

IN THE SENATE OF THE UNITED STATES.

JULY 10, 1882.—Ordered to be printed.

Mr. GARLAND, from the Committee on the Judiciary, submitted the following

REPORT:

[To accompany bill H. R. 676.]

The Committee on the Judiciary, to whom was referred the bill (H. R. 676) to refer the claims of the captors of the ram Albemarle to the Court of Claims, report the same back with the recommendation it do pass, without amendment, and in that connection beg leave to submit, as their report, a report made in the House of Representatives by the Committee on Naval Affairs at the present session of Congress:

This measure was fully considered by the Committee on Naval Affairs of the last House of Representatives, and a careful and elaborate report was made by that committee, and as nothing can be profitably said in explanation of said bill which is not found in that report, the same is adopted by this committee. It is as follows:

"On the night of the 27th of October, 1864, the Confederate ram Albemarle was destroyed by a torpedo-boat under the command of Lieut. Wm. B. Cushing, U. S. N. The capture and destruction of this formidable vessel was of great importance to the United States. It resulted in the speedy capture of Plymouth, N. C., with great quantities of military and naval stores. A large number of vessels of the Navy were at once relieved from blockading Albemarle Sound to prevent the ram escaping to sea and starting upon a cruise of destruction to our commerce, for which she had been especially designed and built. The ram had been completed, armed, equipped, and manned, and at the moment of destruction was ready for sea with steam up, awaiting only the favorable moment to make her escape.

"In the action with the ram the torpedo-boat was disabled and abandoned, and two of her crew were killed and eleven captured by the enemy. Lieutenant Cushing and Edward Houghton, a seaman, were the only persons who escaped death or capture.

"Active military operations followed immediately afterwards, and the condemnation of the ram as a prize was neglected and delayed until after it had been dismantled, and its armament, machinery, stores, &c., appropriated to public use. The ram was finally raised and taken to Norfolk, where an appraisal was had, and in August, 1865, the Secretary of the Navy, after deducting from the total appraisal \$12,500 for salvage, deposited to the credit of the prize fund \$79,944. This sum was distributed among the persons entitled thereto, under a decree of the district court of the United States for the District of Columbia, issued on the 21st day of August, 1865. A copy of the decree is annexed to this report, marked Exhibit A.

"The ram Albemarle had cost the Confederate Government at least \$1,500,000, and even in a northern ship-yard, where greater facilities were attainable, would have cost more than half of that sum.

"It is, therefore, manifest that the appraisal did great injustice to the men who were engaged in the work of destroying it. To remedy this wrong Congress passed the act of April, 1872, which authorized a re-examination by the prize court, 'that the captors' might 'obtain an appraisal such as is required by the prize laws of Congress.' Under that act a reappraisal was had, and the net value of the property pertaining to the prize which had been applied to public use was found to be \$282,835.80. On the 8th of January, 1873, Congress appropriated \$202,912.90, the difference between the old and the new appraisal, 'to enable the Secretary of the Navy to pay to the captors of the rebel ram 'Albemarle' in accordance with the decree of the district court.'

"The decree depended upon the statutes in force at the time. The statutes in force at the date of the decree were the same which were in force at the time of the capture and which fixed the right of the captors at the moment of their victory over the ram.

"The correct application of the law is a matter of right which the captors are justified in contending for. Men who gallantly offer their lives in such hazardous enterprises

in their country's behalf are entitled to a correct application of the law under which they act, in the distribution of rewards.

"The following are provisions of the prize act of June, 1864, the law in force at the time of the capture, applicable to the case (chap. 174, 38th Cong., sess. 1, 1874, Stat. at Large, vol. 13, page 307, section 10):

"The net proceeds of all property condemned as prize shall, when the prize was of superior or equal force to the vessel or vessels making the capture, be decreed to the captors; when of inferior force one-half shall be decreed to the United States, and the other half to the captors. * * * All prize-money adjudged to the captors shall be distributed in the following proportions, namely:

"First. To the commanding officer of a fleet or squadron, one-twentieth part of all prize-money awarded to any vessel or vessels under his immediate command.

"Second. To the commanding officer of a division of a fleet or squadron, on duty under the orders of the commander-in-chief of such fleet or squadron, a sum equal to one-fiftieth part of any prize-money awarded to a vessel of such division for a capture made while under his command.

"Third. To the fleet captain one-hundredth part of all prize-money awarded to any vessel or vessels of the fleet or squadron in which he was serving.

"Fourth. To the commander of a single ship, one-tenth part of all the prize-money awarded to the ship under his command, if such ship at the time of the capture was under the command of the commanding officer of the fleet or squadron, or a division, and three-twentieths if his ship was acting independently of such superior officer.

"Fifth. After the foregoing deductions, the residue shall be distributed and proportioned among all others doing duty on board * * * and borne upon the books of the ship in proportion to their respective rates of pay in the service."

"These are the provisions of law, the only provisions applicable to the case, and which the court undertook to administer in making the decree of distribution.

"The court in express terms decided and decreed that the prize was of superior force to the vessel making the capture, and under the statute already cited all the prize-money belonged to the officers of the fleet and the men doing duty on the vessel making the capture.

"In the final decree of distribution made on the 11th of February, 1873, the court in effect consolidated the two appraisals, and corrected errors and omissions in the first decree. The decree is annexed, marked Exhibit B.

"The whole amount of prize-money arising from both appraisals—the consolidated net fund after the deduction of all costs—was \$273,135.09.

