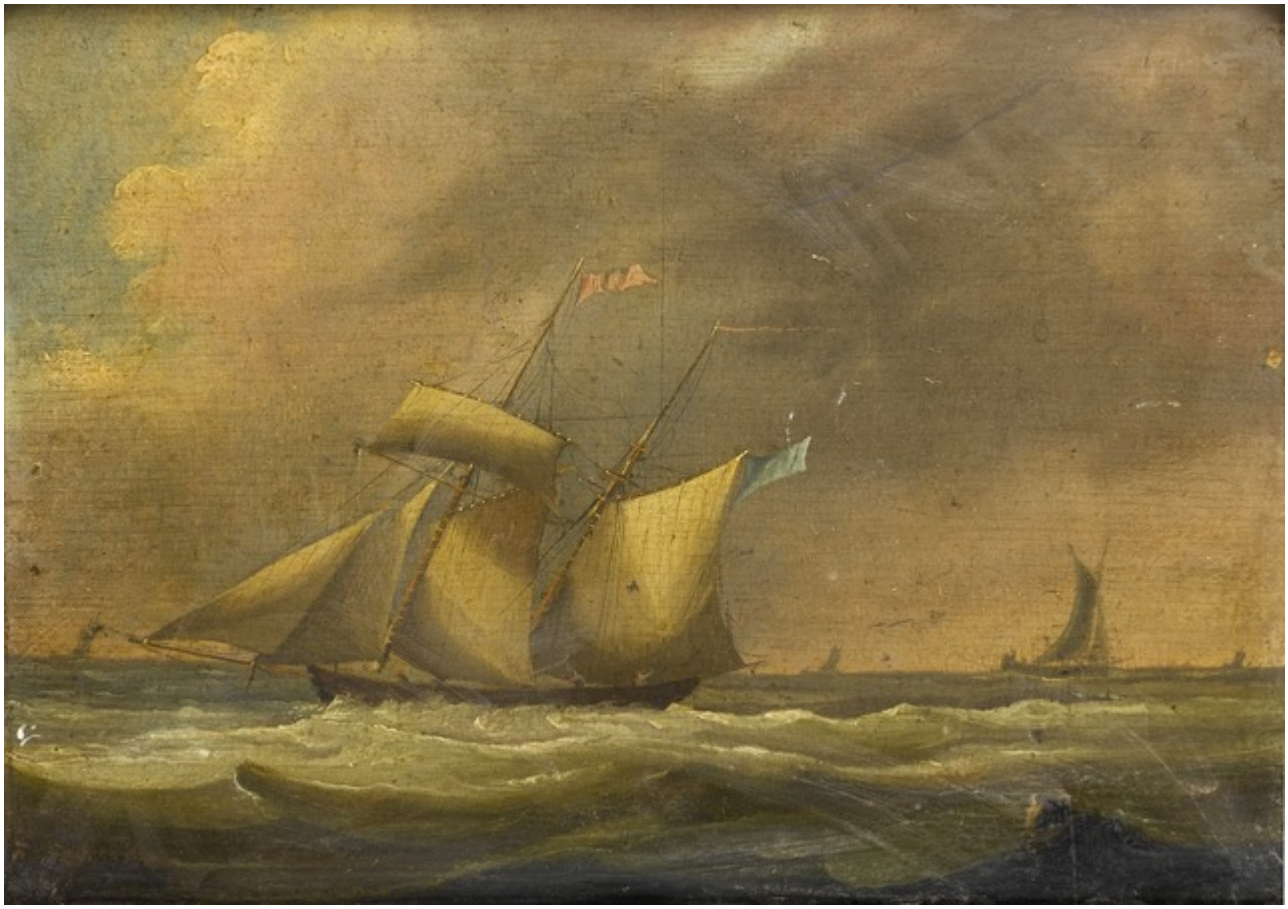
# Insurance For (and Against) the Empire



The merchant from Providence was making a questionable insurance claim, and his Philadelphia underwriters didn’t want to pay.

