could not ground a right at common law since no pursuer could insist on them being produced in court.[30] By their nature, private instructions depended entirely on theAdmiralty's discretion and reflected prevailing circumstances. The necessity of keeping them from the public gaze was repeatedly stressed by crown lawyers. Yet the instructions, in specifying how to exercise the warrant, were binding upon the recipient who could be punished for failing to adhere to them.

The dilemma facing regulating captains was summed up by Allan Maconochie when defending Home in another case. He based his argument to the judges for maintaining the privacy of the Board of Admiralty's instructions upon public policy:

> Now, put the case, that, upon production of those orders, your Lordships were to be of a different opinion from the Board, and think that their orders had a different meaning from what the Board that issued them say was their meaning, your Lordships must at once perceive the incongruities that would result from such a judgment; for, as the orders were discretionary with the Admiralty, they must be entitled to alter or recal [sic] them at pleasure. Nay, they must punish the respondent for acting contrary to their understanding of the orders, though it were agreeably to that of your Lordships; for your decree could not prevent them from cashiering him for disobedience of orders ….[31]

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[26] The dates of the complaints against individual captains are given in brackets: John Ferguson (1755), Charles Napier (1770-1, 1776-1789) and Sir George Home (1790-1796). In Feb. 1771 Napier was instructed to 'break up the different rendevous' and to pay off his tenders, presumably after the Falklands Crisis of 1770/1: The National Archives, Kew [TNA], ADM/106/1271, Napier to the Commissioners of HM Navy, 28 Feb. 1771. On Ferguson, see Lavery, *Shield of Empire*, 136-7.
[27] TNA, Instructions to Officers Raising Men, 1807, ADM 7/967.
[28] *Information for James Chalmers* (note 14), p. 9.
[29] *The Petition of Cunninghams and Simpson* (note 8), p. 32.
[30] *Petition of Sir George Home v Smart* (note 2), pp. 5-6.
[31] Ibid., no. 16, *Answers for Sir George Home v Archer* (note 98), p. 10.

Robert Playfair, agent for Home in a third case, objected when Lieutenant Alexander Pearson, one of Home's officers, was asked in a proof whether he thought it against his duty to read out part of his private instructions.[32] According to him, the sheriff conducting the proof had not seen cause to order production of the instructions and Sir George thought it detrimental to the service.[33]

The standard instructions were nonetheless referred to and quoted in other cases. In the leading case of *Brownings*, for example, the following article was quoted: 'You are not to press any boatswains, carpenters, or first mates belonging to merchant ships of fifty tons or upwards, nor any masters of small vessels'.[34] This exemption was hedged with qualifications concerning the precise circumstances in which a mate was exempt—namely, that it applied only when the ship was at sea with a cargo on board, or while the mate, if ashore, was actually employed on the ship's duty when impressed.[35] Yet, it was argued, even this exemption gave rise to no legal right because it was granted at the pleasure of the Lords of the Admiralty and might be withheld in cases of urgent necessity.[36]

Counsel for pressed men tended to argue that Admiralty practice, in choosing to exempt mates in certain circumstances, had hardened into a customary rule of law. Moreover, they sought to extend the exemption. Similarly, the undoubted protection of ship's apprentices in statute opened the way for an argument that masters enjoyed indirect statutory protection. For if there was no master of a ship, there could be no apprentice, and parliament, in protecting the latter, must have intended to protect the former.[37]

In summary, the position in relation to the law and authority to impress seamen was tinged with doubt. The general unpopularity of impressment, and its lack of direct parliamentary authority, allied to reliance on the uncertain scope of the prerogative (a matter rarely discussed in the court in the eighteenth century), ensured not only that there was room for argument in regard to the practice, but also that the employers and friends of pressed men would exploit any loopholes they could to free them. In that environment, Court of Session litigation was inevitable.

C. PRESS WARRANTS

Sir George Home, when regulating captain at Leith, sometimes permitted a pressed seaman to volunteer so that he would become entitled to a bounty.[38] This generosity

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[32] Playfair was a regular Admiralty court practitioner: J Finlay, ed., *Admissions Register of Notaries Public 1700-1799* [*ARNP*] (2 vols, 2012), II, no. 2339.

[33] NRS, Court of Session, Unextracted processes, 1st arrangement, Inglis Office, CS233/B/5/1, Proof in process Black & Brown against Sir George Hume, 20 Apr. 1795, fo. 8. The proof was held under an Act and Commission from the lords of session to the sheriff depute of Edinburgh.

[34] *Information for Robert Browning* (note 9), p. 6.

[35] ALSP, Arniston Collection, vol. 194, no. 13, *The Petition of Sir George Home, Bart., sometime regulating the service of raising men for his Majesty's Fleet at Edinburgh, now Commander of his Majesty's ship Defiance*, 9 Jul. 1795, p. 2.

[36] As cogently argued by Robert Playfair: NRS, Court of Session, Bill Chamber Processes, Old Series, CS271/4053, 'Answer for Captain Napier to the Bill of Suspension for Robert and John Browning, 1780', fo. 3.

[37] ALSP, Elphinstone Collection, vol. 40, no. 8, p. 5, per Alexander Elphinstone, counsel for the Brownings.

[38] E.g., NRS, Court of Session, Unextracted processes, 1st arrangement, Inglis Office, CS233/B/5/1, Proof in process Black & Brown against Sir George Hume, 20 Apr. 1795, fo. 9; NRS, CS271/29585, *Bill of Suspension, William Main and Others*, 1780,

did not extend to anyone raising legal objections to his impressment, however, because any case of that kind had to be reported to the Admiralty.

The Board of Admiralty press warrant warned captains not to discharge or exchange any impressed man in return for reward or consideration.[39] This was clearly aimed at bribery, although as shown in an action in 1781 (to be discussed shortly) a regulating captain might exercise considerable discretion provided this was for the good of the service.[40] The anti-bribery clause did not, in Charles Napier's view, prevent him from releasing men who had been impressed if he could arrange with them or their employers suitable replacements and there is evidence of other regulating captains making similar arrangements.[41]

In the case in question, the Edinburgh merchants Martin and Kerr entered a bond with Napier to pay a penalty of £100 sterling should they fail to find two satisfactory able-bodied seamen to replace the master and mate of their cutter, the *Resolution* of Folkestone.[42] The *Resolution*, a smuggling vessel, had been overpowered by two Revenue ships and, in line with the recent decision in the *Brownings* case, all hands were pressed. The lord advocate and the English attorney-general had criticised Napier for not making a similar arrangement in the *Brownings* case when two able-seamen or four landsmen were offered in place of the two defenders.[43] Martin and Kerr failed to supply the promised able-seamen, due to the demand for crews for privateers then being fitted out. Instead, they argued that Napier was not entitled to enter into the transaction in the first place.[44] It emerged in this case that the exchequer attorney William Walker, who initiated the transaction with Napier's agent Playfair, was in the habit of recruiting men for privateer vessels which often held greater attraction than the Royal Navy.[45]

D. JURISDICTION

In Edinburgh, the town council asserted its right by royal charter to hear maritime cases. The lord provost did so as admiral of the Firth of Forth, with the Edinburgh bailies as his deputes and admirals of Leith. In 1781, when an issue arose in the Court

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[39] The text is given in ALSP, Miscellaneous Collection, vol. 3 (1774-1778), *Memorial for The Honourable Charles Napier, Respondent, Against William Walker, late residenter at Fountainbridge, Complainer*, 3 Feb. 1778, p. 2.