"The court, in strict conformity with the statutes, ordered payment to the fleet officers as follows:

To the commander of the squadron, $\frac{1}{20}$, or	\$13,656 75
To the commander of the division, $\frac{1}{50}$, or	5,462 70
To the fleet captain, $\frac{1}{100}$, or	2,731 35

21,850 80

"The court ordered 'the remainder (ascertained afterwards to be the sum of \$251,284.29) to be distributed to the persons doing duty on the torpedo-launch in proportion to their respective rates of pay in the service.'

"Strict compliance with the terms of the decree would have distributed the fund awarded to the torpedo-boat according to the following table, which has been framed to show at a glance the true amount due to each man, the amount paid each, the errors made, and the persons entitled to share in the fund, on the assumption that the words 'rates of pay in the service' lawfully mean 'rates of pay in the service' at the time of the capture.

Pay.	Name.	True amount.	Amount paid.	Excess.	Due.
\$1, 875	W. B. Cushing	\$56,799 37	\$56,056 27	.....	\$743 10
1, 300	F. H. Swan	39,380 90	31,102 25	.....	8,278 65
1, 000	W. Stotesbury	30,293 00	23,925 00	.....	6,368 00
1, 000	C. L. Steever	30,393 00	23,925 00	.....	6,368 00
480	W. L. Howarth	14,540 64	35,887 50	\$21,346 86	.....
480	T. S. Gay	14,540 64	28,710 00	14,169 36	.....
480	J. Woodman	14,540 64	11,484 00	.....	3,056 64
360	S. Higgins	10,905 48	8,613 01	.....	2,292 47
240	R. Hamilton	7,270 32	5,742 01	.....	1,528 31
192	E. J. Houghton	5,816 25	4,593 60	.....	1,222 65
192	B. Harley	5,816 25	4,593 60	.....	1,222 65
192	W. Smith	5,816 25	4,593 60	.....	1,222 65
168	R. H. King	5,090 43	4,019 40	.....	1,071 03
168	H. Wilkes	5,090 43	4,019 40	.....	1,071 03
168	L. Deming	5,090 69	4,019 40	.....	1,071 04
*8, 295		251,284 29	251,284 29	35,516 22	35,516 22

*Ratio, \$30.293 on one dollar of pay.

"The table discloses the fact that two of the men, W. L. Howarth and T. S. Gay, actually received sums aggregating \$35,516.22 in excess of what they were entitled to if their 'rates of pay in the service' at the time of capture are to govern. The decree of the court was in terms strictly correct in this aspect of the case, but the Secretary of the Navy was not confined in his distribution by words in the decree showing affirmatively that the pay at the time of capture was intended by the court, and he erroneously, we think, adopted the rate of pay which these men enjoyed at the date of the decree.

"After the capture and before the distribution, Cushing, Howarth, and Gay had all been promoted for their gallant conduct in the destruction of the ram, and their commissions were made to take date on the day of the capture.

"Cushing was promoted from a lieutenant, with a salary of \$1,875, to a lieutenant-commander, with \$2,343 pay; Howarth was promoted from a master's mate, with \$480 pay, to an acting master, with \$1,500 pay; and Gay was promoted from a master's mate, with a salary of \$480, to an acting ensign, with the salary of \$1,200. The distribution was made among these officers upon the basis of the pay of their advanced rank. The only persons benefited by this were Howarth and Gay; all the other captors were made to suffer by it. Cushing lost, because the great increase given to Howarth and Gay reduced his share below what it would have been on his pay as a lieutenant, upon the basis of distribution according to the pay at the time of capture.

"The injustice of this mode of distribution is more manifest when we consider that Howarth, Gay, and Woodman, at the time of the capture, held the same rank of master's mates, with the same pay of \$480 a year; that while Woodman was killed in the engagement, and his family received only \$11,484, Howarth and Gay both survived, were honored and promoted, and received, the one \$35,887.50, and the other \$28,710.

"The following table shows the manner of distribution and the rate of pay of each on which the division was based:

Name.	Rank.	Pay.	Amount paid.
W. B. Cushing	Lieutenant-commander	\$2,343	\$56,056 27
W. L. Howarth	Acting master	1,500	35,887 50
F. H. Swan	Acting assistant paymaster	1,300	31,162 50
Thomas L. Gay	Acting ensign	1,200	28,710 00
William Stotesbury	Third assistant engineer	1,000	23,925 00
C. L. Steever	do	1,000	23,925 00
John Woodman	Acting master's mate	480	11,484 00
Samuel Higgins	First-class fireman	360	8,613 01
Richard Hamilton	Coal-heaver	240	5,742 01
William Smith	Ordinary seaman	192	4,593 60
Bernard Harley	do	192	4,593 60
E. J. Houghton	do	192	4,593 60
Lorenzo Deming	Landsman	168	4,019 40
Henry Wilkes	do	168	4,019 40
R. H. King	do	168	4,019 40
Total .....	.....	.....	251,284 29

"We cannot doubt that the distribution was made in violation of the law and of the spirit and intent of the decree of the court. We think that the rights of the several captors became vested at the very moment of their victory, and that no change in the rank or pay of any one of them could affect his own rights as to prize-money or the rights of any of his associates. In support of this view we quote from the opinion of the then Attorney-General of the United States, Mr. Pierpont, which is hereto annexed, marked Exhibit C:

"But the only terms of this provision which it is material to consider in this connection are the words, 'their respective rates of pay in the service.' What is meant thereby?