As John Brown told it, he and his (now deceased) uncle Obadiah had undertaken precisely the voyage for which they had purchased the insurance policy in 1760: a trip to the West Indies to exchange prisoners of war with the French enemy, under the protection of an official flag of truce. Their vessel had, they declared, traveled to Port-au-Prince, in the French colony of Saint Domingue (modern-day Haiti). Then it had headed back to Providence.

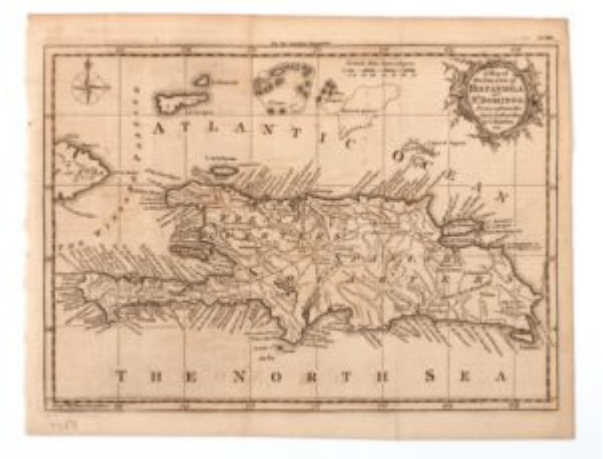



Figure 1. Thomas Kitchin, A Map of the Island of Hispaniola or St. Domingo (London: s.n., 1758). *Courtesy of the American Antiquarian Society, Massachusetts.*

Britain was at war with France, and the Browns knew that their vessel would be in constant danger of capture. They had thus prudently acquired an insurance policy through a Philadelphia broker shortly after the vessel departed Providence in early 1760. While it was possible to acquire an insurance policy that covered only the natural and typical hazards of a sea voyage (such as storms, rocks, or water damage), the Browns instead opted for a more comprehensive (and more expensive) policy that covered them against "all Risques, English, &c." This meant that their underwriters would indemnify them for losses occasioned by the capture of their merchant ship by any vessel whatsoever—French enemies *or* British compatriots. The policy's coverage against British capture was important, as it turned out, since the Browns' brig was in fact taken, on its return from Saint Domingue, by a British privateer: a schooner carrying a letter of marque from the British government that allowed it to legally capture and claim certain oceangoing vessels and their cargoes.

Why would the Browns' own compatriots capture their vessel? The British captors discovered that the vessel was carrying molasses and sugar, which it had evidently purchased from the French at Saint Domingue in exchange for provisions and naval stores. Far from virtuously recovering British prisoners, then, the Providence vessel had actually been peddling strategically important supplies to the French enemies, paying duties, to boot, that supported the French war effort. The captors were unable to produce paperwork documenting this transaction, but they argued that the presence of French molasses and sugar was sufficient proof that such a trade had taken place, and further noted that the Browns' vessel suspiciously lacked "all the legal, necessary, and customary Papers, which all fair Traders ought to have and carry." During the trial, several of the brig's mariners confirmed that New England provisions had been landed and molasses and sugar taken in. Under prevailing doctrines of international law, the captors argued, the Providence vessel was therefore engaged in "illicit and contraband Trade" and was fair game for British seizure.

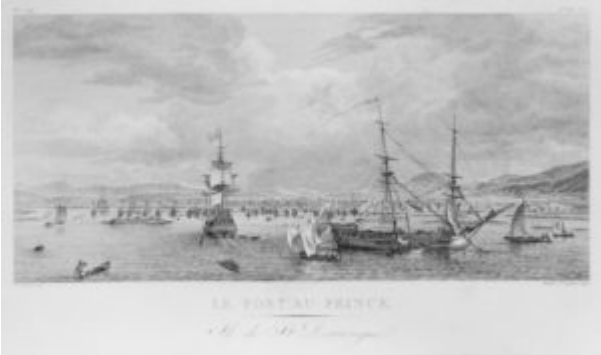


Figure 2. Le Port au Prince, île de Saint-Domingue. *Unknown author, Public domain, via Wikimedia Commons*.