[40] NRS, Court of Session, Bill Chamber Processes, CS271/49108, *Martin & Kerr v Napier*, 1781.

[41] Eg. Capt. John Ferguson in 1762: ALSP, Meadowbank, vol 25, *The Petition of Thomas Meek Merchant in Dunbar*, 22 Jan. 1762, p. 2.

[42] NRS, Court of Session, Bill Chamber Processes, CS271/30960, Bond of Caution by Robert Kerr, 31 Mar. 1781.

[43] *The Petition of Robert Browning* (note 9), 3 Feb. 1781, pp. 18-19. See note, dated 7 Feb 1780/1, on the following page: 'Mr Wallace then attorney General of England and the Lord Advocate of Scotland were both of opinion that Capt. Napier did wrong in refusing to accept of two seamen in place of Brownings and advised that two men should yet be accepted of which were given as could get two men for less money than have the appeal heard'. Both however, according to the same source, considered the Court of Session judgment well-founded. On this case, see note 103.

[44] In *MacAllister v Trokes*, Trokes, though convinced MacAllister was properly pressed, nonetheless claimed he had resolved on going to Greenock to discharge him 'on finding another able-bodied seaman in his place', only to discover that MacAllister had mistakenly been taken to Plymouth: SLSP 169: 16, *Answers for Lieut. John Trokes of His Majesty's Navy … To The Complaint and Petition of Archibald MacAllister*, 4 Mar. 1782, p. 4.

[45] NRS, Court of Session, Bill Chamber Processes, CS271/49108, *Answers for the Honourable Captain Charles Napier Regulating the Impress Service at Edinburgh To The Bill of Suspension for Messrs Martin and Ker Merchants in Leith*, 7 Mar. 1781, Fo. 8. Walker, admitted to the Court of Session in 1764, was an experienced agent: NRS, Court of Session, Books of Sederunt, CS1/14, fo. 193r.

of Session over the city's grant of admiralty rights, the clerk of Leith borrowed the original 1636 charter from the city's charter-house to demonstrate that the admiral of Leith had authority to condemn vessels as prizes.[46]

Charles Napier, however, refused to recognise that he was subject to the council's admiralty jurisdiction when an apprentice ironsmith (and alleged naval deserter), Thomas Neil, and his father, brought a petition against him in 1783.[47] His rationale was that the jurisdiction did not extend beyond the port and harbour of Leith.[48] The Leith tender lay beyond the limits of the port, and neither Napier, nor the lieutenant in charge of the tender, resided within Edinburgh or Leith. Residence aside, as a matter of principle, he alleged that jurisdiction was denied to inferior courts, given that 'questions relative to the Impress Service … are of the most important, and public nature, that can possibly come before an Admiralty or any other Jurisdiction'.[49] In consequence, Napier brought a Bill of Advocation (a process by which a judgment in an inferior court was brought under review by a superior court) to have the case moved to the High Court of Admiralty.

Napier's argument was logical. It relied on the inconvenience for the efficient manning of the navy should the impress service be subject to the jurisdiction 'of every inferior local admiral in Scotland', insisting that only the High Court of Admiralty or the Court of Session should have jurisdiction.[50] An interdict from one of these two courts applied across the jurisdiction, permitting a tender to continue in use provided it remained in Scotland, while an interdict from a local court would would keep it within the narrow bounds of that court's jurisdiction until the disputed matter was resolved.[51]

Edinburgh's magistrates acted as admirals of Leith, a jurisdiction both geographically narrow and limited in scope. They had no jurisdiction, it was alleged, in maritime cases that arose within the limits of Edinburgh, rather than Leith, and could not cite anyone who resided in Edinburgh.[52] Despite presenting its charter, the town failed to persuade the Court of Session in 1781 that the magistrates, as admirals, had authority to condemn prizes.[53] Napier's lawyer, James Feggans, pointed out that condemning prizes was an important exercise of Admiralty jurisdiction but it was no more important than the prerogative of impressment, and if the town's charters did not convey the authority to do the first, they could hardly permit the second.[54]

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[46] ECA, Edinburgh TCM, SL1/1/100, fo. 301. The town lost and the magistrates, as admirals, were found to have no prize jurisdiction.

[47] NRS, Admiralty Court Processes in Foro, AC9/3138, *Answers for the Honourable Captain Charles Napier, Regulating the Impress Service at Edinburgh, To the Petition of Thomas Neill given in to the Lord Provost and Magistrates of Edinburgh as Admirals of Leith*, 14 Jan. 1783. Napier particularly objected to the Lord Provost being designed 'Admiral of the Firth of Forth' in the petition.

[48] The charter, regarding the provost and bailies, stated matters in these terms: 'The Jurisdiction of the Port and Harbour of Leith, making and constituting them Judges between the owners, masters of ships and mariners in Leith, and all other owners, masters and sailors as well our own subjects as foreigners with their ships, barks and boats within the said Port and Town of Leith, for the time in all maritime affairs and actions and other causes whatever'.

[49] NRS, AC9/3138/3, *Answers for Captain Napier to the Petition of John Neill*, 1783, fo. 3.

[50] Ibid., AC9/3138/4, *Bill of Advocation for Captain Napier*, 1783, fo. 3.

[51] Ibid., AC9/3138/6, *Replies for Captain Napier*, fos. 4-5.

[52] Ibid., fos 7-8.

[53] Ibid., fo. 20.

[54] Ibid., fo. 22. Feggans was formerly apprenticed to William Richardson (note 91). He was admitted to Edinburgh bailie court in 1778: ECA, Edinburgh TCM, SL1/1/96, fo. 231. On Admiralty procurators see, J Finlay, *Legal Practice in Eighteenth Century Scotland* (2015), 236-8.

The outcome of this case is not recorded in the process, nor was the case reported. However, Napier's argument was evidently successful. Hugo Arnot's description of the Lord Provost's jurisdiction in the 1779 edition of his *History of Edinburgh* (where he was described as admiral within the 'town, harbour and road of Leith'), which was criticised by Napier's lawyer, was revised for the 1788 edition.[55]

E. IMPRESSMENT PROCEDURE

An impressed man normally had little opportunity to explain why he ought to be set at liberty. According to David Philp, when he was pressed in July 1779 by Lieutenant Kid, the latter, 'adopting the short hand procedure, usual in such cases, sent him on board the Tender without giving him leave to say a word in his own defence'.[56] There was, however, at least some chance to object when being 'regulated' at the rendezvous before the captain, the lieutenant and other officers.[57] In Philp's case he was taken from St Andrews, where he had been pressed, to the Leith rendezvous, but his arguments before Captain Napier availed him nothing. Such were the methods of evading impressment that regulating officers adopted a justifiably sceptical approach.

When George Charles fell into the clutches of the Leith pressgang, he claimed he had the presence of mind, despite being 'immediately hurried on board the tender … to give directions to his wife, to cause present a bill of suspension against Captain Napier'.[58] One of Napier's defences was to allege that the bill lacked any mandate or authority from Charles, whose counsel responded that a verbal order sufficed and that no one imagined a written mandate necessary in the circumstances. In his written pleading, counsel asked the judges rhetorically 'have your Lordships ever seen any thing in the conduct of a press gang to induce you to believe that he would have been allowed to put pen to paper on that subject?'[59] The court accepted that Charles' confinement in the impress room on the tender made communicating a written mandate impossible.