"I think these words signify the rates of pay actually established and to which the parties concerned were entitled at the time of the capture of the prize. Had the condemnation and distribution in the case of the Albemarle occurred prior to the promotion of any of those who took part in the capture, it is very clear that an apportionment of the prize-proceeds among such of the captors as came under the operation of the above-mentioned provision, based upon their respective rates of pay in the service at the time of the capture, would have been in exact conformity with the rule of distribution prescribed in that provision. What would have constituted under the said provision a proper basis for an apportionment then must be deemed to be equally such under the same provision at a more remote period, whatever alteration in the condition of the captors with regard to grade or pay may have taken place in the mean time. The rule of distribution adverted is not liable to be varied, as I conceive, either to augment or diminish any of the individual interests or shares of the captors relative to each other by circumstances affecting the rank or compensation of some of the captors which may arise subsequent to the capture of the prize, or, indeed, by any thing short of a legislative enactment plainly authorizing it.

"Regarded from this point of view, the promotion of a naval officer to whom prize-money is distributable in proportion to his pay, where it has been conferred after the date of the capture of the prize, can have no effect whatever upon the distribution of the money, though by the promotion he became entitled (we will suppose) to increased pay from and including that date. The rate of pay which such officer was in receipt of when the capture was made is the measure of his allowance out of the prize proceeds, not the increased pay resulting from the promotion afterward bestowed upon him."

"Good faith towards the officers and sailors of our Navy 'requires that they should in all cases receive their prize-money' according to the terms and in the proportions prescribed by the law under which they act."

"The law is a conditional grant by Congress, and as soon as the conditions are fulfilled the grant becomes absolute."

"Their 'rights are based upon antecedent facts which amount to an executed contract with the government.'"

"Attorney-General Bates held that the rights of captors vest at the time of the capture. He says:

"Their claim is a legal right, granted by act of Congress, and as the claim exists only by force of the act, it must be made and enforced according to the terms of the act.' (Opinions, vol. xi, page 102.)"

"Such of the captors as have not for any cause received their full share of the prize-money have a just claim on the government unless they have lost or surrendered their claims by their own voluntary acts."

"If accounting officers err designedly or by mistake in making payments, the loss must fall on the United States.' (Reverdy Johnson, Opinions of Attorney-General, vol. v, p. 183.)"

"It is claimed that the distribution was still more radically wrong and unjust, and for another reason. By the fourth clause of section 10 of the prize law of 1864, before quoted, it is provided that the commander of a 'single ship shall be entitled to one-tenth part of all the prize-money awarded to the ship under his command, if such ship at the time of the capture was under the command of a commanding officer of the fleet or squadron, or a division.'"

"It is claimed that the torpedo-boat was a *single ship* under and within the true intent of this provision. That she was acting under the command of the commander of a fleet is admitted, and the court, in their decree awarding prize-money to the officers of the squadron and giving all the rest to the vessel making the capture, give strength to the claim. The torpedo-boat left the fleet in Albemarle Sound and made its way, *in the night*, up the river *alone*, making the capture early in the morning. She was, in fact, commanded, as is universally known, by Lieut. W. B. Cushing. She was far beyond the reach or aid of any other vessel of the fleet. Her officers and crew were mostly volunteers from the various vessels of the fleet for this especial expedition and service. Upon these facts, which cannot be denied, it is claimed with much reason that she was a 'single ship,' and that being a single ship the law will presume she had a commander, and that her actual commander, Cushing, was entitled to all the rights and privileges of the commander of a single ship making capture, and no more. Should this be held to be the correct view, then Lieutenant Cushing was entitled to only one-tenth of the prize-money awarded to the torpedo-boat, and the balance should have been distributed among the others doing duty on board in proportion to their rates of pay in the service."

"The following table will show what the proportions of the prize-money of each person was under such a construction, and who have been overpaid, and how much is now due to the others:

Pay.	Name.	True amount.	Amount paid.	Excess.	Due.
$\frac{1}{10}$	W. B. Cushing	\$25, 128 43	\$56, 056 27	\$30, 927 84	.....
1, 300	F. H. Swain	45, 793 80	31, 102 50	.....	\$14, 691 00
1, 000	W. Stotesbury	35, 226 00	23, 925 00	.....	11, 301 00
1, 000	C. L. Steever	35, 226 00	23, 925 00	.....	11, 301 00
480	W. L. Howarth	16, 908 48	35, 887 50	18, 979 02	.....
480	T. S. Gay	16, 908 48	28, 710 00	11, 801 52	.....
480	J. Woodman	16, 908 48	11, 484 00	.....	5, 424 48
360	S. Higgins	12, 681 36	8, 613 01	.....	4, 068 35
240	R. Hamilton	8, 454 24	5, 702 01	.....	2, 712 23
192	E. J. Houghton	6, 763 39	4, 593 60	.....	2, 169 79
192	B. Harley	6, 763 39	4, 593 60	.....	2, 169 79
192	W. Smith	6, 763 39	4, 593 60	.....	2, 169 79
168	R. H. King	5, 919 62	4, 019 40	.....	1, 900 22
168	H. Wilkes	5, 919 62	4, 019 40	.....	1, 900 22
168	L. Deming	5, 919 61	4, 019 40	.....	1, 900 21
*6, 420		251, 284 29	251, 284 29	61, 708 38	61, 708 38

* Rates, \$35.226 on \$1 of pay.

"The court, by implication, may be said to have decided against this view of the subject, and yet the decree does not show, nor do we know, whether the court considered the question whether the vessel making the capture was a single ship, or whether her commander was entitled to more than one-tenth of the prize-money, nor did the court in terms declare otherwise. The various legal questions raised in this controversy should be judicially determined before any redistribution of prize-money can be made which cannot be hereafter disturbed. While your committee is fully satisfied that gross injustice has been done to some of the captors, and that the distribution was wrong upon every possible theory of sound legal construction, they do not think Congress should undertake to decide upon a case which a court could pass upon after full argument so much better and so much more satisfactorily to the captors and to the government.

