

Title

Pirates, Privateers, and the Merchants Who Walked the Line: An Exploration of 19th Century Maritime Trade Through the Lens of Harmony v. United States.

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Abstract

Through the lens provided by judicial, statutory, and social records from the first half of the 19th century, with a focus on Harmony v. United States,¹ an avid recreation of mercantile practices can be formed which emphasizes the role of piracy and privateering in the early United States of America.

Disciplines

Law, Maritime History

¹ *Harmony v. United States*, 43 U.S. 210, 11 L. Ed. 239, 1844 U.S. LEXIS 325, 2 HOW 210 (U.S. 1844)

“It is convenient to be able to denote piracy by the absence of a lawful commission . . .”²

By this statement, privateering and piracy are as the two sides of the same coin, with the presence of a state power being the only separation. If “piracy is depredation without any authority from any prince or state,”³ privateering is no more than the same depredation under the authority of a government. Through the lens provided by judicial, statutory, and social records from the first half of the 19th century, with a focus on *Harmony v. United States*,⁴ an avid recreation of mercantile practices can be formed which emphasizes the role of piracy and privateering in the early United States of America.

I. *Harmony v. United States* (Part 1) : The Piratical Actions of the *Malek Adhel*

The brig *Malek Adhel* committed piracy. The reports submitted to the court contained five separate counts of piracy “each asserting a piratical aggression and restraint on the high seas upon a different vessel: one, the *Madras*, belonging to British subjects; another, the *Sullivan*, belonging to American citizens; another, *the Emily Wilder*, belonging to American citizens; another, the *Albert*, belonging to British subjects; and another upon a vessel whose name was unknown, belonging to Portuguese subjects; and this last count contained also an allegation of a piratical depredation.”⁵ John Myers, the first mate to the *Malek Adhel* offered a firsthand account of Captain Nunez’s piratical actions:

² An American Citizen. “An Appeal to the Government and Congress of the United States against the Depredations Committed by American Privateers on the Commerce of Nations at Peace with Us.” North American Review and Miscellaneous Journals. Vol. 2, No. 1. Cummings and Hillard: Boston. 1820. P 166.

³ Browne, Arthur. “A Compendious View of the Civil Law and of the Law of the Admiralty: Being the Substance of a Course of Lectures Read in the University of Dublin.” 2nd Edition. British Law: Maritime Law Vol.2 London. 1802. P 461.

⁴ *Harmony v. United States*, 43 U.S. at 210.

⁵ *Harmony v. United States*. 43 U.S. at 229.

Upon the *Madras*, Captain Nunez ran down the vessel “and fired a blank cartridge.”⁶ He then went on board with crew and “returned in about half an hour with a chronometer.”⁷ After returning the chronometer, the *Malek Adhel* “fired another blank cartridge.”⁸

The *Sullivan*, having paid no notice to the first shot fired with blank cartridge, found itself being fired upon with a loaded cannon. Captain Nunez then demanded lamp oil, regardless of the fact that the *Malek Adhel* had oil “sufficient to last . . . twelve months.”⁹

Captain Nunez and the *Malek Adhel* next fired a blank cartridge followed by loaded shot at the *Emily Wilder*. Captain Nunez ordered her to “send her boat along side [the *Malek Adhel*] with their chronometer.”¹⁰ After rating their own chronometer against that of the *Emily Wilder*, Captain Nunez sent the vessel on its way.

Running across the unnamed ship in the night, Captain Nunez ordered the vessel to send over their boat with the captain and its papers. When the unknown captain refused “as their boat leaked and the night was dark,” Nunez fired a double shot “towards the strange vessel.”¹¹ He then sent a contingent of armed men from the *Malek Adhel* to gather the ships papers. Captain Nunez gave his men the order to “tell [the] strange captain he must pay twenty dollars for the shot Nunez had fired at him, and ten dollars for a keg of oil which had been knocked over by the recoil of the gun . . . [and] to look and see if there were any guns and powder on board the other vessel, and if there were any, to spike the guns and bring the powder on board, and see if any

⁶ *Harmony v. United States*. 43 U.S. at 212.

⁷ *Harmony v. United States*. 43 U.S. at 214.

⁸ *Harmony v. United States*. 43 U.S. at 215.

⁹ *Harmony v. United States*. 43 U.S. at 216.