A bill of suspension and interdict presented to the Bill Chamber of the Court of Session was indeed the typical legal recourse for anyone falling into the hands of a pressgang.[60] The interdict element sought an order preventing the pressed man from

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[55] H Arnot, *The History of Edinburgh* (1779), 497. The later edition restricts the jurisdiction to the district of Leith: ibid., *A History of Edinburgh* (Edinburgh, 1788), 502. Arnot was perhaps stung by criticism that he had not properly looked into the town's charters: NRS, AC9/3138/6, *Replies for Captain Napier*, fo. 21. The charter, it was argued, said 'raid' (meaning the entry to the harbour) and did not refer to Leith Roads which extended into the Firth of Forth: ibid., fos 13-15.

[56] SLSP, 169:22, *Memorial for David Philp, Shipmaster in Ely*, 28 Jan. 1783, p.3. Sometimes it was merely asserted, without proof, that they had voluntarily enlisted: GCA, Papers of Mitchells, Johnston & Co., T-MJ/337, John Campbell, Greenock, to Thomas Graham, judge admiral, Glasgow, 22 Oct 1779.

[57] See the language used in NRS, Court of Session, Bill Chamber Processes, Old Series, CS271/50531, *Answers for Captain Napier to George Adamson's Bill of Suspension*, 1782. A Leith press gang operating without a regulating officer might be imprisoned by the magistrates: N. Rogers, 'Impressment and the law in eighteenth-century Britain' in N. Landau, ed., *Law, Crime and English Society, 1660-1830* (2002), 81.

[58] SLSP 169: 15, *Memorial for George Charles late Chaise-driver in Leith, and sometime Corporal of Marines on board the Leveret Privateer, Suspender, against The Honourable Captain Charles Napier, regulating the Impress Service at Leith, Charger*, 29 Jan. 1782, p. 2.

[59] Ibid., p. 3.

[60] The Court of Session's Bill Chamber dealt with applications to obtain signet warrants from the Lord Ordinary on the Bills or whichever judge temporarily presided there. Warrants might be given, for example, for letters of advocation (to remove an action commenced in an inferior court to a superior court, on the ground of the incompetence or iniquity of an interlocutor issued prior to decree) or letters

being taken outside the court's jurisdiction. Often, however, the tender had set sail to The Nore, Belfast or Plymouth before this could be granted. As John McKellar was told after he was pressed, a quick trip from the west coast of Scotland to Belfast was 'the way of disposing of Scotch recruits', with men pressed in Ireland being brought as quickly to Greenock.[61] This was a tactic to preclude court action. A regulating captain would not regard it his duty to remove an impressed man from a tender unless he was ordered by a judge (which took time) or it was quickly established beyond dispute that the man in question had been improperly pressed. Captains rarely gave anyone the benefit of the doubt and it was unwise to detain men for long within reach of friends who might facilitate escape.

Another tactic was for the captain to make himself scarce while gangs carried on their business. The petition of John Syme, whose apprentices had been unlawfully seized, demonstrates exasperation at such behaviour. Having rushed to the rendezvous with his apprentices' indentures, to be rebuffed by Napier who refused to examine them, Syme took the view that Napier knew he had exceeded his authority. Hurrying to Edinburgh, only to find the Court of Session had risen and no judges could be found, Syme, aware 'that on some former occasions, the interference of this Court had been disappointed by the tender's sailing just before an interdict could be obtained', sought to avoid this by immediately sending a notary to record a protest at Napier's home, placing him in *mala fide*.[62]

Pressed men routinely denied being mariners, even if their manners, speech, dress or other personal characteristics suggested otherwise. Counsel for John Trokes, commanding the impress service on the west coast of Scotland, noted of Archibald McAllister that he 'had all the appearance of an expert and able seaman' and claimed to have evidence that McAllister had undertaken voyages to Virginia.[63] Nonetheless, a lord ordinary would normally grant a warrant for liberation, provided the pressed men gave caution to ensure they appeared at a rendezvous in the event that their defence failed. Consent to such liberation might also be given by the regulating captain subject to caution *judicio sisti* (i.e. subject to a cautioner guaranteeing that the pressed man would present himself in court at a stated diet).

F. THE CONSTITUTIONAL POSITION

Lawyers defending pressed men made much of the constitutional intricacies of impressment and set the liberty of the subject, even in a time of war, against the power of the state. They often relied on English authority and English law as pointers to the development of Scots public law. In the case of *Cunninghams and Simpson v Home* in 1795, the issue centred on the validity of the voluntary enrolment of apprentice silver-platers, landsmen not bred to the sea, as a matter of common law and whether their apprentice-master could recover them to complete their contracted service. The case was so important that the Crown commissioned the opinion of

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of suspension (to halt any allegedly irregular or unlawful proceedure). Such letters were issued under the signet.

[61] SLSP, 190:18, *The Petition of John M'Kellar late Master of the Sloop* Sally of Greenock, *and Mess. Hamilton M'Iver and Co. Merchants in Greenock, Owners of the said Sloop*, 16 Jul. 1782, p. 2.

[62] ALSP, Elphinstone Collection, vol. 40, no. 7, *Answers for John Sime, Ship-builder in Leith; To The Petition for the Honourable Captain Charles Napier, regulating the Impress-service at Edinburgh*, 3 Jan 1781, p. 3. Napier was socially well-connected, residing in 1781 in George Square near the duke of Argyll and the lord advocate: Perth and Kinross Council Archives, B59/39/2/63, Charles Melville to his parents, 16 Feb. 1781.

[63] *Answers for Lieut. John Trokes of His Majesty's Navy* (note 44), p. 3.

English counsel to determine what the law and practice was south of the border.[64] The arguments raise interesting points relative to the principle of impressment in both public and private law.

The apprentice-masters argued, through Henry Erskine (dean of Faculty) and William Tait, that the apprentices were not free to enlist because they were bound in service to their employers. They used the analogy of colliers, arguing that an apprentice 'is in truth the bondsman of his master'.[65] They employed the maxim *prior tempore potior jure* (earlier by time, stronger by right) to demonstrate that the apprentice-masters were entitled, by their prior contract, to the services of the men in question. They thought unconstitutional any contention that their argument could not apply against the crown because the king enjoyed a superior right to the services of his subjects. According to Tait, the most sacred constitutional principle was that the crown could not take any property, right, or money from any subject without parliament's consent. He pointed out that the doctrine of state necessity (the conventional argument supporting impressment), had been found to be unconstitutional, referencing the question of ship money in seventeenth-century England.[66] Tait denied the idea that the king 'is entitled to take measures for the supply of the army and the navy, if those measures are necessary, which, laying aside that necessity, he is not entitled to take'.[67] The king's power was hedged in by the common law and, in case of dire necessity, it was for parliament to act and not the king under his prerogative.