To legally claim their prize, the captors conveyed the Browns' brig to the British vice admiralty court at Nassau, in the Bahamas. The court examined the evidence and confirmed the Brown's vessel as a lawful prize, granting it to the captors as their property.

The Browns believed this loss was covered by their insurance policy and demanded compensation from their underwriters.

Two of the Browns' underwriters, David and William McMurterie of Philadelphia, balked. They had insured only a small portion of the Browns' vessel (£100 in Pennsylvania currency) and they had received a premium of £23 for doing so—which was high, but far from exceptional for a wartime insurance policy. Still, the McMurteries did not think they were obligated to pay. The Browns took them to court.

When the Supreme Court of Pennsylvania decided that the McMurteries were obligated to pay the Browns, the McMurteries took the case to the British Privy Council, which heard appeals from the American colonial courts. The underwriters contended that the Browns had violated both the specific terms of their insurance policy and the implicit terms of *every* insurance policy by trading contraband goods with their nation's enemy. The underwriters argued, in addition, that the Browns' vessel's flag of truce was "specious"—that is, that that the Browns had no real intention of making a prisoner exchange. There had been no French prisoners on the voyage to Saint Domingue, and there had been only two "English subjects" on the returning voyage. The McMurteries told the court that the capture was therefore "not a Loss within the Meaning of the Policy in Question, the Appellants having no Knowledge of the Intention of the Respondent, and his Partners, to carry on such illicit and contraband Trade."

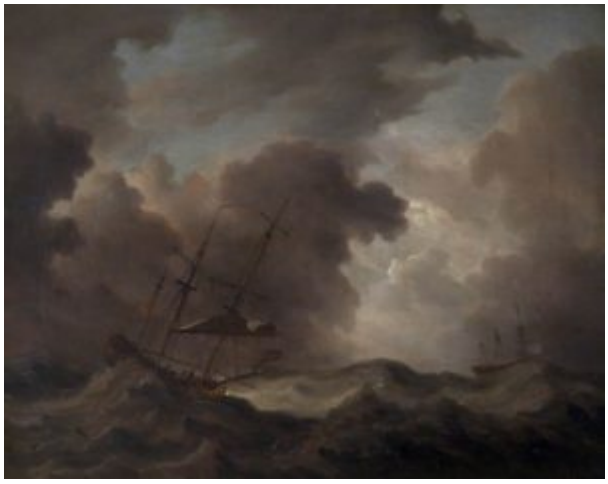


Figure 3. A British Schooner in a Storm (1743-1759) Attributed to Charles Brooking. *Charles Brooking, Public domain, via Wikimedia Commons*.

The McMurteries' argument, on its face, seems compelling, and the Browns did not counter the facts put forward. But the Browns' defense of their actions tells us a great deal about the conflicting legal regimes of the British Empire in the middle of the eighteenth century, as well as the ways that conflict vested authority in the marine insurance business and rendered it profitable.

The Browns justified their behavior by pointing to two sources of authority. The first was the Governor of Rhode Island. They affirmed that the vessel was "in the actual Employ" of Stephen Hopkins, "Esquire, Governor, Captain-General, and Commander in Chief" of Rhode Island. Their flag of truce was his genuine issue, they asserted, and they had the paperwork to prove it. What this meant was that the precise number of prisoners on their vessel, headed in either direction, was irrelevant—by the authority of Hopkins' papers, they were genuine flag trucers.

The second source of authority by which the Browns defended their actions was their insurance policy itself. The Browns pointed out that their policy was a comprehensive one, which not only covered capture by British vessels, but also included a specific wartime proviso that the underwriters were not allowed to argue about the *legality* of capture. "The Assurers," they pointed out, "promised to pay the Loss, without further Proof, than the said Policy; and to prevent any Dispute thereafter about the Legality of the said Insurance, they promised to pay at the usual Time without any Delay, or intention to plead the Goods were not lawful Seizures by Custom-house Officers in *Providence* only excepted, as by the said Policy of Insurance more fully may appear." In other words, it was irrelevant whether or not the Browns' activities were adjudged in the end to be legal. They had purchased an insurance policy that explicitly protected them against the inconvenience and cost of a lengthy dispute about whether their activities were legal or not. The matter was not supposed to get to law in the first place.