¹⁰ *Harmony v. United States*. 43 U.S. at 217.

¹¹ *Harmony v. United States*. 43 U.S. at 218.

sweetmeats were on board, and bring them on board also.”¹² The *Malek Adhel* left with “a jar of sweetmeats, one dog, and twenty dollars for the shot.”¹³

The final encounter with the *Albert* began as the two ships ran afoul with each other. Nunez ordered five shots fired at the *Albert*. Captain Nunez then sought to bring the captain of the *Albert* aboard and whip him. His men would not do it. Nonetheless the *Malek Adhel* sent a group of men over to rate the chronometer before leaving.

These proceeding descriptions of piracy do not appear akin to those traditional ideas of violence, thieving and plunder that popularly describe piracy in the early 19th century. Contrary to these modern Hollywood ideals, but still adjudicated as piratical, the brig *Malek Adhel* committed crimes on the high seas against the Law of Nations. In context of this paper, the story of the *Malek Adhel* offers the distinct difference between piracy and privateering: the letter of marque and reprisal. Here, the courts condemned a merchant brig for its piratical actions, seizing the vessel and arresting the crew for what could colloquially be called “be annoying on the high seas.” In contrast to the petty actions of Captain Nunez, privateers seized merchant vessels through the use of force and firepower. Nonetheless their lawful commissions insulated these privateers from the same fate that befell the *Malek Adhel*.

II. Privateering in the Early 19th Century: Purposes and Statutory Basis

“The question remains whether it is morally right or politically expedient for governments to grant [letters of marque] or for individuals to act under them.”¹⁴ Disregarding,

¹² *Harmony v. United States*, 43 U.S. at 210.

¹³ *Harmony v. United States*, 43 U.S. at 210.

however, the moral and political dilemmas of a civilian fleet harassing the enemy's economic maritime infrastructure, privateering played a dominant role in early American maritime practices. Privateering supplemented the United States' inadequately powerful naval presence; it "was a necessary response to the weak state of the U.S. Navy in 1812."¹⁵ This act of granting temporary commissions to merchant vessels in order to harass the enemy's naval and economic presence has been cited as a cost effective manner to supplement a nation with "but few national vessels."¹⁶ The United States, prior to and throughout the war of 1812, defined this idea of "a nation with but few national vessels." As a country that had yet to develop a competitive naval presence, privateering "persisted in American History as an economical way to augment naval forces against an enemy in wartime,"¹⁷ and as a means of acquiring larger vessels of war."¹⁸

The usefulness of privateering extended beyond the expansion of military and into the realms of social and economic importance as well. Friedrich Jacobson sited privateering as both an economic stimulus and a means of linking the lay person to the war.¹⁹ Under this analysis, Jacobson examined the importance of restraining the private trade of an enemy, assisting both the government and the ordinary citizen with the economic burdens of war and of "making the war to some extent a war of the people."²⁰ To put the matter colloquially, the non-military benefits of privateering created a robin hood effect in which the raiding of enemy merchants in early America enriched both the government and the citizens of the United States.

¹⁴ An American Citizen. "An Appeal to the Government and Congress of the United States against the Depredations Committed by American Privateers on the Commerce of Nations at Peace with Us." North American Review and Miscellaneous Journals. Vol. 2, No. 1. Cummings and Hillard: Boston. 1820. P 166.

¹⁵ Cooperstein, Theodore, M. "Letters of Marque and Reprisal: The Constitutional Law and Practice of Privateering." Journal of Maritime Law & Commerce. Vol. 40. No. 2. April 2009. P 237.

¹⁶ Jacobson 385.

¹⁷ Cooperstein 221.

¹⁸ Jacobsen, Friedrich Johann. "Laws of the Sea, with Referent to Maritime Commerce During Peace and War." Translated by William Frick. American Law: Maritime Law. Baltimore 1818. P. 420-421.

¹⁹ Jacobsen 421.

²⁰ Jacobson 421.