Among the points raised by crown counsel (Robert Blair, solicitor-general for Scotland, and Allan Maconochie) was an argument relying on the Roman law of *locatio conductio*, for which was cited Justinian's *Institutes*, Johannes Voet, and Stair's *Institutions of the Law of Scotland*.[68] This was to the effect that, in the hire of services, the first hirer enjoyed no real right (*jus in re*), and the apprentice who promised to serve two masters could not be recovered by the first, although he was bound to compensate him in damages for breach of contract. Maconochie denied Tait's contention that specific performance, where that was possible, was the ordinary remedy in Scots law, stating that in this case the appropriate remedy was damages rather than performance.[69] The crown, after all, could exert military discipline to retain the service of a seaman, whereas a private party had to go to court. Therefore the powers arising from enlistment trumped those in any private contract of apprenticeship because the king had the coercive power to retain the service of an enlisted man against his will, a power that no apprentice-master enjoyed.[70] While the master could sue for debt and carry out legal diligence, leading to the apprentice ending up in a debtors' prison (in this context only if, under statute, the debt

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[64] ALSP, Arniston Collection, vol. 194, no. 14, *Answers for Sir George Home, Baronet, Officer Superintending the Levies of Seamen on the East Coast of Scotland* [etc.], 8 Dec. 1795, p. 34. On English opinions in Scotland, see A.D.M. Forte, "Opinions by 'eminent English counsel' in insurance cases in the Court of Session in the late 18th and early 19th centuries" (1995) *Juridical Review*, 345-364.
[65] *The Petition of Cunninghams and Simpson* (note 6) p. 18.
[66] The necessity justification, for example, is central to Charles Butler's pamphlet, *An Essay on the Legality of Impressing Seamen* (1777). Cf. also D Barrington, *Observations on the more Ancient Statutes from Magna Charta to the twenty-first of James I cap. XXVII* (1769).
[67] *The Petition of Cunninghams and Simpson* (note 6), p. 22.
[68] Maconochie had been appointed Professor of Public Law at the University of Edinburgh in 1779: NRS, PS3/10, fo. 446.
[69] The principle engaged was *loco facti imprestabilis succedit damnum et interesse* [damages come in place of the performance itself].
[70] *Answers for Sir George Home* (note 64), pp. 14-15.

amounted to £20 or more), the apprentice remained a soldier or seaman and would, upon release from a debtors' prison, return to the king's service.

The key point raised by Maconochie was that it was the crown's prerogative to do what was necessary for national security. Subjects were 'under an original obligation, whatever their civil occupations be, to yield military service to the State, whenever the public safety requires it'.[71] This was regarded as a pre-feudal obligation, found in all European nations and founded upon notions handed down from the ancient world. It was the result 'of the national union', 'the political union' (also referred to as 'the social union'), references not to 1707 but to the original creation of the state which imposed upon those who belonged to it a duty to protect 'the common safety'. In Scotland, where institutions were said to have been taken from France, the fiery cross was, like the French *arrière-ban* (*retrobannum*), the signal to summon the people to arms.[72] Nothing in the Glorious Revolution, Maconochie suggested, affected this obligation which necessarily superseded all others, including that imposed by an apprentice contract.

According to Maconochie, no statute absolutely prevented the voluntary enlistment of apprentices, with or without the consent of the apprentice-master.[73] Indeed, statutes even provided that soldiers who had enlisted prior to completing apprenticeships should, at the end of their military service, be regarded as though they had served out their apprenticeship.[74] He argued that the legislature, in more than one enactment, had identified that contracts of apprenticeship did not bar voluntary enlistment.[75]

In support of his argument, Maconochie attached to his pleadings the opinion of the English common lawyers John Mitford and Spencer Perceval. They took the view that, at common law, the master had a right only to damages, based upon the covenants in his indenture, from an apprentice who enlisted voluntarily and not an order *ad factum praestandum*. They referred to a statute of 1747 (20 Geo II. c. 19) as authority for a justice of the peace in England to issue a warrant against a wilfully absent apprentice, thus triggering a criminal process that would entitle the master to recover the apprentice from the king's service. This statute, however, did not apply in Scotland.

These arguments are worth setting out at length because they canvassed a range of legal sources and adopted quite distinct positions. State necessity was rejected by one side as a proper justification for impressment and many thought this the only justification. John Campbell, in a letter in 1777 to Thomas Graham, the judge admiral in Greenock, took the view that 'it is only the necessity of the state that authorises the impressing of seamen in this country, there being no law for so doeing'.[76]

The Court of Session judges decided, by six to five, in favour of the argument put forward by Erskine and Tait in support of the apprentice-masters.[77] An apprentice-master, according to a note taken of Arniston's comments, 'could compel specific

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[71] Ibid., *Answers for Sir George Home*, p. 16.
[72] Maconochie knew France well; see H Brougham, *Memoir of the late Hon. Allan Maconochie of Meadowbank one of the Senators of the College of Justice, Etc Etc Etc in Scotland* (1845), 7-9.
[73] They could not be impressed until aged 18: 2 &3 Ann., c. 6, s.4,
[74] *Answers for Sir George Home* (note 64), p. 24. He cited specifically 12 Ann., c. 13; 10 & 11 Will. III, c. 11, s. 1; 4. Ann., c. 19 s.10.
[75] Ibid., p. 24. E.g., 12 Ann., c.13; 31 Geo. II, c. 10, ss. 1, 16. Wages earned by apprentices who voluntarily enlisted in breach of their indentures could, until they reached 18, be reclaimed by their masters: *The Petition of Thomas Meek* (note 41).
[76] GCA, Papers of Mitchells, Johnston & Co, T-MJ/337.
[77] This outcome was consistent with the only reported authority, *Wrights v Lumsden*, 1742. Mor. Dic. 586.

performance' and therefore liberate a pressed man. A brief note of the opinion of Lord Justice Clerk Braxfield was recorded as follows:

> But at Common Law an apprentice can neither inlist in Army or Navy: if he has entered actually into Service of Master. Prior tempore Potior Jure, is the rule in preferring inconsistent personal contracts. But as to Act of Parl[iamen]t inclines to Dean [Erskine] & Tait's argument that it must be supposed Person legally inrolled.[78]

The last point touched on the argument that the phrase 'no person who shall be enrolled' under the 1795 Act was restricted in its meaning to persons who could lawfully be enrolled (enlisted). This, at common law, could not include anyone forcibly or fraudulently enrolled. Nor, it was argued, could it include anyone enrolling voluntarily who was bound by a prior and inconsistent obligation which he might in law be required to implement.[79]

Generally impressment was seen by the judges very much in terms of common law, as amended by statute. As a result, it was repeatedly stressed that instructions issued from the War Office or the Lords of Admiralty could not make law and would be void if contrary to public law.[80]

G. AVOIDING THE PRESS

If regulating captains used sharp practice to retain possession of men, subterfuge was also adopted by those seeking to avoid the press.[81] Captain Napier thought that Edinburgh shipmasters used 'every strategem' to evade the press and Alexander Lockhart noted, in 1756, that errors in the execution of press warrants 'from the various Strategems used by those liable to be impressed, cannot be Matter of Surprise'.[82] The safest strategy was to avoid ports altogether. In 1806 Admiral Vashon wanted a lugger because his tender was expensive to run and too slow. Something faster was needed because merchant captains, in helping their crews 'to evade the impress, … land them before they come into port – they are afterwards concealed and kept out of the way'.[83]

