

# OF NAVAL COURTS MARTIAL AND PRIZE CLAIMS: SOME LEGAL CONSEQUENCES OF COMMODORE JOHNSTONE'S SECRET MISSION TO THE CAPE OF GOOD HOPE AND THE "BATTLE" OF SALDANHA BAY, 1781 (PART 1)

**JP van Niekerk\***

## 1 Introduction

When viewed from a slightly unorthodox or novel angle, well-known historical events often acquire a quite unexpected relevance. That is true when the British attempt at capturing the Cape of Good Hope in 1781 is viewed from a legal-historical perspective. The relevant events in that year gave rise to a surprising number of legal consequences, both in England and at the Cape. This contribution attempts to trace and describe some of them.

## 2 General background

### 2.1 The Fourth Anglo-Dutch War and British and French interest in the Cape

A series of three naval wars in the course of the seventeenth century between two competing maritime and mercantile powers, the ascendant Dutch and the emerging

\* Professor, Department of Mercantile Law, University of South Africa.

English, became commonly known as the Anglo-Dutch wars, or, to the Dutch, as the English Naval wars. They were mainly fought in the North Sea and the (English) Channel.<sup>1</sup> Essentially trade wars,<sup>2</sup> they involved conflicting claims, not only by the two states but also by chartered trading companies, merchants and shipowners on both sides, as regards navigation and maritime trade.<sup>3</sup> There was also an underlying and growing colonial rivalry.

- 1 The First Anglo-Dutch War, Jul 1652 to Apr 1654, was decided by the final Battle of (Ter Heijde, near) Scheveningen on 31 Jul to 10 Aug 1653. The death there of the popular Adm Maerten Tromp (1597-1653) became emblematic of English victory and Dutch defeat. The Second Anglo-Dutch War, 1665-1667, was preceded in Aug 1664 by attacks on and intermittent skirmishes at the Dutch settlement of New Amsterdam which, after its surrender by Pieter Stuyvesant to the English, was promptly renamed New York. It involved several famous sea battles, and was brought to a culmination by Adm Michiel de Ruyter's (1607-1676) daring naval raid on the Medway, 10-14 Jun 1667, the destruction of several unprotected English warships laid up at the Chatham naval base, and Dutch raiders making off with the naval flagship the *Royal Charles* as a prize. As one historian has observed, "[i]t can hardly be denied that the Dutch raid on the Medway vies with the battle of Majuba in 1881 and the fall of Singapore in 1942 for the unenviable distinction of being the most humiliating defeat suffered by British arms": CR Boxer *The Anglo-Dutch Wars of the 17<sup>th</sup> Century 1652-1674* (London, 1974) at 39. Some time after the raid, rumours of further Dutch attacks persisted and in his diary for 19 Jul 1667 Samuel Pepys wrote that "[t]he Dutch fleet are in great squadrons everywhere still ... but God knows whether they can do any hurt, or no, but it was pretty news come so fast of the Dutch fleets being in so many places, that Sir W[illiam] Batten [a naval officer, surveyor of the Navy, and colleague of Pepys] at table cried: "'By God', says he, 'I think the Devil shits Dutchmen'": see <http://www.pepysdiary.com> (accessed 22 Jan 2015). The Third Anglo-Dutch War, 1672-1674, resulted in the ageing Dutch fleet under De Ruyter again (this time narrowly and less convincingly) gaining the upper hand over the English fleet, the poor financial situation of the English state and the unpopularity of her French alliance at the time having as much to do with the outcome as De Ruyter's strategic leadership.
- 2 But see, eg, Gijs Rommelse "The role of mercantilism in Anglo-Dutch, 1650-74" (2010) 63 *Economic History Review* 591-611, observing that mercantilism – commercial, industrial and maritime rivalry – was a dominant factor in Anglo-Dutch political relations only until after the second war, after which the always present political and, to a lesser extent, ideological differences gained in importance.
- 3 These claims are reflected in the conflicting views on the international law of the sea advanced by Hugo Grotius in his *Mare liberum* (1609) and, following on the Portuguese cleric Serafim de Freitas's *De iusto imperio Lusitanorum Asiatico* (1625), by John Selden in his *Mare clausum* (1635). Cornelius van Bynkershoek supported a compromise in his *De domino maris* (1702), namely that the high seas should be "free", ie, international territory, and open to and transnavigable by all seafaring trade, while waters within a certain "controllable" distance of land should be "closed" territorial waters belonging to and under the jurisdiction of the coastal state concerned. The Italian Ferdinand Galiami's suggestion that the controllable width of territorial waters should be the range of the most advanced canon of the time, became accepted and hence the three-nautical-mile canon-shot rule. See, generally, Mónica Brito Vieira "*Mare liberum vs Mare clausum*: Grotius, Freitas, and Selden's debate on dominion over the seas" (2003) 64 *J of the History of Ideas* 361-377.