Article I, Section 8 of the United States Constitution grants Congress the power to issue letters of Marque and Reprisal”²¹ in order to create a privateer fleet. The Articles of Confederation allowed for “letters of marque or reprisal . . . after a declaration of war by the United States in Congress assembled.”²² Although no universal law governed the actions of the multinational privateer fleets, each nation enacted their own rules in accordance with their own governing bodies. Justice Story identified that “it has been the great object of every maritime nation to restrain and regulate the conduct of its privateers.”²³ Story recognized that without governance, these privateer fleets may violate public faith through the disregard of traditional conventions. He expressed fear that “cartels and flags of truce might be disregarded, and endless embarrassments [may] arise in negotiations, with foreign powers.”²⁴ As such the United States created a series of laws meant to further govern the actions of its privateers.

By the Prize Act of 1812, “the President of the United States is authorized to establish and order suitable instructions for the better governing and directing the conduct of vessels commissioned” as privateers.²⁵ The Supreme Court further defined the Prize Act as allowing the President to “grant, annul and revoke, at his pleasure, the commissions of privateers.”²⁶ The Court reasoned that “the right of capture is entirely derived from the law: it is not an absolute, vested right which cannot be taken away or modified, [instead] it is a limited right.”²⁷

These strict regulations concerning the practices of privateering stem from the startling similarities between piracy and privateering. By means of example, contemporary British law

²¹ United States Constitution. Article I. Section 8.

²² Davis, Pardon. The principles of the Government of the United States: Adapted to the Use of Schools. Philadelphia. 1823. P 18.

²³ *The Thomas Gibbons*. 12 U.S. 421, 429, 3 L. Ed. 610, 1814 U.S. LEXIS 445, 8 Cranch 421 (U.S. 1814)

²⁴ *The Thomas Gibbons*. 429.

²⁵ Wheaton, Henry. “A Digest of the Law of Maritime Captures and Prizes.” American Law: International Law. New York, 1815. P 48.

²⁶ *The Thomas Gibbons*. 428.

²⁷ *The Thomas Gibbons*. 428.

declared any privateer who ransomed a captured, neutral ship “instead of bringing them into port to try the justice of detention . . . are guilty of piracy.”²⁸ British law continued to explain that although a letter of marque grants immunity to raid neutral vessels, “if the commission be wantonly exceeded . . . our statute law punishes with death, and considers [such actions] as piracies.”²⁹ Although privateering existed in the early 19th century as a state sanctioned and legislatively controlled means of establishing a naval presence, these regulations depict its likeness to piracy and take preventative action against any privateer willing to cross the line into lawlessness.

III. Piracy in the Early 19th Century

A. Statutory Governance Controlling Piracy

Regardless of the laws that define privateering, the definitive truth is that without a lawful commission, privateering is piracy. “A pirate is he who sailing without being authorized by any sovereign to make captures, commits depredations at sea or on shore.”³⁰ Congress enacted the following laws in pursuance of Article I, Section 8 of the Constitution which enables them “to define and punish Piracies and Felonies committed on the high Seas, and offences against the Law of Nations.”³¹ This Law of Nations has been categorized efficiently by Sir

²⁸ Browne. 341.

²⁹ Browne. 461.

³⁰ Bijnkershoek, Cornelis Von. A Treatise on the Law of War: Translated from the Original Latin of Cornelius Van Bynkershoek: Being the First Book of his Quaestiones Juris. Philadelphia. 1810. P 128.

³¹ United States Constitution. Article I. Section 8.

William Blackstone in his *Commentaries*,³² and extended to include such principles as requiring a declaration of war or a letter of marque in order to attack foreign trading, and most importantly here, requiring the prosecution of piracy.

As the *Malek Adhel* entered the limelight in the 1840's, Congress had permanently defined an act of piracy.

“By the temporary acts of Congress of 3d March, 1819, and 15h May, 1820, made perpetual by that of 30th January, 1823, robbery upon the high seas, or in any open roadstead, or in any basin or bay, or in any river where the sea ebbs and flows, upon any ship or vessel, or upon any of the ship's company of any ship or vessel, is piracy, and punished with death.”³³

This 1820's definition of piracy reflects the earlier legal principal from 1790 in which

“In general, the commission at sea, or in a river, haven, bason or bay, out of the jurisdiction of any particular state, of murder, robbery, or any other offence, which if omitted within the body of a country, would, by the law of the United States, be punishable with death.”³⁴