"It is therefore recommended that the claimants be permitted to prosecute their claims in the Court of Claims, where the government can make any legal defense which may be open to it, and that therefore the bill accompanying this report be passed."

APPENDIX.

EXHIBIT A.—Decree of August, 1875.

District court of the United States for the District of Columbia.

At the United States court-rooms, in the city of Washington, on the 21st day of August, A. D. 1875. Present, Andrew Wylie, justice.

THE UNITED STATES	}	No. 146. In prize. Decree of distribution.
<i>vs.</i>		
THE REBEL RAM ALBEMARLE, HER TACKLE, &C.		

A final decree of condemnation of the rebel ram Albermale having been duly rendered herein by the court, and it appearing, by the papers filed in court under the seal of the Navy Department, that the said rebel ram, having been taken and appropriated by the Government of the United States for the use of the United States, was appraised at the sum and value of (\$79,944) seventy-nine thousand nine hundred and forty-four dollars;

And it further appearing that the aggregate sum of the costs and disbursements herein, together with the allowance made to the counsel for captors under a special stipulation filed with the papers in the case, and as the adjustment of the same, pursuant to the act of June 30, 1864, on file in the office of the clerk, is two thousand six hundred and forty-five dollars and thirty cents (\$2,645.30), and that the net amount for distribution on the basis of the said adjustment is, therefore, the sum of seventy-seven thousand two hundred and ninety-eight dollars and seventy cents (\$77,298.70):

It is now ordered and decreed, on the motion of the district attorney, the counsel for the captors assenting to the same, that the aforesaid net amount be deposited in the Treasury of the United States, and be distributed according to law.

And it further appearing that the papers filed in said cause under the seal of the Navy Department, and the affidavit in behalf of the captors, show what public ship is entitled to share in the said prize, and whether the said prize was of superior, equal, or inferior force to the vessel making the capture, and there being no conflicting claim: Now, therefore, it is *adjudged and decreed* that the prize was of superior force to the vessel making the capture, and that the whole of the residue of said valuation be paid to the captors, as follows:

One-twentieth of said residue to the officer commanding the North Atlantic blockading squadron at the time of said capture; one-hundredth part of said residue to the fleet captain of said North Atlantic blockading squadron (*three-twentieths of said residue to the officer commanding the torpedo-launch capturing said prize*),* and the remainder distributed to the other persons doing duty on board said torpedo-launch, in proportion to their respective rates of pay in the service.

By order of the court.

(Signed)

A. W.

*These words in *italics* were struck out of the original draft of the decree.

EXHIBIT B.—Decree of February 11, 1873.

In the district court of the United-States for the District of Columbia.

THE UNITED STATES	} Prize.
vs.	
THE REBEL RAM ALBERMARLE.	

This cause coming on to be heard, and for final decree, the district attorney of the United States for the district of Columbia appeared for the United States, and the captors were represented by their proctors, whereupon the proceedings were read and considered; and it appearing to the court that on the first day of April, A. D. 1872, an act of Congress was approved by the President requiring the court to take up and re-examine this cause, that the captors might obtain an appraisal such as is required by the prize-laws of Congress; and that on the third day of June, A. D. 1872, Commander William B. Cushing, of the United States Navy, who commanded the expedition on board the torpedo-launch which captured the said prize, filed in this court his petition on behalf of himself and the other captors praying the order of this court for such appraisal; whereupon a board of appraisers was appointed to make such appraisal, and notice was directed to be given, and was given by public advertisement of these proceedings to all persons claiming to be interested therein, for the term of three weeks, and after the expiration thereof the said board returned their appraisal valuing the said prize at the sum of two hundred and eighty-two thousand eight hundred and fifty-six dollars and ninety cents (\$282,856.90), to which report no exceptions were filed, either by the United States or the captors, and the same was, on the 9th day of July, A. D. 1872, ratified and confirmed; and that thereafter, on the 8th day of January, 1873, Congress made an appropriation to enable the Secretary of the Navy to pay the captors of the said prize the sum of two hundred and two thousand nine hundred and twelve dollars and ninety cents, being the difference between the value of the said vessel as appraised under the order of this court and the amount heretofore deposited by the Secretary of the Navy with the assistant treasurer of the United States as part of the value of said prize, which sum of two hundred and two thousand nine hundred and twelve dollars and ninety cents (\$202,912.90) has been deposited with the assistant treasurer of the United States, at Washington, subject to the order of this court:

And it being further seen that on the 12th day of July, A. D. 1872, Commander Wm. H. Macomb, United States Navy, filed his petition in this court, claiming to share in the prize as commander of a division of the North Atlantic blockading squadron, and has offered evidence to prove his claim as commanding such division; and it being further seen that on the 5th day of August, 1872, William Peterkin, and on the 9th day of January, A. D. 1873, Wilson P. Burlingame, filed their petitions, by leave of the court, claiming a share in the prize, as having been part of the crew of a cutter which accompanied the torpedo-launch on the expedition to capture the prize, but was ordered back before the attack was made, but neither of said petitioners having offered any evidence to support their claim; while on the other hand, the persons doing duty on the torpedo-launch have offered evidence to prove that the said cutter was not within signal distance of the torpedo-launch at the time of the capture, nor under circumstances nor in a condition to render any aid; and at this hearing no objection is made on the part of said petitioners, Burlingame and Peterkin:

Now, therefore, it is, this eleventh day of February, A. D. 1873, ordered, adjudged, and decreed that, of the said amount of two hundred and two thousand nine hundred and twelve dollars and ninety cents (\$202,912.90) there to be paid into the hands of the marshal of the District of Columbia the sum of seven thousand and seventy-six dollars and fifty-one cents (\$7,076.51), to be by him paid according to the bill of costs taxed and allowed by this court, and that the residue of said sum so as aforesaid appropriated, to wit, the sum of one hundred and ninety-five thousand eight hundred and thirty-six dollars and thirty-nine cents (\$195,836.39) be deposited in the Treasury of the United States, to be distributed as follows, that is to say: one-twentieth part thereof to the officer commanding the North Atlantic blockading squadron, one hundredth part thereof to the fleet captain of the said blockading squadron, one-fiftieth part thereof to the officer commanding that division of the said squadron called the Division of the Sounds of North Carolina, together with the further sum of fifteen hundred and forty-five dollars and ninety cents (\$1,545.90), being one-fiftieth part of the sum heretofore decreed by this court to be distributed; and that the remainder be distributed to the persons doing duty on the torpedo-launch in proportion to their respective rates of pay in the service.

(Signed)

D. C. HUMPHREYS,
Justice.

Filed Feb'y 11, 1873.

EXHIBIT C.—*Opinion of the Attorney-General.*

DEPARTMENT OF JUSTICE,
Washington, December 10, 1875.

Hon. GEORGE M. ROBESON,
Secretary of the Navy:

SIR: Your letter of the 9th of June last, in relation to the distribution that has already been made of the prize-money adjudged to the captors of the rebel ram Albemarle, submits for my consideration the following questions, which have arisen since such distribution, namely:

1st. Were our Navy officers in October, 1864, who were promoted to take rank on a certain day then past, entitled to the pay of the promoted rank, provided they were doing duty in such rank? If so, are officers who are entitled to prize-money in proportion to their pay so entitled in proportion to the pay of the increased rank?

2d. Is the commander of a single ship limited to one-tenth of all the prize-money awarded to his ship, if the amount to which he would be entitled, if paid according to his rank, exceeded such one-tenth?

3d. Is picket-boat No. 1, as at the time of the destruction of the Albemarle, to be considered, either in fact or under the decree of the court, a "single ship," under the command of a commanding officer of a fleet or squadron?

The first question contains two distinct branches, which it is thought expedient to deal with here in their inverse order. The answer to the latter of these branches depends upon the meaning and effect of the statutory provision requiring a certain portion of the proceeds of a prize to be distributed "among all others doing duty on board, * * * and borne upon the books of the ship, in proportion to their respective rates of pay in the service." (See prize law of 1864, 13 Statutes, p. 310.) But the only terms of this provision which it is material to consider in this connection are the words "their respective rates of pay in the service." What is meant thereby?

I think these words signify the rates of pay actually established and to which the parties concerned were entitled *at the time of the capture of the prize*. Had the condemnation and distribution in the case of the Albemarle occurred prior to the promotion of any of those who took part in the capture, it is very clear that an apportionment of the prize proceeds among such of the captors as came under the operation of the above-mentioned provision, based upon their respective rates of pay in the service *at the time of the capture*, would have been in exact conformity with the rule of distribution prescribed in that provision. What would have constituted under the said provision a proper basis for an apportionment *then*, must be deemed to be equally such under the same provision at a more remote period, whatever alteration in the condition of the captors with regard to grade or pay may have taken place in the mean time. The rule of distribution adverted to is not liable to be varied, as I conceive, either to augment or diminish any of the individual interests or shares of the captors relative to each other, by circumstances affecting the rank or compensation of some of the captors which may arise subsequent to the capture of the prize, or, indeed, by anything short of a legislative enactment plainly authorizing it.

Regarded from this point of view, the promotion of a naval officer to whom prize-money is distributable in proportion to his pay, where it has been conferred after the date of the capture of the prize, can have no effect whatever upon the distribution of the money, though by the promotion he became entitled (we will suppose) to increased pay from and including that date. The rate of pay which such officer was in receipt of *when the capture was made* is the measure of his allowance out of the prize proceeds, not the increased pay resulting from the promotion afterward bestowed upon him.

Accordingly, the latter branch of your first question is answered in the negative, and it is presumed that this answer renders unnecessary any response to the other branch of the same question.

Answering your second question in the same general terms in which it is stated, I say, yes. The prize-law above cited gives to the "commander of a single ship," under some circumstances, *one-tenth*, and under others *three-twentieths* of the prize-money awarded to his vessel, and there being no other provision made for him out of the prize-money so awarded, he is of necessity restricted to the one-tenth or the three-twentieths, as the case may be. He cannot, therefore, share "according to his rank" when that would give him more than the proportion just mentioned.

Your third inquiry appears to involve two questions: 1st. Whether "picket-boat No. 1" was at the time of the capture a "single ship" within the meaning of the provision of the prize-law just referred to. 2d. Whether it was then under the command of a commanding officer of a fleet or squadron. The latter of these is purely a question of fact, and as such inappropriate for the consideration of the Attorney-General. Its solution may be readily had, I imagine, by reference to the records of the Navy Department. With respect to the former, the papers submitted do not contain sufficient information to enable me to reach a satisfactory conclusion on the

subject. By the decree of the court the prize was awarded solely to the vessel mentioned, but this determines nothing in relation to the real point presented, which is whether the vessel should be considered a "ship" or not under the provisions of the prize-law to which reference is above made. This point seems to require for its intelligent consideration something more definite and specific touching the description of the boat, its size, character, complement of officers and men, &c., than is found in the papers before me. The papers received with your letter are herewith returned.

I have the honor to be, very respectfully, your obedient servant,

EDWARDS PIERREPONT.

EXHIBIT D.

TREASURY DEPARTMENT.

Be it remembered that S. J. W. Tabor, esq., who certified the annexed papers, is now, and was at the time of doing so, Fourth Auditor of the Treasury, and that full faith and credit are due to his official attestations.