Those unable to evade ports tried to avoid the press by claiming to fall into exempt categories, pretending to be too old or too young, apprentices, or landsmen who had never used the sea. For instance, William Walker in Fountainbridge, allegedly retired from the East India Company where he had served at sea, obtained two certificates from individuals stating that they 'believed' him to be aged over sixty. Napier, whose lawyer in the Admiralty court thought that both certificates had been written by the

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[78] *Prior tempore potior jure* means 'earlier by time, stronger by right' i.e. where two rights compete, the right perfected first is preferred.
[79] *The Petition of Cunninghams and Simpson* (note 8), p. 36.
[80] Ibid., p. 32 (per William Tait); *Information for James Chalmers* (note 6), p. 9 (per Andrew Crosbie).
[81] E.g., NRS, Admiralty court processes in foro, AC9/3015, alleged attempt by David Thomson in 1781 to evade the press by falsely claiming to be an apprentice.
[82] Rogers, 'Impressment and the law', 89; ALSP, Craigie Collection, vol. 46, no. 2, *Answers for Capt. John Ferguson, Commander of the Solebay Man of War, and Capt. James Pattison, of the Royal Regiment of Artillery*, 19 Jul. 1756, p. 16; see also *The Scots Magazine*, vol. 18 (1756), 306-11; 359-365.
[83] National Maritime Museum [NMM], Greenwich, Markham Family Papers, MRK/101/2/34, Vashon to Rear Adm. John Markham, Admiralty, 22 Aug. 1806. A lugger was a small sailing ship with typically two or three masts and a lugsail (a four-sided inclined sail).

same hand, argued that even if they were not forged the best evidence was an extract from a parish birth register.[84] Only a regulating captain could judge an individual's fitness for the service, it was sugested, otherwise 'innumerable law-suits' would result.[85] As press gangs used intelligence from informers, who might be mistaken or malicious, genuine errors must have occurred.[86]

Merchants and tradesmen were naturally careful to avoid having their employees impressed. The cases reviewed here suggest that employers took sensible precautions to minimise interference by the Navy. Shipbuilders, for example, made it a rule not to take on an apprentice who had previously been at sea.[87] Gangs sometimes had personal knowledge that a man was a seaman, even where he had since established a different career on land. In 1778, William Graham of Airth wrote to Charles Napier seeking the release of a tenant who had seized despite claiming never to have been at sea. Napier undertook to discharge him if this were true, but discovered from Lieutenant Grierson at Bo'ness that some of the gang had sailed with the man before, a fact which the latter did not deny. Noting that Graham had been imposed upon, Napier ended, perhaps rather sharply, by stating that 'such misrepresentations are often made, I doubt not on any future occasion you will make strict inquiry before you take their cause by the hand'.[88]

(1) False debtors

The classic example of evasion was attempting to have a pressed man removed from his ship and imprisoned for civil debt by means of a court application known as a caption. On hearing that their debtor had been pressed, a creditor would have immediate grounds for a warrant *meditatione fugae* (that is, against a party who is in contemplation of leaving the country). Such cases came to be quite common, although the impress service regarded alleged creditors with distrust.

By statute, no naval volunteer could be arrested for a debt less than £20.[89] The practice in England, where a seaman was arrested for a debt above this level, was for the judge to order the debtor, once liberated, to be directly returned by the gaoler to the ship from which he had been taken or to the nearest naval office. In 1781, Napier argued in the High Court of Admiralty that, as that statute did not apply to a pressed man, no rule of law required the king to be deprived of such an individual on account of any civil debt of whatever amount.

> If this is not the Law your Lordship will easily see how many methods may be fallen upon by seamen to evade the Impress, and a Caption would then be equivalent to a Protection.[90]

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[84] *Napier v Walker* (note 39), pp. 4-5.
[85] Ibid., p. 5.
[86] Named informers are rare but there is an example from Rothesay in 1778, the informer acting from 'a motive of resentment' that the pressed man had litigated against him: GCA, Papers of Mitchells, Johnston & Co., T-MJ/427/62.
[87] *The Petition of John Syme* (note 14), p. 9. A burgh councillor in Kinghorn sought exemption in 1790: NRS, CS271/28561, *Bill of Suspension, William Dunbar v Captain Younghusband & Sir George Hume*, 1790. It was initially argued that there was 'no law, regulation or practice' by which common seamen who were town councillors were exempt, but the matter was apparently settled amicably.
[88] NLS, Airth Papers, MS 10876, fo. 108v. Punctuation added.
[89] See note 21.
[90] NRS, Admiralty Court summary warrants, AC10/595, *The Petition of the Honourable Captain Charles Napier*, 17 Mar. 1781, fo. 3.

False arrestments, he asserted, had often been attempted and he invited the judge to put a stop to such a 'pernicious practice'. In the particular case, Archibald Young, aboard the tender *The Swan*, was the subject of what Napier alleged was a collusive attempt to have him liberated. Having been carefully advised by William Richardson (later procurator fiscal in the High Court of Admiralty), Napier's petition prayed that, if Young was handed over, he should be returned to the Navy for the public service at the conclusion of his imprisonment for debt. James Philp, judge admiral, made an order in precisely these terms.[91]

A few months later, in a similar case involving the Glasgow volunteer William Russell, Napier sought a warrant to have Russell returned upon his liberation should he be imprisoned for debt.[92] He alleged that the creditor's sudden decision to seek imprisonment, having waited years since protesting for non-payment in 1772 (at which point he had first become entitled to pursue by caption), was simply a device to remove the debtor from the navy. Warrants of the type sought by Napier came to be routinely granted by the judge admiral and his depute.[93]

(2) False mates

The Admiralty, in the interests of the merchant marine, routinely exempted from impressment mates of vessels above 50 tons. This was not an exemption required by law and, as noted earlier, it was circumscribed with conditions.[94] Whether a pressed man was a master or mate was a question of fact regularly disputed in litigation. It was often argued that once a man was imbued with the character of shipmaster he never lost it, unless he voluntarily relinquished it and returned to the occupation of ordinary seaman. Regulating captains therefore accepted that a master who had taken a ship abroad—and was necessarily required to return as a passenger in another vessel—could not be pressed, but that was as far as they would readily go.

There were regular disputes over whether an impressed man who claimed to be a master actually enjoyed that status. William Cumming from Aberdeen, for example, claimed to have retained the character of shipmaster when employed to captain a Prussian vessel in a journey transporting coal from Limekilns, via Aberdeen, to Amsterdam.[95] The regulating captain, Napier, argued that the spirit of the exemption for masters applied only to shipmasters of British vessels engaged in British commerce, not to those working for foreign states or owners.[96] Cumming's claim to have been employed in Aberdeen as replacement for the deceased captain of the vessel, was also questioned. It was an established rule that if a vessel's master died, the mate succeeded to the position.[97] Foreigners could not be employed as master of a

[91] Ibid., fo. 6. On Richardson, see Finlay, ed., *ARNP 1700-1799*, I, no. 1283, and, as fiscal, ibid., *Legal Practice in Eighteenth Century Scotland*, 351.
[92] NRS, Admiralty Court summary warrants, AC10/618.
[93] E.g., ibid., AC10/622, AC10/623.
[94] See text at note 35.
[95] SLSP, 169:20, *The Petition of William Cuming* [sic], *Shipmaster in Aberdeen*, 14 Dec. 1782. Not all pressed men were British subjects, e.g. a Swedish subject who was impressed in 1781 by Napier, NRS, SC271/31143, *Bond of Caution for Carl Patterson Wisted*.
[96] Several royal proclamations related to British subjects 'in the service of divers foreign princes and states, to the prejudice of our kingdom', commanding them to quite foreign service and return home: SLSP, 169:20, *Answers for The Hon. Captain Charles Napier; To The Petition of William Cumming, designing himself Shipmaster in Aberdeen*, 2 Jan. 1782, pp. 1-2.
[97] E.g. Marine Ordinance 1681, s.20(5).