Even in today's world, piracy carries a heavy punishment. In 2013, the Fourth Circuit Court of Appeals cited to *Harmony* in *United States v. Shibin*, and determined that “piracy is subject to universal jurisdiction, as pirates are considered *hostis humani generis*, the enemies of all humankind.”³⁵ The Circuit Court based their determinations on 18 USCS 1651 which states that “whoever, on the high seas, commits the crime of piracy as defined by the law of nations, and is afterwards brought into or found in the United states, shall be imprisoned for life.”³⁶ The *Shibin* Court offered the modern day definition of piracy as defined by Article 101 of the United Nations Convention on the Law of the Sea:

Piracy consists of any of the following acts:

³² Blackstone, William, Sir. Blackstone's Commentaries with Notes of Reference to the Constitution and Laws of the Federal Government of the United States and of the Commonwealth of Virginia. Ed. George Tucker. Philadelphia: William Young Birch, and Abraham Small. 1803.

³³ Holmes, John. The Statesman, or, Principles of Legislation and Law. Augusta: Maine. 1840. P 62.

³⁴ Act of the 30th of April 1790. 8-1 Law U.S. 102.

³⁵ *United States v. Shibin*, 722 F.3d 233, 239-240, 2013 U.S. App. LEXIS 14131, 2013 AMC 1817, 2013 WL 3482000 (4th Cir. Va. 2013)

³⁶ 18 USCS 1651.

- (a) any illegal acts of violence or detention, or any act of depredation, committed for private ends by the crew or the passengers of a private ship or a private aircraft, and directed:
 - (i) on the high seas, against another ship or aircraft, or against persons or property on board such ship or aircraft;
 - (ii) against a ship, aircraft, persons or property in a place outside the jurisdiction of any State;
- (b) any act of voluntary participation in the operation of a ship or of an aircraft with knowledge of facts making it a pirate ship or aircraft;
- (c) any act of inciting or of intentionally facilitating an act described in subparagraph (a) or (b).³⁷

While the definitions of piracy offered thus far have revolved around themes of murder and robbery, the 19th century legislature expanded the definition of piracy into the field of harassment as well. Section IV of the act of 1819 clarified the idea of “piratical aggressions” which extended to include search, restraint, depredation or seizure.³⁸ This act continued by establishing a punishment for a piratical aggression which is less than the death sentence imposed upon committing piracy. A piratical aggression resulted in the “sale and distribution” of the offending vessel.³⁹

B. The Role of Agency in Punishment for Piracy

Herein lays the core debate in the case of *Harmony v. United States* and any other case of piracy in which an innocent owner suffered a high agency cost due to the losses incurred by their agent, the captain: to what extent does the condemnation of a ship for piratical aggression condemn the presumably innocent owners of the cargo and the vessel? This topic must be

³⁷ *Shibin.240*.

³⁸ Statutes at large of the United States of America, 1789-1845, 8 vols. Boston: Little, Brown, and Company. 1846-1867.

³⁹ Statutes at large of the United States of America, 1789-1845, 8 vols. Boston: Little, Brown, and Company. 1846-1867.

discussed in two pieces: the liability of the owner through the 19th century laws of agency, and the extent to which the sale and distribution extended over the offending vessel.

When the United States Navy took the *Malek Adhel* in 1840, the punishment for piracy was death. The punishment for piratical aggressions required the sale and distribution of the offending vessel.⁴⁰ The courts calculated the fines owed to the government and to the injured party, and drew these pecuniary damages from the captured pirate ship. “For petty misconduct, or petty plunderage . . . [the Court] contends itself with the mitigated rule of compensation in damages” rather than punishment by death.⁴¹ While a bright line rule concerning the punishment for piracy provided clarification regarding pecuniary damages, uncertainty existed in context of respondent superior and third party ownership of a condemned ship. Judge Story addressed these issues of agency by analyzing “whether the innocence of the owners can withdraw the ship from penalty of confiscation under the act of Congress.”⁴²

In his earlier commentaries on the law of agency in regard to maritime commerce and jurisprudence,⁴³ Judge Story explained that “the owner of a ship will be liable for damages and losses arising . . . by reason of the negligence, the fraud, the unskillfulness, or the tortious acts of the master.”⁴⁴ Justice Story made clear in regard to piracy that although an owner “is not liable for the torts . . . of his agent in any matters beyond the agency . . . [and therefore] never liable for the unauthorized, willful, or malicious act or trespass of his agent,”⁴⁵ that the act of 1819 “makes no exception whatsoever, whether the [piratical] aggression be with or without the cooperation of

⁴⁰ Statutes at large of the United States of America, 1789-1845, 8 vols. Boston: Little, Brown, and Company. 1846-1867.