The outcome of these wars confirmed the position of the Dutch as the leading naval and maritime force and dominant mercantile state, at least for the time being.<sup>4</sup>

Although coming more than a century after the last of the previous wars, and only tenuously linkable to them, the next conflict between these protagonists, (then) Britain and the Dutch Republic, was called the Fourth Anglo-Dutch War. On 20 December 1780, Britain declared war on the Netherlands after the latter became involved in the American War of Independence. Given her declining commercial and naval power and having been surpassed by the British in both respects, the Dutch support of the rebellious American colonies by means of her neutral trade caused a reaction from Britain.

According to the Dutch they were merely asserting a recognised right of neutral shipping.<sup>5</sup> Britain, again, thought they were acting in breach of such a right by illegally smuggling contraband goods to the American revolutionaries while also assisting the French and Spanish who had sided with the Americans.<sup>6</sup>

4 There is a wealth of material on these wars. Good points of entry are Boxer (n 1), with an extensive bibliography at 66-68; “De VOC en de Engelse oorlogen” available at <http://www.vocsite.nl> (accessed 9 Jan 2015) which contains a summary of the more important naval battles and a list of the Dutch East India Company ships captured or lost during these wars; and the comprehensive bibliography at <https://anglodutchwars.wordpress.com> (accessed 23 Jan 2015).

5 After the American Revolution had in 1776 become the War of Independence, the French in 1778 chose the side of the Americans, leading to the Anglo-French War being declared in March of that year. Other European states were forced to take sides. The Dutch, aware of the potential risk to her international maritime trade and of her inability to oppose the larger European powers, declared her neutrality, hoping to continue trading with both sides.

6 The old rule of “free ships, free goods” had been accepted between England and the Netherlands in their Treaty on Commerce and Navigation of 1674. The rule recognised the right of a neutral to convey goods to parties on both sides of a conflict; a belligerent had to consider cargo on board a ship sailing under a neutral flag as neutral cargo, even if consigned to another belligerent. Excluded from the rule were contraband goods, ie, at first, weapons and necessities of war, canon, shot, gunpowder, and horses. Visitations (detention and searches) of neutral ships at sea enforced the rule and in the event of transgressions, neutral ships and prohibited (contraband) cargoes were captured and declared lawful prizes to the captors. In the run-up to the Fourth Anglo-Dutch War (see, eg, Alice Clare Carter “The Dutch as neutrals in the Seven Years’ War” (1963) 12 *International & Comparative LQ* 818-834 for the political (diplomatic) and judicial (international law) background to the (contested) Dutch neutrality in the eighteenth century), especially during the Seven Years’ War, 1756-1763), the British adopted a wide definition of contraband: for them it included not only weapons but also naval stores and shipbuilding materials such as iron, wood, sails, and rope. The Dutch in their own interest continued to regard contraband in its original, narrow sense. The British sought to prevent the Dutch supplying her enemies with militarily strategic supplies while the latter wished her neutral maritime trade to be restricted as little as possible. Confrontations between the Royal Navy and Dutch merchant ships at sea were the result as the British sought to enforce her prohibitions and exercise her – now contested – right to search neutral shipping for what she considered to be “contraband”. There were also clashes with British privateers: on the scale and operation of British privateering during this period generally, see David J Starkey “A restless spirit: British privateering enterprise, 1739-1815” in David J Starkey, ES van Eyck van Heslinga & JA de Moor (eds) *Pirates and Privateers. New Perspectives on the War on Trade in the Eighteenth and Nineteenth Centuries* [*Exeter Maritime Studies*] (Exeter, 1997) at 126-140.

The Fourth Anglo-Dutch War itself was a relatively low-key affair.<sup>7</sup> There was only one minor but bloody sea battle, at Dogger Bank in August 1781, where both sides suffered heavy losses, and the armistice concluded in January 1783 was followed by a peace treaty in 1784.

The outcome of the War, for which they were both navally and economically totally unprepared, was disastrous for Dutch overseas trade and led indirectly to the ruin of the Dutch East India Company (the “DEIC”).<sup>8</sup> Britain, again, obtained the important right to free trade on East India and around the East Indian archipelago which ultimately put an end to many sources of Dutch colonial prosperity, such as the export of wheat from the Cape to both the East and the Netherlands.<sup>9</sup>

See, eg, Jeroen ter Brugge “Onrust voor de storm, de kaping van de *Gouden Roos* in 1779” (2011) 26(3) *Leidschrift historisch tijdschrift* [issue title: *Een behouden vaart? De Nederlandse betrokkenheid bij kaapvaart en piraterij*] 131-149 as regards the search (involving plunder) and detention in the Atlantic of the merchantman the *Gouden Roos* in Sep 1779 and her eventual release on the order of an American court. Her Dutch owners sought compensation for the losses suffered as result of her illegal detention and capture in the High Court of Admiralty in London, arguing that the search and detention were illegal because there were no shipbuilding materials or naval stores on board. After several delays, they relinquished their claim sometime in 1782.