British trading vessel and, it was argued, all maritime nations had the same rule. The passport which Cumming had obtained from the Prussian ambassador even stated that he had been engaged '*par le maître du navire'*, 'by' and not 'as' the master of the vessel, although Cumming put this down to a clerical error.

To maximise benefit from the exemption, it became common practice 'for seamen to borrow each others [sic] descriptions, and evade the impress by exhibiting certificates belonging to their neighbours'.[98] According to Allan Maconochie:

> In this way almost every vessel above the burden of 50 tons is provided not only with a master, but with a pretended mate and supercargo, or part-owner, the person who is really master or mate being often called the supercargo or part-owner, and a common seaman called the mate, in order that he may profit by the indulgence intended by Government to mates when employed in their functions.[99]

In that context Sir George Home, when regulating captain at Leith, routinely pressed anyone suspected of being a 'pretended mate' until he could satisfactorily prove his status. Given the testimony of one young mate, who had an Admiralty protection as a Greenland man (a whaler) and was able safely to go on shore, that 'he has known the mates borrow the Greenlandmens protections to carry them ashore', such scepticism was not unreasonable.[100]

In another case the petitioner, Bain, originally the master of a coastal vessel, was found on board another ship on which he claimed to be 'supercargo', carrying a contract of sale of the ship to himself. He also had bills of lading and other papers in the name of one of his men, the master of the vessel. His claim to be owner and supercargo, however, was fictitious and the lords determined that he had no title to be exempt from impressment.[101] As Alexander Murray later put it in *Cumming v Napier*, 'it would be strange, indeed, if a commission to buy a ship, could make a man captain of that ship before it was bought.'[102]

In the leading case of *Brownings* in 1780, it was successfully argued that a written commission was not required to appoint the master or mate of a vessel.[103] In this case, the fact that James Clark of Folkestone, owner of the alleged smuggling vessel the *Liberty of Folkestone,* had obtained letters of marque naming David Browning as master of the vessel was deemed irrelevant. Clark was at much at liberty to remove

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[98] ALSP, Arniston Collection, vol. 194, *Answers for Sir George Home, Bart. Regulating the Service at Edinburgh, for Raising Men for his Majesty's Fleet; To The Petition of David Archer, said to have been Mate of the Ship called the Robert and Sarah of Scarborough*, 26 May, 1795, p. 3.

[99] Ibid., 2-3. A supercargo was the representative of a ship's owner who travelled to oversee the cargo and its eventual sale.

[100] Ibid., *The Petition of Sir George Home, Bart. Regulating the Service of Raising Men for his Majesty's Fleet at Edinburgh*, 16 May 1795, p. 10. Exemption did not apply to all and about 150 men were pressed from Greenland ships in the calendar year up to October 1806, according to Rear Admiral James Vashon in Leith, who objected to any being released: NMM, Greenwich, Markham Family Papers, MRK/101/2/34, Vashon to Rear Adm. John Markham, Admiralty, 21 Oct. 1806. Only 'line managers, boat steerers and Harpooners' were exempt: ibid., MRK/101/2/31, idem to idem, 22 Aug. 1806.

[101] Papers in this case have not been traced, however it is referred to in SLSP, 169:20, *Answers for The Hon. Captain Charles Napier; To The Petition of William Cumming, designing himself Shipmaster in Aberdeen*, 2 Jan. 1782, pp. 8-9.

[102] Ibid.

[103] *Petition of Robert Browning* (note 9), 21 Nov. 1780; NRS, Bill Chamber Processes, CS271/4053, 'Answers for Captain Napier to The Bill of Suspension presented for Robert & John Browning, 1780'.

him and name another as Browning was to move to another ship. What mattered was who actually exercised command on board, and thus acted as master in charge of the ship (in this case Robert Browning), and the person to whom the cargo was entrusted (in this case John Browning) who was thereby the mate.

Brownings was a major judgment, with a clear majority of judges, seven to four, in favour of repelling the grounds by which the impressment had been suspended. The dominant view is summed up in a contemporaneous note taken of the words of Lord Kennet, president in the absence of Lord Arniston, that 'smugglers [were] not entitled to plead upon a privilege granted to fair traders'.[104] The majority of judges recognised, as a rule of law rather than an indulgence by the Admiralty, that masters and mates of vessels above 50 tons, engaged in lawful commerce, were not subject to impressment. Long practice underpinned the exemption and impressment, it was noted, was 'the creature of practice'. In the same way London bargemen, who had no protection and undoubtedly fell within the description of press warrants, had famously been found exempt from the press because in practice they had never been subject to it.

Two of the dissenting judges—Gardenstone, Covington, Stonefield and Ankerville—made interesting comments. Gardenstone, noting that there was ten times more smuggling on the Thames than in the whole of Scotland yet no smuggling captain in England had ever been pressed, asked 'will you condemn a man as a smuggler on a regulating captain's word?' and pondered, if so, whether the many receivers of smuggled wine ought not also to be so condemned. Covington, who noted his 'great regard' for Napier whom he had long known, was against him in this case because few Scottish ships employed on foreign trade returned without 'some contraband goods', albeit far outweighed in value by fair cargo. Given that the law gave no definition of 'smuggling', and the captain had 'taken it upon him to judge and convict the suspenders as smugglers without proof', where, he asked, might this 'Jedburgh justice' end?[105]

Yet for Lord Elliock and the majority, the law might not define smuggling but it was well-enough known what smugglers were; in fact, they were 'worse than pirates' and so could not claim 'an indulgence given to fair traders'.[106] Lord Kames opined that if the Admiralty gave instructions to impress captains and mates then that would be lawful, by implication accepting Napier's argument that *de jure* neither masters nor mates of any ship in the public service enjoyed exemption from impressment. This, however, was firmly a minority view.

Another interesting aspect of the case was that other regulating captains were consulted by Napier and their responses provided in his pleading. Regulating officers responded from Hull, Liverpool, London, Falmouth, Poole, Stockton, Yarmouth, Newcastle, Feversham, Dublin, Harwich, Chester, Exeter and Whitehaven. The general trend of their views was that the masters and mates of smuggling vessels enjoyed no exemption. Admiral Francis William Drake furnished an interesting response, indicating that it was his practice to impress everyone aboard a vessel condemned for smuggling, 'but how far the law and practice in this country may

[104] *Petition of Robert Browning* (note 9), 21 Nov. 1780, note written on p. 3.
[105] Jedburgh or 'Jeddart' justice was synonymous with hanging first and asking questions later.
[106] On anti-smuggling measures, see G. Daly, 'English smugglers, the Channel, and the Napoleonic Wars, 1800-1814' 46 (2007) *Journal of British Studies*, 30 at 32-34.

authorise my doing so, I really can't give you my opinion on that head; and would recommend you stating the case, and applying to the Admiralty, for information'.[107]

Brownings was appealed to the House of Lords but settled in London out of court, without any further judgment, when the crown lawyers obliged Napier to take replacement seamen.[108] The case had substantial import in Scotland and was soon cited.[109] When officers at Irvine Custom House found gunpowder being illegally transported on a sloop pursuing the coastal trade between Irvine and Greenock in September 1781, it was because of *Brownings* that they reported it to Lieutenant John Trokes regulating the impress service there.[110] Trokes had left the crews of small packet-boats alone due to their commercial importance in transporting mail and goods quickly across the Forth or along the Clyde. Since the judges had declared that every person, without distinction, on board a smuggling vessel might be pressed, the master was reported to Trokes and pressed.