⁴¹ *Harmony v. United States*. 43 U.S. at 235

⁴² *Harmony v. United States*. 43 U.S. at 233.

⁴³ Story, Joseph. “Commentaries on the Law of Agency: As a Branch of Commercial and Maritime Jurisprudence, with Occasional Illustrations from the Civil and Foreign Law. Boston: C.C. Little and J. Brown. 1839.

⁴⁴ Story. 466.

⁴⁵ Story. 474.

the owners.”⁴⁶ Story expanded on this idea of the owner’s liability through his explanation that “[it] is not an uncommon course in the admiralty . . . to treat the vessel [by] which . . . a wrong or offence has been done as the offender, without any regard whatsoever to the personal misconduct or responsibility of the owner thereof.”⁴⁷ Story concluded this idea of agency in regards to piracy by summarizing that “the acts of the master and crew, in cases of [piracy or piratical aggression], bind the interest of the owner of the ship, whether he be innocent or guilty; and he impliedly submits to whatever the law denounces as a forfeiture attached to the ship by reason of their unlawful or wanton wrongs.”⁴⁸

Having established the rule that an owner’s vessel is liable for an agent’s piratical action, the next rule the court had to determine was the extent of this owner liability. The *Harmony* Court determined that the Rule of 1819 extended only to captured ship and not to any attached cargo.⁴⁹ The Rule of 1819 contained only the following provisions in regard to compensation for piratical aggression:

“After due process and trial, or in any court having admiralty jurisdiction, and which shall be holden for the district into which such captured vessel shall be brought; and the same court shall thereupon order a sale and distribution thereof accordingly, and that their discretion.”⁵⁰

Justice Story expanded on this legislation through the clarification that “under the act of 1819, it is plain that the cargo stands upon a very different ground from that of the ship.”⁵¹ Story made clear that a cargo owned by a third party, separated entirely from the ship, would retain its ownership property.⁵² Similarly he concluded that even when the owner of a cargo shared an ownership of the condemned vessel, “the cargo is not generally deemed to be involved in the

⁴⁶ *Harmony v. United States*. 43 U.S. at 233.

⁴⁷ *Harmony v. United States*. 43 U.S. at 233.

⁴⁸ *Harmony v. United States*. 43 U.S. at 234.

⁴⁹ *Harmony v. United States*. 43 U.S. at 234.

⁵⁰ Statutes at large of the United States of America, 1789-1845, 8 vols. Boston: Little, Brown, and Company. 1846-1867.

⁵¹ *Harmony v. United States*. 43 U.S. at 235.

⁵² *Harmony v. United States*. 43 U.S. at 236.

same confiscation as the ship, unless the owner thereof co-operates in or authorizes the unlawful act.”⁵³

IV. *Harmony v. United States* (Part 2) : The Facts and Holdings

Returning now to the details of the *Malek Adhel* provides concrete example of the aforementioned laws and practices regarding piracy and privateering in the early 19th century. While the *Malek Adhel* did commit piracy, the focal point of this case rests on the relationship of the owners to the captain.

A. Facts of the Case

The brig *Malek Adhel* committed piracy. The above pages clarify the exact extent to which this piracy extended. The Supreme Court, however, did not try *Harmony v. United States* in order to contemplate the actions of Captain Nunez and the vessel, but rather to consider the implications between owner and master. As such, the crimes of piracy will remain documented above, but will not reappear in this second section. Instead, *Harmony v. United States* will be analyzed, interpreted, and explained through a lens of agency and historical context.

Peter Harmony, Leonardo Swarez, and Bernard Graham jointly owned “the brig, her tackle, apparel, furniture, and cargo.”⁵⁴ These three men existed both as the exclusive owners of the *Malek Adhel* and the owners throughout the entirety of the aforementioned affair.⁵⁵ By all known information, these owners equipped the brig with the “usual equipments of a vessel of

⁵³ *Harmony v. United States*. 43 U.S. at 237.

⁵⁴ *Harmony v. United States*. 43 U.S. at 210.