The Dutch, on their part, vigorously contested the validity in international law of the expanded view of “contraband”, but, given the declining state of her navy, could not place all her merchantmen under the protection of naval convoys – the introduction of a system of “onbeperkt convooi” proved practically unworkable – and could ultimately do little more than protest the actions of the British. See, generally, ES van Eyck van Heslinga “De vlag dekt de lading. De Nederlandse koopvaardij in de Vierde Engelse Oorlog” (1982) 1 *Tijdschrift voor zeeschiedenis* 102-113.

7 By far the majority of Dutch losses – 324, mainly small, merchantmen in total – occurred during the first three months of the War, most probably due to the fact that home-bound Dutch merchant ships could not rely on any protection from the depleted Dutch navy and were in any event unaware of the outbreak of war and unprepared to defend themselves against the numerous British naval and privateering vessels already on the alert because of the war with France: see Jan van Zijverden “The risky alternative: Dutch privateering during the Fourth Anglo-Dutch War, 1780-1783” in Starkey, Van Eyck van Heslinga & De Moor (n 6) 186-205 at 189-190. As will be recounted shortly, four *Indiamen* forming part of the home-bound fleet of 1780, having left the East Indies before news of the outbreak of war had arrived there, were lost under these circumstances at the Cape in 1781, as were another out-bound vessel. But the Dutch quickly took steps to prevent such losses. The Dutch East India Company outbound-fleet of mid-1781 sailed secretly and in a convoy accompanied by several naval warships, the return fleet of 1782 remained in Batavia, and the fleets of 1783 were cancelled for fear of falling prey to British naval or privateering vessels (see, also, Anna J Boeseken “Die Nederlandse kommissaris en die 18de eeuwse samelewing aan die Kaap” (1944) 7 *Argiefjaarboek vir Suid-Afrikaanse Geskiedenis* at 231). By 1782 Dutch shipping had virtually returned to its normal, pre-war volume, mainly because of a resort to neutral flags.

8 See, eg, CR Boxer *The Dutch Seaborne Empire 1600-1800* (London, 1973, repr 1988) at 124-125.

9 *Idem* at 282. For a Dutch perspective on the War, see, eg, JC Mollema *Geschiedenis van Nederland ter zee* vol 3 (Amsterdam, 1941) at 271-310.

However, there was a new dimension to the Fourth Anglo-Dutch War: the belligerents' colonial interests.<sup>10</sup>

Gaining control of Dutch colonies – the Cape of Good Hope, Ceylon, and the Dutch East Indies (Indonesia) – became of strategic and pressing importance to Britain, the more so because of the perceived threat to its trade on Asia from France. Possession of the Cape, in particular, became crucial to both now that the Netherlands were no longer neutral but on the side of the French. The French already had naval bases on Mauritius and Reunion, and showed a renewed interest in India. They made frequent use of the Dutch settlement at the Cape as a port of call for their East India trade and to provision their bases and settlements in the Indian Ocean. For that purpose they wished to protect the small Dutch garrison there against British attack, especially as the weak Dutch navy were largely unable to do so. For the British, too, the Cape's victualling capacity was crucial: the Dutch settlement supplied not only passing British ships but also her base on St Helena, where warship and merchant fleets rendezvoused and re-supplied on their way to and from the East Indies.<sup>11</sup> “[T]he Cape was a prize of decisive importance for both Britain and France in their struggle for supremacy in the Indian Ocean.”<sup>12</sup>

In short, as a result of the end of Dutch neutrality with her entry into war against Britain in 1780, it became crucial for both the British and the French to reach the Cape first to secure their respective interests.

## 2.2 Johnstone and Suffren and the race for the Cape

Soon after the outbreak of the war with the Netherlands, Britain sent a squadron of naval ships accompanied by troops on what was intended to be a secret mission to the Cape of Good Hope.<sup>13</sup> The aim was to capture the Cape from the Dutch and to occupy the settlement for Britain.