In *Brodie, Ellis and Herd against Napier* the Lord Ordinary (Gardenstone) took a different line from *Brownings*.[111] This was despite the fact that the solicitor-general (Alexander Murray) sought to rely on it, on Napier's behalf, even while it was under appeal to the House of Lords.[112] Rather than focusing on the general proposition that mates of vessels above 50 tons could be pressed, a principle he did not think was precluded by the *Brownings* decision, Napier's counsel relied on the fact that the masters of the vessels in *Brodie* were smugglers. In fact, as Andrew Crosbie for the masters pointed out, the lord advocate had provided a certificate of *noli prosequi* (reflecting his decision 'not to prosecute') in the Court of Exchequer, and effectively so did the Advocate General in that court who determined there was insufficient proof of the illegal import of tea and spirits to prosecute. As the case was decided on its own facts, it was not inconsistent with the general rule in *Brownings* that the masters and mates of smuggling vessels could lawfully be pressed, but was held to be authority for the view that single acts of smuggling, carried on by otherwise lawful traders, could not justify impressment.

In 1813, Glasgow's town clerk, James Reddie, corresponding with Robert Saunders Dundas, second Viscount Melville and First Lord of the Admiralty, doubted the Court of Session's view in *Brownings*, and cases which followed it, in relation to the idea that the Admiralty's 'discretionary exemption, had created a consuetudinary

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[107] ALSP, Elphinstone Collection, vol. 40, no. 8, *Information for The Honourable Captain Charles Napier … Against Robert and John Brownings*, 1 Aug. 1780, Appendix, p. 4.

[108] HL Journal (5 Dec. 1781), 371; (24 Jun. 1782), 546. See note 43, where the writer of the addendum identified the failure of the Folkestone merchant James Clark as the reason the appeal was not discussed, 'the Dutch war having ruined many in his way'.

[109] Note 40 above (*Martin & Kerr v Napier*); also SLSP, 169:11, *Napier v Brodie* et al.; NRS, Court of Session, Unextracted processes, 1st arrangement, Inglis Office, CS233/A/3/2, *Archer v Napier*, 1795 (also SLSP, 361: 28).

[110] SLSP, 190:18, *Answers for Lieut. John Trokes, regulating the Impress Service on the West Coast of Scotland; To The Petition of John M'Kellar late Master of the Sloop Sally of Greenock, and Mess. Hamilton M'Iver and Company Merchants in Greenock, Owners of the said Sloop*, 3 Aug. 1782, p. 4.

[111] The case initially arose before Gardenstone while *Brownings* depended before Lord Kennet. The parties agreed to await the outcome of the latter case.

[112] SLSP, 169:11, *Answers for William Brodie, Master of the Dragon of Newburgh, Peter Ellis Master of the Peggy of Aberdeen, and John Herd Master of the Mally* [sic] *of Findhorn. To The Petition of the Honourable Captain Charles Napier, regulating the Impress Service at Edinburgh*, 1 Dec. 1781, pp. 4-5. The case related to legislation in 1779, 19 Geo. III, c. 69, s.7. Related material can be found at NRS, Unextracted processes, 1st arrangement, Currie-Dalrymple office, CS230/B/5/16; ibid., Court of Session, Bill Chamber Processes, Old Series, CS271/13905. It is reported, Mor. Dic. 6611.

right at common law'.[113] He accepted Melville's view that this remained a matter of indulgence by the Lords of the Admiralty and seems to have been particularly persuaded on being informed that, in England and Wales, the Court of King's Bench would reject an application for a writ of *habeas corpus* in such a case and refer the matter to the Board of Admiralty.[114] In Scotland, the Admiralty, despite *Brownings*, continued to insist that their private instructions grounded no legal right.[115]

H. REMEDIES

Besides interdict, an award of damages was potentially available to anyone sufferring loss from wrongful impressment. The shortage of seamen meant rising wages which increased the level of damages that might be demanded for replacing youths or men who were wrongfully impressed.[116] John Syme, who owed a dry-dock in Leith and was deprived of apprentices essential to his business, vigorously sought such redress. The Leith ship-building community had suffered raids by press-gangs, despite measures taken to ensure that their apprentices were not eligible for, or had a protection against, the impress. It was contended that only a regulating captain *in mala fides* (in bad faith) could be held answerable in damages, but Syme's counsel argued that this confused criminal liability with civil liability for fault which naturally gave rise to the payment of reparation.

Napier's orders empowered him:

> To impress so many seamen, sea-faring men, and persons whose occupations and callings are to work in vessels and boats upon rivers, as he shall be able, in order to serve on board his Majesty's ships.[117]

This was specific. The navy was essentially looking for deep-sea sailors.[118] When the united fleets of Spain and France posed an imminent threat (the so-called Armada of 1779), regulating captains received the following private instructions.

> To impress as many seamen, seafaring-men, and other persons described in their press-warrants, as they possibly could, without regard to any protections which might have been granted previous to the date of said order, with exception only of foreigners, and of the companies of ships belonging to the navy, victualing, ordnance, excise, customs, and post-departments, and carpenters of vessels of 150 tons burden and upwards.[119]

The order to disregard protections, made 'on the spur of the occasion', was later ratified by parliament.[120] It did not, however, permit impressment of men whose impressment was not otherwise lawful.

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[113] NRS, Melville papers, GD51/2/1046/3.
[114] According to Henry Erskine in 1779, Lord Mansfield had granted such a writ and expected Admiralty obedience: SLSP, 597:12, *Replies for John Syme, Ship-builder in Leith,* 2 Oct. 1779, pp. 2, 15.
[115] E.g. *Answers for Captain Napier to George Adamson's Bill of Suspension* (note 57).
[116] As noted by Andrew Crosbie: *Information for James Chalmers* (note 14), p. 11.
[117] *The Petition of John Syme* (note 14), p. 6.
[118] Dancy, *Myth of the Press Gang,* 132.
[119] *The Petition of John Syme* (note 14), pp 8-9.
[120] Mor Dict. 6607.

Syme's case depended to some extent upon terminology. His apprentice carpenters had never been to sea and were not 'sea-faring men' (a point not beyond dispute).[121] They did not 'work in vessels' but worked 'on vessels' and, it was said to be commonly understood, were exempt from impressment. The fact that Napier had removed them quickly not just from Leith, but from Scotland, meant that Syme had to take action in England, adding to his costs. He granted a power of attorney to his fellow shipbuilder John Mackenzie, who sailed to Newcastle and took advice from English counsel on *habeas corpus* proceedings, before heading to London. Based on that advice, Syme himself went to Berwick to swear an affidavit before a commissioner of the Court of King's Bench. In London, Lord Mansfield declined to grant a warrant to return the apprentices because the violence complained of had originated in Scotland. However, his opinion was that if the writs were shown to the Lords of the Admiralty they would send the apprentices back north. The Lords, advised by king's counsel, did precisely that. With such strong English opinion on his side, in terms of the legality of the impressment, Syme pushed in Edinburgh to have his losses made good, although that was a different legal question.