⁵⁵ *Harmony v. United States*. 43 U.S. at 210.

her class, on an innocent commercial voyage,” and neither contemplated nor authorized any acts inconsistent with the merchant trade.⁵⁶ In fact, the owners of the vessel never contemplated anything beyond “an innocent commercial voyage from New York to Guayamas,” under the command of Captain Joseph Nunez.⁵⁷

The innocent voyage that the owners had originally intended went quickly awry and the execution of the journey strayed far from the original plan. Peter Harmony and his fellow owners routed the voyage to begin in New York and to end in Guayamas Mexico. Instead, Captain Joseph Nunez began his voyage in New York, traveled through Fayal and concluded his trip in Bahia, Brazil.⁵⁸ For modern reference, Salvador is the modern day Bahia. While at first glance, Captain Nunez took the *Malek Adhel* dramatically out of its way, possibly foreshadowing the blatant disregard of orders, a further analysis demonstrates that until this point that captain may have still been adhering to the profitable goals of the ship’s owners. “Colonial agents sometimes used their initiative in selecting a different route for a vessel than the one intended by the owner.”⁵⁹ These divergences in plan stemmed from changing opportunities and inadequate communications. By means of example the *Bristolington* in 1756 arrived at a port contrary to the intention of the ship’s owners. The master of the ship acted under the knowledge that a great deal of rice had already been sent from Charleston to [the intended port] that year,” and the master saw fit to dispose of the cargo at a more profitable location.⁶⁰ Returning now to the situation of the *Malek Adhel*, Captain Nunez and his brig may not have acted inappropriately.

⁵⁶ *Harmony v. United States*. 43 U.S. at 211.

⁵⁷ *Harmony v. United States*. 43 U.S. at 230.

⁵⁸ *Harmony v. United States*. 43 U.S. at 220.

⁵⁹ Morgan, Kenneth. *Bristol & The Atlantic Trade in the Eighteenth Century*. Cambridge: The Cambridge University Press. 1993. P 74.

⁶⁰ Morgan 74.

When considering that such divergences in plan were common place, the unaccounted for deviance in route appears harmless.

While a divergence in route may be harmless to shipping in the 19th century, the aforementioned piracy created catastrophic results for the owners of the ship and cargo. Upon reaching the port of Bahia, the sailors on the *Malek Adhel* “told [the first mate] they would do no more work until they saw the American consul.”⁶¹ Following this demand, the first mate met with the American consul in Brazil and presented a full account of the piratical aggressions committed by Captain Nunez; the Captain confirmed the truth of these statements.⁶² Following a presentation of these facts to the office of the consul in Bahia, the U.S. navy transferred members of the crew to Rio to presumably meet with George William Gordon, the United States Consul serving in Rio de Janeiro from 1840 until 1846.⁶³ The last records of the crew indicated that they left Rio in custody aboard the *Malek Adhel* under the command of United States Navy Lieutenant Drayton.⁶⁴ First Mate, John Myers recorded that Captain Nunez was last seen in jail at Rio.⁶⁵

B. Holding by Justice Story

The United States navy eventually brought the *Malek Adhel* into the prize courts of Baltimore for adjudication.⁶⁶ Here, the defense raised the following contentions: the brig was not an armed vessel as defined by the act of 1819; “the aggressions, restraints, and depredations

⁶¹ *Harmony v. United States*. 43 U.S. at 217.

⁶² *Harmony v. United States*. 43 U.S. at 218.

⁶³ George William Gordon Papers. Property of the Manuscripts and Archives Division of the New York Public Library.

⁶⁴ *Harmony v. United States*. 43 U.S. at 219.

⁶⁵ *Harmony v. United States*. 43 U.S. at 219.

⁶⁶ *Harmony v. United States*. 43 U.S. at 210.

disclosed in the evidence were not piratical” under the act of 1819; and that “because the owners neither participated in nor authorized the piratical acts . . . if the brig is so liable to condemnation, the cargo is not, either under the act of Congress or by the law of nations.”⁶⁷ Z. Collins Lee and R. Johnson presented to the court an argument which suitably persuaded Justice Story to decide for the United States in all but the final count. Jonathan Meredith Jr.⁶⁸ and John Nelson,⁶⁹ counsel for Peter Harmony and the owners of the brig, preserved the cargo of the ship for their clients in the final count.