- 10 HM Scott “Sir Joseph Yorke and the waning of the Anglo-Dutch alliance, 1747-1788” in Bob Moore & Henk van Nierop (eds) *Colonial Empires Compared. Britain and the Netherlands, 1750-1850* [Papers delivered at the Fourteenth Anglo-Dutch Historical Conference, 2000] (Aldershot, 2003) at 11-32 refers at 13 to the War as “when Britain’s far superior fleet swept its rotting Dutch counterpart from the seas, facilitating a series of British seizures of Dutch shipping and conquests of colonial territory”.
- 11 On the role, importance and value of the Cape settlement in Anglo-French commercial and colonial rivalry in, and *en route* to, the East (India) at this time, see, eg, Vincent Harlow *The Founding of the Second British Empire, 1763-1793. Vol 1: Discovery and Revolution* (London, 1952) at 106-125 and 132-135.
- 12 LCF Turner “The Cape of Good Hope and Anglo-French rivalry, 1778-1796” (Apr 1966) 12 *Historical Studies: Australia and New Zealand* 166-185 at 166. Even after the British failure to capture the Cape in 1781, the English East India Company urged the government to make another attempt, a suggestion that was soon rejected: see *idem* at 173-174 for the relevant correspondence.
- 13 On the Cape mission, see generally G Rutherford “Sidelights on Commodore Johnstone’s expedition to the Cape. Part I” (1942) 28 *Mariner’s Mirror* 189-212 and *idem* “Sidelights on Commodore Johnstone’s expedition to the Cape. Part II” (1942) 28 *Mariner’s Mirror* 290-308; Robert Beatson *Naval and Military Memoirs of Great Britain from 1727 to 1783* vol 5 (London, 1804, repr 1972) at 311-312.

The expedition was under the command of Commodore George Johnstone, a former colonial governor who had limited experience in naval matters but was politically well connected.<sup>14</sup>

Johnstone did not sail under Admiralty orders but under the authority of the Secretary of State.<sup>15</sup> Although responsible solely to his political masters, Johnstone seems to have had a relatively free hand in determining how the principal aim of the expedition had to be achieved. In what was to become a central theme of the mission and his involvement in it, Johnstone, who was at the time in command of the British

- 14 Johnstone (1730-1787) had a patchy career as a naval officer. While diligent and fearless (he was praised in dispatches for bravery in encounters with the enemy and in capturing prizes), he was also at times insubordinate and censured for disobedience (eg, in 1747 he was involved in a duel with Capt Cruikshank under whom he had served as a midshipman on the *Lark*, and in 1757, having killed the captain's clerk in a duel, he was court-martialled for disobeying orders and found guilty, but in view of his earlier record of gallantry merely reprimanded and ordered to resume his duties). In Nov 1763, his political contacts resulted in the lucrative appointment as governor of the newly acquired but short-lived British colony of West Florida, a position curtailed after little more than two years as result of clashes with both the local military establishment and his superiors in London. Johnstone, who called himself governor rather than captain (he was, after all, "a sailor turned politician": Harlow (n 11) at 110), then continued his political career as a Member of Parliament until 1780. But, after nineteen years ashore, he returned to his former career when, in Nov 1779, he was offered and accepted the naval commodoreship of a squadron based in Lisbon. This appointment was preceded and may have been facilitated by suggestions and requests he made in Jun 1779 to the Admiralty for what he called "some trifling alterations to the establishments of the Navy which from repeated experience I have found very beneficial to the easy working of Ships of War": see DB Smith "Commodore Johnstone's improvements, 1799" (1930) 16 *Mariner's Mirror* at 85-86. It was a fruitful appointment in that as flag officer from Dec 1779 to Nov 1781 Johnstone, although ashore for most of 1780, shared in a sizeable sum of prize money resulting from several enemy captures by the cruisers in his squadron (see, further, par 3 2 2 in Part 2 of this article for one of his claims in this regard). Then, at the beginning of 1781, he was given command of a secret expedition to South America which promised rich prizes but which was, after some reinforcement, diverted against the Dutch settlement at the Cape of Good Hope. On Johnstone, see, further, Robin FA Fabel *sv* "Johnstone, George" in *Oxford Dictionary of National Biography* (hereafter *ODNB*) (online ed Jan 2008, accessed 8 Jan 2015); RFA Fabel *Bombasts and Broadside: The Lives of George Johnstone* (Tuscaloosa, Ala, 1987); RFA Fabel "Governor George Johnstone of British West Florida" (1976) 54 *Florida Historical Quarterly* 497-511; J Ralfe *The Naval Biography of Great Britain ...* vol 1 (London, 1828) at 364-373.
- 15 The British government had diverted a planned privateering expedition to South America to the Cape. As Rutherford "Part I" (n 13) observes at 203, "the genesis of the expedition was political". The need for secrecy may account for the fact that a mere commodore, placed in charge of what was initially a privateering expedition to South America but then, on the outbreak of the war with the Dutch, became diverted to the Cape, remained in command, albeit of a somewhat strengthened fleet, even though the nature of the expedition had been significantly altered from a maritime and strategic point of view. Beatson (n 13) at 311 observes that the outbreak of the war caused the British government "to lay aside the expedition designed against the Spanish colonies, and to substitute in its place, an attack on the settlement at the Cape of Good Hope".
- 16 Rutherford "Part I" (n 13) at 200, quoting (Mar 1781) *Political Magazine*.