What would the Privy Council decide?

Britain's Privy Council had been taking an increasing interest in commercial law over the course of the eighteenth century. Like the British admiralty courts, which operated as a distinct system, the Privy Council grappled with the colonists' boundless enthusiasm for illegal trade, and with various legal complications brought about by the expansion of privateering. In aggregate, increasing numbers of cases appealed from the American colonial supreme courts were overturned by the Privy Council, demonstrating the Council's newfound inclination to assert its own control over enforcement of the Navigation Acts.

This, then, seems to be a familiar story of expanding imperial authority—one of the sort that seems to prefigure the American Revolution. One might assume the Privy Council would leap at the chance to support underwriters who, in this instance, were actually trying to force merchants to adhere to a stricter interpretation of the law. To take the McMurteries' side would seem to bolster the authority of the empire, to affirm strict interpretations of the laws of truce, to help stamp out contraband trade with the enemy, to support the privateers who helped enforce the laws of trade, and to encourage the alignment of insurance policies with British law. In short, it would seem to be a great opportunity to assert the authority of the empire over unruly traders who placed profits over loyalty.

However, matters were not so simple as a unified empire opposing conniving free traders, because the empire had many component parts and many different interests. Flag trucing was an extremely useful practice for cash-strapped colonial governments, in that it allowed them to offload expensive prisoners and recover subjects, at the price only of a private shipowner's for-profit voyage. To support trade under flags of truce, then, was to support a prospering trade for the empire's own colonies. The revenue produced by this trade stabilized and empowered local imperial administrators, who generally operated under a great deal of pressure.

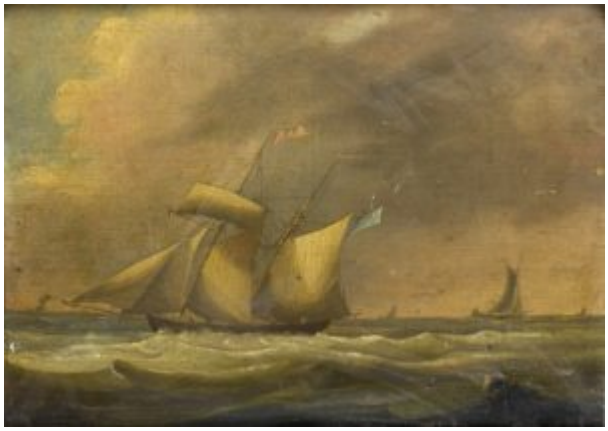


Figure 4. Thomas Buttersworth, A Topsail Schooner in a Heavy Swell. *Thomas Buttersworth, Public domain, via Wikimedia Commons*.

The captors of the Browns' vessel, moreover, did not have the purest of patriotic motivations. They were privateers—which is to say, they were involved

in a public-private partnership in their own right. They hunted disobedient merchant ships and made it harder for their fellow subjects to engage in contraband trade, but they only did this because it profited them personally to do so. Public and private were already intertwined in many ways on both sides of this imperial dispute.

Marine insurance itself was a business that flourished during periods of war and uncertainty. It had a complex relationship with the British state. On the one hand, it allowed British merchants to pool the risks they took in trading, and to share these risks deliberately with their fellow subjects. Britain's maritime trade had been extraordinarily successful during the eighteenth century, and Britain's maritime insurance business deserved some of the credit for this success. On the other hand, and more troublingly, the thriving British insurance business *also* brought security to the French enemy, who could legally purchase British insurance policies throughout the Seven Years' War. To make matters worse, insurance was particularly profitable whenever Britain appeared vulnerable and wherever the empire was weakest. And as the Brown's case demonstrates, insurance facilitated mercantile maneuvers in the legally murky spheres of the empire at war—which was where the greatest profits were often to be found.