It was argued by analogy with a gaoler, liable to creditors for the value of the debt if an imprisoned debtor escaped through his negligence, that a regulating captain acting negligently should be liable for the loss sustained by the employer of anyone wrongfully impressed. Relying on the maxim *culpa lata equiparatur dolo* (gross negligence equates to intentional fault), Syme successfully argued that a public officer may be liable in damages where he acts violently and precipitously, without sufficient enquiry into the facts, and while refusing to hear the party against whom he has acted.[122] The court (except for Lord Monboddo who, as lord ordinary in 1779, appears throughout to have consistently found against Syme), adhered to the ultimate interlocutor which found Napier liable in damages and expenses. Notably, his lieutenants were found not liable because they were merely obeying his orders.

An interesting point to emerge in Syme's case was that ship-builders had negotiated to provide a quota of journeymen to Napier which he claimed indicated that such apprentices were liable to impressment. Syme's riposte was that the men referred to had been to sea and, technically, were subject to impressment but that did not render all apprentice-carpenters so liable.

The idea that a ship's carpenter was not a sea-faring man was tested again in *Hunter v Stormont* in 1783, a case originating in Dundee from the same urgent press warrant issued in June 1779. For Lieutenant Hunter it was argued that ship's carpenters followed a profession so 'intimately and necessarily connected with seafaring business' that they came within the definition of sea-faring men.[123] This interpretation was based on English sources going back to Edward III, as well as the example of Louis XIV and the French maritime service.

> During the time that Captain Napier has been employed in the impress service, he has at different times published advertisements, requiring fishermen, *carpenters, and other persons liable to be impressed*, to

[121] Ibid. 6609. The report indicates several judges had doubts on the point. It was raised again in *Hunter v Stormont* (note 123).
[122] ALSP, *Answers for John Sime, Ship-builder in Leith*, 3 Jan. 1781, p. 14.
[123] ALSP, Arniston Collection, vol. 152, no. 15, *The Petition of Lieutenant Hunter, lately employed in the Impress Service at Dundee*, 11 Feb. 1783, p. 9.

> furnish a certain number of hands in consideration of which, the remainder might be protected for a limited time.[124]

Apprentice ship's carpenters were exempt in practice but this was based only on a generous interpretation of the statute by which apprentice seamen were exempt, practice having put 'an equitable interpretation on the meaning of the legislature'.[125] This was consistent with the case of *Chalmers v Napier* decided in 1782, in which it was held that qualified ship's carpenters were to be treated as landsmen in terms of the legislation, and so remained exempt from the impress for two years after first going to sea.[126]

I. CONCLUSION

It must have been particularly challenging to be a regulating captain. Issued with a quarto volume of relevant legislation, and private instructions from the Admiralty, such men had to do their duty as they saw it while trying to avoid criticism from the courts or their superior officers.[127] In *Brodie*, Andrew Crosbie, counsel for the defenders, insinuated that Charles Napier, since he received a payment for every man he pressed, was not too scrupulous about how he went about it, and asserted that regulating captain 'is known in the Admiralty not to be a very dignified line of duty'.[128] Napier, he went on, 'has set himself up as paramount to all courts of law'. Regulating captains were often blamed for despatching men on tenders to obstruct justice, despite having issued orders (although whether in good faith is questionable) to keep them within the jurisdiction.[129] A regulating captain found to be acting in bad faith risking being liable for exemplary damages.[130] Napier himself, ultimately passed over for promotion to flag officer, retired on half-pay in 1793 having suffered, as he confessed to the Admiralty, the 'mortifying disappointment' of not obtaining 'the rank I have looked up to all my life'.[131]

There are two sides to every story and no more so than in court pleadings. Encounters with pressgangs were unpleasant and might involve, as Robert Cuming alleged in 1760, house-breaking, violent assault, and being dragged from bed to the nearest port.[132] John Syme's apprentices were not even allowed time to dress.[133] The consequences for the families of those involved were severe and the attitude of regulating captains like Napier might, to them, seem high-handed and peremptory.

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[124] Ibid., pp. 10-11.
[125] Ibid., p. 11.
[126] Mor. Dict. 6612.
[127] *Information for James Chalmers* (note 11), p. 9. The Admiralty provided every commissioned captain with a large volume entitled *A Collection of the Statutes 'relating to the Admiralty, Navy, Ships of war, and Incidental matters*.
[128] *Answers for William Brodie* (note 112), p. 4.
[129] Such orders were often claimed to have been given, e.g. *Answers for Lieut. John Trokes of His Majesty's Navy* (note 44), pp. 4-5. Cf Lavery, *Shield of Empire*, 137, who refers to most impress service officers as having 'undistinguished' careers
[130] ALSP, Arniston Collection, vol. 194, *Answers for John Smart, Chief Mate of the Brig Molly of Leith*, 3 Sep. 1795, p. 5.
[131] TNA, ADM 1/2224, Napier to Sir Philip Stephens, First Secretary of the Admiralty, 30 May 1793. This was the date from which Napier's superannuation commenced: ibid., ADM 1/2225. Napier's son, Admiral Sir Charles Napier (1796-1860), was more successful.
[132] *The Petition of Captain John Ferguson* (note 82), pp. 1-2. Resistance to press gangs was, of course, offered, e.g. NRS, CS271/27480.
[133] *The Petition of John Syme* (note 14), 28 Jun. 1779, p. 1.

When necessary, the Admiralty and its officers could be 'quite ruthless' in applying the regulations.[134]

The impressment system was harsh but it was targeted and limited, those limits reflecting the interests of trade (taking too many from the merchant marine would have significant consequences) while prioritising the welfare of the many over the few. It created conflict locally and allowed lawyers to bring into play constitutional principles and conceptions of liberty which gave judges pause to reflect carefully on how the law should be enforced. The cases reveal details of individuals' personal histories and, through pleadings and proofs, ordinary voices reveal attitudes to military service and the British state. The legal arguments demonstrate the extent to which public law in Scotland had quickly come to be understood in English common law terms, even if there were debates in some cases about whether clauses in English statutes, not repeated in later British statutes, could be applied there.[135]

Despite the lack of statutory authority for impressment, the courts recognised the crown's right to pursue it as a necessary practice. Judges, however, both locally and centrally, were willing to defend the rule of law and due process, insisting, for example, on warrants and the presence of peace officers whenever a pressgang sought entry to private premises.[136] They defended those who were exempt and were quick to criticise the inappropriate use of authority. For those who succeeded in getting into court (an important qualification), the judges and defence counsel, even in an age of jeopardy, ensured that the laws were not silent.

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[134] Rogers, 'Impressment and the law', 92.
[135] ALSP, Meadowbank, vol 25, no. 3, *Answers for Thomas Grieve sailor in his Majesty's Navy To The Petition of Thomas Meek in Dunbar*, 9 Feb. 1762, p. 5.
[136] NRS, CS271/27480, *Answers for Robert Lawson and others To The Bill of Suspension for Sir George Home*, 29 Apr. 1795, fos 5-6.