Portrait of Commodore Johnstone, Caird Collection, National Maritime Museum, Greenwich; BHC2808: half-length portrait in oil of Johnstone, in captain's uniform; from an original painting by Henry Raeburn, painted 1768-1774. There is also an enlargement from the miniature of Raeburn by John Bogle in the Scottish National Portrait Gallery, Acc no PG 2523, watercolour on ivory, height 9,9cm, bought in 1982 from a Christies' auction.

naval station at Lisbon, accepted his orders with some reluctance as they apparently meant that he would lose out on an anticipated opportunity to share in prize money: he “sailed in ill-humour [on the expedition to the Cape], saying he had lost £100 000 by a change of his orders”.<sup>16</sup>

Delayed by stormy weather and other factors, the squadron under Johnstone sailed from Spithead only on 12 and 13 March 1781. It was a sizeable company of ships, comprised of forty-six naval vessels (including five ships of the line and

17 The ships of the line (ie, warships mounting at least fifty heavy guns) were HMS *Hero* (seventy-

four frigates, a fireship and a bombship, and a number of light armed cruisers and storeships) and thirteen East Indiamen sailing under convoy.<sup>17</sup>

Also in the squadron were eleven transport ships<sup>18</sup> carrying not only supplies and equipment, but also three battalions of more than 2 500 soldiers as well as a small detachment of artillery, all under the command of General William Medows.<sup>19</sup>

The fact that, nominally, there were both a naval and a military commander on the expedition to the Cape would prove strategically problematic and also give rise to at least some of the legal issues arising from it.

Although the British took the first steps in preparing to reach and attack the Cape, the French did not get left behind. Having obtained information of the British

four guns, third rate, built in 1759, commanded on the expedition by Capt James Hawker); HMS *Monmouth* (sixty-four guns, third rate, built in 1772, Capt James Alms snr); HMS *Isis* (fifty guns, built in 1774, Capt Evelyn Sutton); HMS *Jupiter* (fifty guns, fourth rate, built in 1778, Capt Thomas Pasley); and the flagship – she carried the flag of Johnstone, the commander of the expedition – HMS *Romney* (fifty guns, fourth rate, built in 1762, Capt Rodham Home). Among the other ships in the squadron, the following will feature later on: HMS *Active* (a thirty-two-gun frigate, built in 1780, Capt Thomas Mackenzie: see, further, at n 73 below); HMS *Porto* (a sloop, commanded initially by the Hon Thomas Charles Lumley until 22 Apr 1781, and then by George Linzee: see, further, n 367 in Part 2 of this article); HMS *Rattlesnake* (a cutter armed as a sloop of war, which but a few days into the expedition on 17 Mar 1781 chased a Dutch merchantman and captured her after a sharp action: see George McCall Theal *History of South Africa [1691-1795]* (London, 1888) at 249); HMS *Lark* (an armed cutter under Lieut Philip D’Auvergne: see, further, n 99 below); and HMS *Infernal* (a fireship, under Henry d’Esterre Darby: see, further, nn 29 and 177 below).

On the ships in Johnstone’s squadron, see, further, eg, William Laird Clowes *The Royal Navy. A History from the Earliest Times to the Present* vol 3 (London, 1898) at 545-546; Rodney MS Pasley (ed) *Private Sea Journals: 1778-1782: Kept by Admiral Sir Thomas Pasley ....* (London, 1931) at 121-122; Rutherford “Part I” (n 13) at 204-205; and (Fri 16 Mar 1781) no 1250 *Lloyd’s List*. More general sources on British naval vessels include Michael Phillips’ “Ships of the old Navy” available at <http://www.ageofnelson.org> (accessed 16 Jan 2015) and <http://threedecks.org/index> (accessed 30 Jan 2015). The discrepancy in the number and identity of the vessels in Johnstone’s squadron in these and other sources must be ascribed to the fact that ships were detached from and attached or re-attached to the squadron at various stages of the voyage to the Cape.

18 Four of them were privately-owned vessels on hire to the military, and among the others was HMS *Resolution*, one of Capt James Cook’s ships on his second expedition 1772-1775: see, further, Alistair MacLean *Captain Cook* (London, 1972) and Frank McLynn *Captain Cook. Master of the Seas* (New Haven, Conn, 2011).