Justice Story determined in the first count that the brig *Malek Adhel* “is an armed vessel within the true intent and meaning of the act” of 1819.⁷⁰ Clarifying the act, Story explained that “no distinction is taken, or even suggested . . . as to the objects, or purposes, or character of the armament” aboard the vessel.⁷¹ The presence of “a cannon and some ammunition . . . pistols and daggers,” transformed the brig into an armed vessel.⁷² Whether the *Malek Adhel* had run its original trade route or not, the brig was armed.

Under the second question, counsel for Harmony contended that the actions of the *Malek Adhel* were not piratical under the act of 1819. As the abovementioned section IV of the act specifically sets forth, “piratical aggressions” are punishable and extend to include search, restraint, depredation or seizure.⁷³ Justice Story used this opportunity to further clarify the act of 1819 and made clear that “where the act uses the word “piratical,” it does so in a general sense; importing that the aggression is unauthorized by the law of nations, hostile in its character,

⁶⁷ *Harmony v. United States*. 43 U.S. at 230

⁶⁸ [Meredith Family Papers: 1764-1964](#). The Historical Society of Pennsylvania.

⁶⁹ “Attorney Generals of the United States 1789-Present..” The United States Department of Justice. <http://www.justice.gov/ag/aghistpage.php?id=16>.

⁷⁰ *Harmony v. United States*. 43 U.S. at 231.

⁷¹ *Harmony v. United States*. 43 U.S. at 231.

⁷² *Harmony v. United States*. 43 U.S. at 210.

⁷³ Statutes at large of the United States of America, 1789-1845, 8 vols. Boston: Little, Brown, and Company. 1846-1867.

wanton and criminal in its commission, and utterly without any sanction from any public authority or sovereign power.”⁷⁴ Counsel for Harmony had argued that any piratical aggression must be committed “with a view to plunder and not for any other purpose”⁷⁵ The Court immediately rejected such a proposition under the theory that such a “narrow and limited” interpretation allowed acts of “hostile or atrocious or indispensable nature” on the high seas so long as the purpose is not plunder.⁷⁶ Applying the facts of the case to this redefined term of piracy revealed to the Court that “the search or restraint [by the *Malek Adhel*] may be piratical although no plunder follows, or is found worth carrying away.”⁷⁷ Regardless of whether the intention of this piratical depredation was “to train his crew to acts of wanton and piratical mischief . . . to seduce them into piratical enterprises [or simply] a reckless and wanton abuse of power, to gratify his own lawless passions,” Captain Nunez and the brig *Malek Adhel* committed piracy under the act of 1819.⁷⁸

The final issue that the Supreme Court determined brings us back to Story’s interpretation of agency in regard to piracy: did the innocence of the Peter Harmony provide any defense in the confiscation of his ship and cargo? The *Malek Adhel* provided a canvas for the Supreme Court to address this questions of third party ownership and many of the rules established above were determined through the catalyst provided by this case. While Captain Nunez had physical control of the *Malek Adhel*, Peter Harmony, Leonardo Swarez and Bernard Graham owned the “brig, her tackle, apparel, furniture and cargo.”⁷⁹ These owners challenged the seizure of their property. They condemned the illegal actions of the captain and sought

⁷⁴ *Harmony v. United States*. 43 U.S. at 232.

⁷⁵ *Harmony v. United States*. 43 U.S. at 225.

⁷⁶ *Harmony v. United States*. 43 U.S. at 231.

⁷⁷ *Harmony v. United States*. 43 U.S. at 233.

⁷⁸ *Harmony v. United States*. 43 U.S. at 233.

⁷⁹ *Harmony v. United States*. 43 U.S. at 210.

return of their cargo, arguing that they were being punished by the unapproved and illegal actions of their captain.⁸⁰ Justice Story immediately clarified that Congress made “no exception whatsoever, whether the aggression be with or without the co-operation of the owners.”⁸¹ “The vessel which commits the aggression is treated as the offender.”⁸² The Court cited to the common course of admiralty “under the law of nations,” in order to make their determination in this matter.⁸³