In testimony whereof I, Chas. F. Conant, Acting Secretary of the Treasury of the United States, have hereunto subscribed my name and caused to be affixed the seal of this department, at the city of Washington, this 1st day of February, in the year of our Lord 1877.

[SEAL.]

CHAS. F. CONANT,

Acting Secretary of the Treasury.

TREASURY DEPARTMENT,

Fourth Auditor's Office, Nov. 3d, 1865.

SIR: On the 5th of October last an order was received from you to change the rank of Wm. L. Howarth, on the prize-list of the "picket-boat" for destruction of the Albemarle, from acting ensign to acting master, and pay him accordingly. This was done. Subsequently, on the 12th of October, you issued an order for a new distribution of said prize, which materially changed the shares of the captors. Acting Mas. Howarth had already been paid his shares of the prize under the first distribution, with the additional which the change from acting ensign to acting master gave him. This difference gave him an overplus of \$1,821.36 to which he was not entitled, but had nevertheless been paid by your order as above stated. He was at once ordered to return the amount stated, but as yet nothing has been heard from him. If he is still in the service and subject to orders from your department, I would suggest that you take such a course as will immediately reimburse the government in the amount referred to.

I am, sir, very respectfully, your obedient servant,

W. A. CROMWELL,

Acting Auditor.

Hon. GIDEON WELLS,
Sec'y of the Navy.

A true copy.

S. J. W. TABOR,

Auditor.

U. S. SHIP CONSTELLATION,

Annapolis, Md., Jan. 20th, 1873.

SIR: I would respectfully state that in the first distribution of prize-money for the destruction of the rebel ram Albemarle, certain officers received their share thereof from the date of their promotion as a reward for gallant service in said destruction.

I was promoted from the same date, October 27th, 1864, and in the distribution about to be made I would respectfully ask that I may be allowed my share thereof according to the rank and pay of acting ensign instead of master's mate. The records of the department will show that my statements are correct.

Very respectfully, your ob't serv't,

THOMAS S. GAY,

Sailmaker, U. S. N., Late Act. Ensign.

Hon. S. J. W. TABOR,

4th Auditor of the Treasury, Washington, D. C.

A true copy.

S. J. W. TABOR,

Auditor.

TREASURY DEPARTMENT,
Fourth Auditor's Office, January 25, 1873.

SIR: Enclosed I transmit the statement of Sailmaker Thomas S. Gay, which is correct. Commander W. B. Cushing received his share of the prize as a lieutenant at a salary of \$2,343.00, though at the time of capture his actual pay was that of a lieutenant. Acting Ensign W. L. Howarth received his share thereof as an acting master with a salary of \$1,500.00, when his actual pay was \$1,200.00.

Under the department's letter of April 3d, 1872, Mr. Gay, with the others, would seem to be entitled to his share of said prize as an acting ensign.

I would also ask the department whether, under the law of June 30, 1864, Commander Cushing would be considered as an officer in command of a single ship, and as such, entitled to his share of said prize, according to the fourth provision of the tenth section of said act.

I am, sir, very respectfully,
(Signed)

STEPHEN J. W. TABOR,
Auditor.

Hon. GEO. M. ROBESON,
Secretary of the Navy.

A true copy.

Auditor.

TREASURY DEPARTMENT,
Fourth Auditor's Office, February 21st, 1874.

Hon. GEO. M. ROBESON,
Secretary of the Navy:

SIR: The facts in the case of the distribution of the bounty awarded for the destruction of the ram Albemarle, called for by endorsement upon a communication from Jas. Fullerton, referred by you to this office on the 19th inst., are as follows:

The first distribution was made under an order from the Secretary of the Navy, dated Aug. 28th, 1865, a copy of which is herewith enclosed marked "A." It will be observed that the order requires distribution to be made "in accordance with the decree transmitted, which decree provided that the money should" be paid to the captors as follows: "One-twentieth to the officer commanding the North Atlantic blockading squadron at the time of said capture; hundredth part to the fleet-captain of the said North Atlantic blockading squadron, and the remainder distributed to the persons doing duty on board said torpedo-launch in the proportion to their respective rates of pay in the service." The list accompanying the order was prepared in the usual form signed by Paymr. F. H. Swan, and approved by Lt. Comdr. W. B. Cushing. The name of W. B. Cushing appeared thereon with the rank of lieutenant-commander, W. L. Howarth as act. ensign, and T. S. Gay as m. mate; each received his share according to the rate of pay attached to the rank given upon the list. In the following month of October a letter was addressed to me by the Secretary of the Navy (copy enclosed marked "B"), upon the receipt of which an order was issued to check against the pay of Lt. Comdr. Cushing the sum of \$2,840.12, on account of the excess of bounty-money allowed for the destruction of the Albemarle.

This amount was repaid to him March 23th, 1867, upon claim presented in due form, supported by a letter of the Secretary of the Navy (copy enclosed marked "C"). The question of the rank of the three officers mentioned was again raised at the time of the second award, and was referred to the Hon. Secretary of the Navy for his decision. A copy of his letter, fixing the rank and pay to be recognized in the distribution, is enclosed marked "D." The decree of court in this case contained the same instructions quoted from the first in this letter, with the addition of the following clause inserted after the words "fleet-captain, &c.": "One-fiftieth part thereof to the officer commanding the division of the said squadron called the Division of the Sound of North Carolina, together with the further sum of fifteen hundred and forty-five dollars and ninety cents (\$1,545.90), being one-fiftieth part of the sum heretofore decreed by this court to be distributed." The distribution was made in strict accordance with the above-mentioned orders, and payment has been made to all persons entitled to share, or their legal representatives.