19 Sir William Medows (also spelt Meadows) (1738-1813) was made a colonel of the 89th Foot in 1780 and in Mar 1781, as maj genl for the expedition, he commanded the troops which sailed for the Cape with Johnstone. Although not always successful as a military commander, Medows was well liked and admired by his troops; he resigned to the soldiers under him his share of the prize money due after the attack on Tipu Sultan’s capital of Seringapatam in Feb 1792, worth nearly £5 000. In 1788 Medows was appointed governor of Madras, and in 1790 governor of Bombay. See, further, Alastair W Massie *sv* “Medows, Sir William” in *ODNB* (online ed Jan 2008, accessed 8 Jan 2015).



secret plans through spies resident in London,<sup>20</sup> they quickly ordered an assembled naval expedition to the Indian Ocean under Admiral Suffren<sup>21</sup> to head first for the Cape. Smaller than its British counterpart,<sup>22</sup> the French squadron was likewise accompanied by a military compliment of some 1 200 troops of the Luxemburg and Pondicherry regiments, the latter under command of an Irishman, Colonel Thomas Conway. Suffren was instructed to beat the British to the Cape, to disembark the troops at and in defence of the allied Dutch settlement, and then to sail on to reinforce the French fleet in the Indian Ocean. The French squadron sailed from Brest a mere nine days after Johnstone had left England, on 22 March 1781.

Thus were the two main and contrasting protagonists involved in the race for the Cape – “a trial of speed, in which the possession of the Cape was to be the prize of the winner”<sup>23</sup> – Johnstone, a navally inexperienced politician, and Suffren, an experienced naval officer and brilliant tactician and strategist.<sup>24</sup>

*En route* to the Cape, though, there occurred an event that predetermined the outcome of the race: the confrontation at Porto Praya.<sup>25</sup>

### 2 3 The battle of Porto Praya

Johnstone first made for the neutral Portuguese harbour of Porto Praya in the Cape Verde Islands, to resupply, take on water and to allow slow transports to catch up

- 20 One of them, François Henri de la Motte, was arrested in Jan 1781 and sentenced to be executed for high treason and for carrying on a treasonable correspondence with the enemy. He was hanged in London on 27 Jul 1781 – ultimately for fifty-seven minutes – but, as directed by his sentence, not until dead, and was then cut down, beheaded, disemboweled, and quartered. A report on De la Motte’s trial and execution is contained in (1781) 2 *The New Annual Register or General Repository of History, Politics, and Literature* .... sv “Principal Occurrences” at 81-82.
- 21 Pierre André de Suffren (also spelt Suffrein, Suffrin) de Saint Tropez (1729-1788) was one of France’s greatest but least liked naval commanders. He went on from the Cape inconclusively to contest established British naval power in the Indian Ocean. See generally Howard Ray Killion *The Suffren Expedition: French Operations in India during the War of American Independence* (DPhil thesis, Duke Univ, 1972) at 193 *et seq.* GJ Schutte sv “De Suffren Saint-Tropez, Pierre André” in *Dictionary of South African Biography* (hereafter *DSAB*) vol 1 (Cape Town, 1968) at 222-223 refers to him as the “defender of the Cape”.
- 22 The five relatively new and better armed ships of the line in the French squadron were the flagship *Héros* (seventy-four guns); *Annibal* (seventy-four guns, commanded by Capt De Trémignon); *Artésien* (sixty-four guns, under Capt De Cardaillac); *Vengeur* (sixty-four guns, Capt De Forbin); and *Sphinx* (sixty-four guns, Capt De Duchillon). A weakness of the French squadron was the absence of any frigates. See, further, on the French vessels, eg, Clowes (n 17) at 545-546, Theal (n 17) at 249; Rutherford “Part I” (n 13) at 205-206.
- 23 Theal (n 17) at 248.
- 24 Rutherford “Part I” (n 13) at 205 points out that the only features they had in common were age and stoutness.
- 25 On the battle there, see, eg, Rutherford “Part I” (n 13) at 200-212 (on the voyage to Porto Praya), 290-298 (on the battle itself) and 299-308 (on subsequent events); William B Willcox “The Battle of Porto Praya, 1781” (1945) 5 *American Neptune* 64-78; Theal (n 17) at 249-252; Turner (n 12) at 170-172; Clowes (n 17) at 546-549 (there is a map at 547 illustrating the battle positions); AT

with the rest of his squadron. His ships started arriving in drips and drabs from 10 April 1781. Despite local intelligence of the anticipated arrival of French ships that had to be provisioned, they anchored haphazardly in the Porto Praya roads, ill prepared to fend off and unprotected against any enemy attack.<sup>26</sup>

The French, too, had decided to put into Porto Praya for watering and provisioning. After an advance vessel had informed him of Johnstone's presence there, and knowing the latter's ultimate destination, Suffren decided to take the initiative, leave his convoy behind, and attack with his warships in the hope of destroying or at least disabling the unsuspecting British contingent.