However established the doctrine of vessel liability may be, the question regarding the cargo remained unanswered at this time. The act of 1819 made no reference to the cargo, and the law of nations offered no direct precedent to consider on this matter. To answer this question, Justice Story considered the intention of the law, citing that “the general rule is, not forfeiture of the offending property; but compensation to the full extent of all damages sustained or reasonable allowable.”⁸⁴ The Court further considered that the Law of Nations may require confiscation of cargo but only for “very gross and wanton violations of duty,” and even then only in cases of “extraordinary turpitude or violence.”⁸⁵ The Supreme Court in *The Marianna Flora* determined that although for “gross violations of the law of nations on the high seas, the penalty of confiscation may be properly inflicted upon the [cargo] . . . it is not therefore to be admitted, that every offence . . . is to be visited with such harsh punishments.”⁸⁶ Applying the facts relevant to Peter Harmony and the *Malek Adhel* revealed to the Court that “the present case seems . . . fairly to fall within the general principle of exempting the cargo.”⁸⁷ The Court

⁸⁰ *Harmony v. United States*, 43 U.S. at 210.

⁸¹ *Harmony v. United States*, 43 U.S. at 233.

⁸² *Harmony v. United States*, 43 U.S. at 233.

⁸³ *Harmony v. United States*, 43 U.S. at 233.

⁸⁴ *Harmony v. United States*, 43 U.S. at 235.

⁸⁵ *Harmony v. United States*, 43 U.S. at 235.

⁸⁶ *The Marianna Flora*, 24 U.S. 1, 40, 6 L. Ed. 405, 1826 U.S. LEXIS 298, 11 Wheat. 1 (U.S. 1826).

⁸⁷ *Harmony v. United States*, 43 U.S. at 237.

determined that because the “owners are confessedly innocent, [and] free from any imputation of guilty and every suspicion,” they “should be unwilling to enforce” the confiscation of cargo.⁸⁸

C. Conclusion

Peter Harmony, Leonardo Swarez and Bernard Graham recovered only their cargo as the saga of the *Malek Adhel* reached its conclusion. Captain Nunez sailed in a time of privateers and piracy and found himself acting as the latter. His lack of a commission along with his belligerent actions landed the Captain in the brig and the owners of the *Malek Adhel* without a ship. The above focus on *Harmony v. United States* along with the records and results of the court demonstrated the role of piracy and privateering in the early United States of America.

Appendix I – Character Biographies

In the spirit of providing an avid recreation of the setting surrounding the mercantile practices of the *Malek Adhel*, two specific characters generalize the case and add context to the time and place: Z. Collins Lee and Captain Percival Dratyon. Z. Collins Lee entered the scene as the attorney for the United States alongside R. Johnson. Zaccheus Collins Lee, born 1805 and dying 1859, was the nephew of Light-Horse Harry Lee and the First Cousin of Robert E. Lee.⁸⁹ Records indicate that Lee “was a classmate of Edgar Allan Poe [at the University of Virginia],

⁸⁸ *Harmony v. United States*. 43 U.S. at 237.

⁸⁹ "Lee Family Digital Archive Blog." : *Z. Collins Lee Attends Edgar Allan Poe's Funeral*. <http://blog.leearchive.org/2011/04/z-collins-lee-attends-edgar-allan-poes.html>.

and one of the few attendees of Poe's funeral."⁹⁰ Z. Collins Lee served as the United States Attorney for the District of Maryland from 1841-1845 and again from 1850-1853.⁹¹

Captain Percival Drayton served to escort the imprisoned sailors from Bahia, to Rio, and then back to the United States while serving as a Navy Lieutenant. Captain Drayton, born in Charleston South Carolina, continued to have a superior career as a naval officer with recorded victories against the confederacy in Port Royal, South Carolina. Drayton's commands included the gunboat Pocahontas, the sloop of war Pawnee, the ironclad Passaic, superintendent of ordinance at New York Navy Yard, fleet captain to the commander of the West Gulf Blockading Squadron, and Chief of the Bureau of Navigation. Captain Drayton died in 1865 and has had two Navy destroyers named in his honor.⁹²

⁹⁰ "Lee Family Digital Archive Blog."

⁹¹ "MARYLAND & THE FEDERAL GOVERNMENT." *U.S. Attorney (Maryland)*.
<http://msa.maryland.gov/msa/mdmanual/39fed/03usattorney/former/html/00list.html>.

⁹² Hoyt, Gertrude L. Naval Letters from Captain Percival Drayton: 1861-1865.