The communication of Mr. Fullerton is herewith returned.

Very respectfully, your ob't servant,

STEPHEN J. W. TABOR,
Auditor.

A true copy.

S. J. W. TABOR,
Auditor.

NAVY DEPARTMENT, *October 5, 1865.*

SIR: Please place the name of Wm. L. Howarth upon the prize-list for the destruction of the ram Albemarle, to rank as acting master instead of acting ensign.

Very respectfully,

G. WELLES,
Secretary of the Navy.

S. J. W. TABOR, Esq.,
Fourth Auditor.

A true copy.

S. J. W. TABOR,
Auditor.

TREASURY DEPARTMENT, FOURTH AUDITOR'S OFFICE,
March 9, 1876.

Hon. GEO. M. ROBESON,
Secretary of the Navy:

SIR: The papers relating to the destruction of the ram Albemarle, transmitted with your letter of the 11th ulto., have been received and filed in this office. In acknowledging the receipt thereof I take the opportunity to restate the facts submitted in a former letter as to the manner of distributing this award.

The first distribution was made under an order from the Secretary of the Navy, dated Aug. 28, 1865, directing me to distribute the money "in accordance with the decree transmitted." The court, in the decree referred to, prescribed the mode of distribution in specific terms as follows: "One-twentieth to the officer commanding the North Atlantic blockading squadron at the time of said capture; one-hundredth part to the fleet-captain of the said North Atlantic blockading squadron, and the remainder distributed to the persons doing duty on board said torpedo-launch in proportion to their respective rates of pay in the service."

The list of persons entitled to share, accompanying the order, was prepared in the usual form, signed by Paymr. F. H. Swan, and approved by Lieut. Comdr. W. B. Cushing, and each person was allowed to sharing according to the rate of pay attached to the rank given upon this list.

The second distribution was made February 27, 1873. The decree of the court in this case contained the same instructions as quoted from the first in this letter, with the addition of the following clause appearing after the words "fleet-captain, &c.": "One-fiftieth part thereof to the officer commanding the division of the said squadron called the Division of the Sounds of North Carolina, together with the further sum of fifteen hundred and forty-five dollars and ninety cents (\$1,545.90), being one-fiftieth part of the sum heretofore decreed by this court to be distributed." Distribution was made as before in strict accordance to the decree and orders of the Secretary of the Navy.

The respective rates of pay of Messrs. Cushing, Howarth, and Gay were fixed in this instance by direct instructions from the Secretary of the Navy. The question having been raised whether the torpedo-launch was at the time of this capture a "single ship," within the meaning of the prize-law of June 30th, 1864, I have to say that it does not appear to have been so recognized by the court in the decree referred to, and that the prize-list and recbrds of this office show that these persons were attached to and borne upon the rolls of other vessels or station, and continued so attached until regularly transferred at subsequent periods. I will say, further, that in my judgment the distribution was in all respects just and fair and in conformity with the intent of the law of Congress authorizing the award.

Should a redistribution be determined upon, the money required would have to be appropriated by act of Congress, for the reason that the entire amount awarded has been paid to the captors or their legal representatives.

S. J. W. TABOR, *Auditor.*

A true copy.

S. J. W. TABOR, *Auditor.*

NEW YORK, *May 11, 1865.*

SIR: Inclosed please find a list of the officers and men composing the expedition which destroyed the rebel ram Albemarle:

* { Lieut. Comdr.
 { Lieut. W. B. Cushing, commanding Monticello.
 A. A. Paym'r Francis H. Swan Otsego.
 Act. Ensign Wm. L. Howarth.

*In the original list the word "Lieutenant" has been struck out and the words "Lieut. Comdr." written over it in a handwriting different from that of the body of the list.

Act. Master's Mate John Woodman	Commodore Hull.
Act. Master's Mate Thos. S. Gay	Otsego.
Act. Third Assistant Engineer Wm. Stotesbury	Picket-boat.
Act. Third Assistant Engineer Chas. L. Steever	Otsego
Sam' Higgins, first-class fireman	Picket-boat.
Richard Hamilton, coal-heaver	Shamrock.
Wm. Smith, ordinary seaman	Shickopee.
Bernard Harley, ordinary seaman	Chickopee.
Edw. J. Haughton, ordinary seaman	Chickopee.
Lorenzo Denning, landsman	Picket-boat.
Henry Wilkes, landsman	Picket-boat.
Robt. H. King, landsman	Picket-boat.

Very respectfully, your obedient servant,

FRANCIS H. SWAN,
Assistant Paymaster, United States Navy.

To Hon. GIDEON WELLES,
Secretary of the Navy, Washington, D. C.

Approved:
 W. P. CUSHING,
Lieut. Commdr.

A true copy of the original list accompanying the order of the Secretary of the Navy for distribution, dated August 28, 1865.

S. J. W. TABOR, *Auditor.*

NAVY DEPARTMENT,
Washington, August 28, 1865.

SIR: Inclosed herewith is prize-list for the sinking of the ram Albemarle, October 27, 1864.

The amount for distribution in the case is \$77,298.70; the flag officer, D. D. Porter, and the fleet captain, K. R. Breese.

Transmitted also is the decree in accordance with which distribution will be made, and which you will please return.

Please proceed with the distribution.

Very respectfully,

G. WELLES,
Secretary of the Navy.

Hon. S. J. W. TABOR,
Fourth Auditor.

A true copy.

S. J. W. TABOR, *Auditor.*

B.

NAVY DEPARTMENT,
Washington, October 12, 1865.