On 16 April 1781, the French attacked. Confused close action followed for five hours, but without any side gaining the upper hand.<sup>27</sup>

When the superior British force had gathered itself, with the element of surprise gone and with two of his naval commanders killed in action<sup>28</sup> and the loss or capture of one of his damaged warships threatening, Suffren retreated to sea, content to take with him a few prizes.<sup>29</sup>

The British suffered relatively little damage, but Johnstone delayed any retaliation which was in any event made difficult by the position of his warships.

Mahan *The Major Operations of the Navies in the War of American Independence* (New York, 1916, repr 1969) at 235-238 (with a map at 236); Beatson (n 13) at 313-320. Johnstone's version of the events in a letter to the Secretary of State dated 30 Apr 1781 was reprinted in (1781) 2 *The New Annual Register or General Repository of History, Politics, and Literature* .... sv "Principal Occurrences" at 72-78.

- 26 Thus, the transports and merchantmen were anchored outside the port while the flagship *Romney* and the other men-of-war were inside the port from where they could not fire freely on any attackers. Pasley (n 17) at 299 refers to the "slovenly arrangement" of the British ships; John Campbell *Naval History of Great Britain* ... vol 6 (London, 1813) observes at 43 that Johnstone's vessels "were suffered to lie at anchor in a very confused and promiscuous manner"; and Beatson (n 13) at 313 describes the fleet as having come to anchor in "the most intermixed manner". Further, a large contingent of experienced seamen were ashore, on leave or performing tasks related to replenishing, while the decks of the warships were laden with cargo, casks and livestock. Also, Johnstone had not sent a vessel cruising to keep a lookout for and to warn of approaching enemy vessels.
- 27 According to NAM Rodger *The Command of the Ocean. A Naval History of Britain 1649-1815* (London, 2005) at 349, "[n]either officer showed to great advantage; each had warning of the others's presence but neglected to inform his captains, so that both attack and defence were muddled".
- 28 Captain De Trémignon of the *Annibal* and Capt De Cardaillac of the *Artésien* were mortally wounded at Porto Praya. British sailors boarded the latter ship and sought unsuccessfully to capture her. However, they did take twenty-five prisoners and from them learnt that the French vessels were destined for the Cape: see Theal (n 17) at 250.
- 29 These included two Indiamen. The vessels were all recaptured within a few days. The French also took the fireship *Infernal* (see n 17 above), but later abandoned her on the British approaching. She returned to the squadron with a skeleton crew, minus Capt Henry d'Esterre Darby and five seamen and nine soldiers who had been taken prisoner of war. The French left Darby at the Cape, from whence he returned to England. See, further, at n 177 below for Darby's court martial.

He laid the blame for the delay of almost three hours at the door of Captain Sutton, of the HMS *Isis*. This was to have significant legal repercussions.<sup>30</sup> By the time the British eventually put to sea in pursuit of the retreating French who were only a short distance away with a damaged warship in tow, darkness had fallen, the chase was abandoned, and the enemy managed to slip away.<sup>31</sup>

Ultimately Johnstone's conduct at Porto Praya came in for severe criticism: "[T]he commodore was greatly censured for his want of foresight, and for the disposition of squadron: ... he totally neglected the first precautions every prudent man, well knowing his profession, ought to have taken in time of war."<sup>32</sup>

Because of the indecisive action at Porto Praya – it was “a drawn battle at most”<sup>33</sup> – the race for the Cape was in theory still on.

However, despite having learnt of Suffren's orders but assuming wrongly that he would send part of or go with his squadron to South America for repairs and supplies, Johnstone stayed a further fortnight at Porto Praya to repair relatively minor damage to his ships. He only sailed for the Cape on 2 May. Suffren, again, sailed directly for the Cape, effecting temporary repairs *en route* and in fact towing the damaged and demasted warship all the way there.

With a fair wind at his back, Suffren arrived at the Cape in his flagship *Héros* on 21 June, with the rest of the slower transport ships in his squadron entering False Bay a few days later. There he disembarked the troops and strengthened the settlement against attack.<sup>34</sup>

By his prior arrival, Suffren for all intents and purposes frustrated the very object of the British expedition: the Cape would remain in Dutch hands or at least not fall into British hands.<sup>35</sup>

At home, Johnstone himself was widely blamed for the failure of his expedition, maybe even more so because he would nevertheless manage to turn it into an

30 See, further, par 3 1 2 *et seq* below.

31 See, further, Isaac Schomberg *Naval Chronology; or an Historical Summary of Naval and Maritime Events* .... (London, 1802) vol 2 at 64-65, pointing out that a further factor causing Johnstone to call off the pursuit and return to port was that he had left most of his squadron behind without orders to conduct the convoy to a proper rendezvous, raising the fear of enemy doubling around and attacking it.