In the end, the power of the insurance contract prevailed. The Privy Council upheld the decision of the Pennsylvania court, dismissing the McMurteries' appeal and requiring them to pay the Browns, heedless of their questionable flag-of-truce trading and the strong evidence that they were trading with the enemy. While no documentation survives to explain this particular ruling, we can surmise that the Privy Council apprehended the importance of confirming the legitimacy of a business contract—even, paradoxically, a contract that asserted its right to supersede the question of legality.

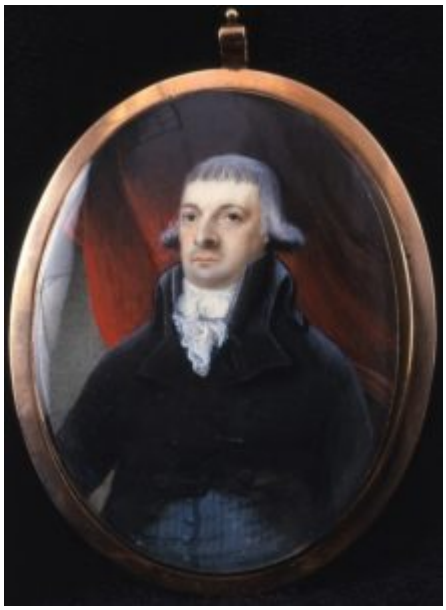


Figure 5. Portrait of John Brown. *Edward Greene Malbone, Public domain, via Wikimedia Commons.*

The Privy Council's decision sheds light on the extraordinary power of maritime insurance, not only as a business that allowed merchants to mitigate their risks and profit from hazard but also as a mechanism for merchant self-governance alongside or outside the state. To put this another way, insurance provided merchants with a framework for sidestepping questions of legality altogether, and this framework was so secure that the British legal system itself acknowledged it.

As histories of the American Revolution often tell us, the eighteenth-century British Empire possessed an extraordinary administrative and juridical apparatus that grew more powerful over time. This empire also hosted hordes of self-interested private traders, who sought out every possible opportunity for profit, testing or crossing the physical and legal boundaries of their empire. But one cannot merely imagine this conflict as one between a unified empire and its unruly individual subjects. For the empire was, itself, made up of many different component institutions, with distinct and competing aims. To the extent that we can think of the British Empire as a unified force at all, we must acknowledge that it needed its unruly traders, and the unruly traders needed their empire. And if we trace the productive but frequently strained relationship between traders and empire, we will find that it ran through yet another peculiar and unruly institution, one that lay only partly within the purview of the British Empire. That institution, of course, was the marine insurance business.

## Further Reading

The Privy Council case from which this story is drawn is M'Murtrie [McMurterie] v. Brown[e] (1765). The cases of the appellant (McMurterie) and the respondent (Brown or Browne; the spelling evolved) and other relevant records are digitized in *Appeals to the Privy Council from the American Colonies: An Annotated Digital Catalogue: Part 1,* ed. Sharon Hamby O'Connor and Mary Sarah Bilder, with the assistance of Charles Donahue, Jr. (Ames Foundation, 2014). The appellant's case, respondent's case and other documentation is available here. For more on the Privy Council in the eighteenth century, see Mary Sarah Bilder, *The Transatlantic Constitution: Colonial Legal Culture and the Empire* (Cambridge: Harvard University Press, 2004). On trading with the enemy during the Seven Years' War, see Thomas Truxes, *Defying Empire: Trading with the Enemy in Colonial New York* (New Haven: Yale University Press, 2008). For the verdict in this case, see "At the Council Chamber Whitehall the 16th day of July 1765…" Privy Council Register, 1 Oct. 1765 to 27 Aug. 1766 (PC 2/111), 277, in Anglo-American Legal Tradition: Documents from Medieval and Early Modern England from the National Archives in London. This source is digitized and displayed through The O'Quinn Law Library of the University of Houston Law Center, Aug. 2015.

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