SIR: The rank of Lieutenant-Commander Cushing should be lieutenant, and that of Acting Master Wm. L. Howarth should be acting ensign, upon the prize-list of the picket-launch for the destruction of the rebel ram Albemarle.

Please make correction and distribution accordingly.

Very respectfully,

G. WELLES,
Secretary of the Navy.

Hon. S. J. W. TABOR,
Fourth Auditor.

A true copy.

S. J. W. TABOR, *Auditor.*

C.

NAVY DEPARTMENT,
Washington, March 28, 1867.

SIR: In conformity with the decision under an opinion of the Attorney-General in the case of Surgeon Wheelwright, referred to in a letter from the Fourth Auditor of this department, July 9, 1855, and with the practice in similar cases subsequently, Lieut. Comdr. Wm. B. Cushing was entitled to the pay of his grade from the date of his rank, October 27, 1874, at which time he held a command appropriate to the grade, and having received the pay, he is entitled by law to prize-money as of that grade in case of the Albemarle.

The order to him to refund a supposed overpayment having been inadvertently issued, his pay should be allowed him in the same currency in which he would have received it had it not been checked.

Very respectfully,

G. WELLES,
Secretary of the Navy.

Hon. S. J. W. TABOR,
Fourth Auditor Treasury Department.
A true copy.

S. J. W. TABOR, *Auditor.*

WASHINGTON, February 25th, 1873.

SIR: In reply to your letter relating to the method of distribution of the award to the captors of the Albemarle, you are informed that, on a careful review of all the laws, orders, and papers in the case, I am unable to see any legal ground for distinction between the cases of Lieutenant-Commander Cushing and Messrs. Howarth and Gay, and am therefore of opinion that the same principles of payment should apply to all these officers. If it were entirely a new question, I would have great doubt as to whether either of them is entitled to the pay of the higher rank claimed; but as the question has been in principle decided in the case of Lieutenant-Commander Cushing, I am willing to let the matter rest as I find it, though clearly of opinion, especially since the repeal of the law giving higher pay for higher grade of duty, that there is no foundation, either in law or fact, for any distinction between his case and the others. They should all be paid on the same principles governing in Commander Cushing's case.

Very respectfully,

GEO. M. ROBESON,
Secretary of the Navy.

Hon. S. J. W. TABOR,
Fourth Auditor.

A true copy.

S. J. W. TABOR,
Auditor.

Statement showing names of all persons allowed to share in prize-money awarded for the destruction of the ram Albemarle, amount paid to each, and date of certificate issued by Fourth Auditor for payment.

Name.	Rank.	Amount allowed in first distribution, 1865.	Date certificate was issued.	Amount allowed in second distribution, 1873.	Date when certificate was issued.
D. D. Porter	Flag officer	\$3,864 93	Sept. 2, 1865	\$9,791 82	Feb. 28, 1873
K. R. Breese	Fleet captain	772 98	Sept. 11, 1865	1,958 37	Feb. 28, 1873
W. H. Macomb (deceased)	Division commander	Nothing.	.....	5,462 70	Mar. 3, 1873
William B. Cushing	Lieutenant commander.	17,952 58	Sept. 28, 1865	38,103 69	Feb. 27, 1873
William L. Howarth	Acting master	11,493 33	Sept. 28, 1865	24,394 17	Feb. 27, 1873
F. H. Swan	Acting assistant paymaster.	10,477 97	Oct. 26, 1865	20,624 53	Feb. 28, 1873
Thomas S. Gay	Acting ensign	3,868 81	Oct. 12, 1865	24,841 19	Feb. 27, 1873
William Stotesbury (deceased)	Third assistant engineer.	8,060 00	Oct. 20, 1865	15,865 00	Feb. 28, 1873
Charles L. Seever	do	8,060 00	Nov. 8, 1865	15,865 00	Feb. 28, 1873
John Woodman (deceased)	Acting master's mate	3,868 81	Oct. 16, 1866	7,615 19	Feb. 28, 1873
Samuel Higgins (deceased)	First-class fireman	2,901 50	Feb. 15, 1873	5,711 51	Feb. 28, 1873
Richard Hamilton	Coal-heaver	1,934 41	Oct. 20, 1865	3,807 60	Feb. 28, 1873
William Smith	Ordinary seaman	1,547 53	Jan. 3, 1866	3,046 07	Mar. 26, 1873
Bernard Harley	do	1,547 53	Oct. 20, 1865	3,046 07	Oct. 20, 1868
Edward J. Houghton (deceased)	do	1,547 53	Jan. 30, 1866	3,046 07	Mar. 17, 1873
Lorenzo Deming (deceased)	Landsman	1,354 09	Mar. 16, 1866	2,665 31	May 19, 1873
Henry Wilkes	do	1,354 09	Oct. 27, 1865	2,665 31	Mar. 12, 1873
Robert H. King (deceased)	do	1,354 09	Nov. 2, 1865	2,665 31	Apr. 16, 1873

Respectfully submitted.

STEPHEN J. W. TABOR,
Auditor.

TREASURY DEPARTMENT,
Fourth Auditor's Office, January 30, 1877.

E.

NAVY DEPARTMENT,
Washington, April 24, 1877.

SIR: Your letter of the 3d instant has been received, and its contents and subject-matter very carefully considered.

It seems to me that your clients' case is a meritorious one, and I regret that I have not the power to comply with your request in their behalf. As the Albemarle prize-fund has been fully distributed, and as there is no other fund which I can lawfully order to be applied to the payment of the captors of the Albemarle, whom you represent, it seems to me that they must look to Congress for the relief to which they seem to be entitled.

Very respectfully,

R. W. THOMPSON,
*Secretary of the Navy.*JAMES FULLERTON, Esq.,
Washington, D. C.

O