32 Ralfe (n 14) at 370.

33 Willcox (n 25) at 67.

34 On Suffren's voyage to, and stay at the Cape, see Killion (n 21) at 248-251; Kathleen M Jeffreys (ed) *Kaapse archiefstukken ... 1781, 1782 Deel 1 en 2, 1783 Deel 1...* (Cape Town, 1930, 1931, 1935, 1938) (hereafter *Kaapse archiefstukken*) 1781 at 251-252 (Dagregister, 21 and 22 Jun 1781); *idem* 1781 at 252 (Dagregister, 24 Jun 1781); *idem* 1781 at 254 (Dagregister, 3 Jul 1781: the troops marched overland and arrived in Cape Town on 3 Jul “met vliegende vaandels en slaande trommels”); and HCV Leibbrandt *Precis of the Archives of the Cape of Good Hope. Requesten (Memorials) 1715-1806*, vol 1: A-E and vol 2: F-O (Cape Town, 1905), vol 3: P-S (Cape Town, 1988), vol 4: T-Z and vol 5: Index (Cape Town, 1989), the volumes with continuous pagination, at 121-123.

35 Beatson (n 13) at 324-325 observes that the “timely arrival of the French armament saved the settlement at the Cape of Good Hope from changing masters”. Suffren remained at the Cape until it was confirmed that Johnstone's squadron had departed and then made his way to Mauritius and

apparently lucrative personal venture.<sup>36</sup> Although no formal official action was ever taken against him, the naval establishment and even his political contacts were not supportive and his subsequent career was unremarkable.<sup>37</sup>

## 2 4 The position at the Cape

The political situation at the Cape at the time was turbulent.<sup>38</sup> Local defences were also severely defective,<sup>39</sup> while there was no naval protection in 1781 for the returning DEIC fleet rounding the Cape.<sup>40</sup>

News of the outbreak of war between Britain and the Netherlands was delivered by the French frigate *Sylphide* towards the end of March 1781 and thus after both

the Indian Ocean where in 1782 and 1783 he clashed in a number of severe but indecisive naval encounters with the British under Adm Hughes.

36 Ralfe (n 14) at 372 refers to his “inglorious but lucrative expedition”.

37 See, again, n 14 above for his biographical sources.

38 As a result of dissatisfaction with the conduct of local Company officials, including the governor and, in particular, the fiscal Boers (about whom more in n 393 in Part 2 of this article), a disgruntled group of free burghers (the “Cape Patriots”, as they were subsequently labelled) had in 1779 sent a delegation to the Netherlands to present their grievances about local conditions to the DEIC: see, eg, Theal (n 17) at 230-238. The governor, Plettenberg (1739-1793), was a law graduate from the University of Utrecht, a member of the Court of Justice in Batavia 1764-1766, the independent fiscal at the Cape Oct 1766-Aug 1771, acting head of the Cape government Sep 1771-May 1774, and governor May 1774-Feb 1785. For details of his tenure at the Cape, see Theal (n 17) at 220-270; GC de Wet & GJ Schutte *sv* “Van Plettenberg (Plettenburg), Joachim Ammema (Amama)” in *DSAB* vol 5 (Cape Town, 1987) at 820-823.

39 The local garrison consisted of about 500 regulars under the command of Capt Robert Jacob Gordon (he had arrived in Jun 1777, became commander in 1780 and was promoted to col in Mar 1782). Although some 3 000 burghers could theoretically be called up for military service, they were not all readily available and were in any case reluctant to leave their farms open to attack by local tribesmen: see Theal (n 17) at 228-229, 239. The DEIC was accordingly forced to hire mercenary units, mainly French, to protect the settlement and to bolster the garrison. The French regiments landed by Suffren, eg, built new defensive batteries: see Andrew B Smith “The French period at the Cape 1781-1783: A report on excavations at Conway Redoubt, Constantia Nek” (1981) 5 *Military History J* 107-113; SA Cannon Association “The French period at the Cape of Good Hope” available at <http://www.sa-cannon.com> (accessed 31 Jan 2015); and Thean Potgieter “Maritime defence of the Cape of Good Hope, 1779-1803” (2003) 48 *Historia* 283-308. The Pondicherry regiment remained at the Cape from Jul 1781 until the conclusion of the Anglo-Dutch War in 1783; the Swiss De Meuron Regiment followed in 1783 and stayed on until 1788, long after the end of hostilities. See, further, on the French and other foreign military influx and influence during this period, Nigel Penn “Soldiers and Cape Town society” in Nigel Worden (ed) *Cape Town between East and West. Social Identities in a Dutch Colonial Town* (Johannesburg, 2012) 176 at 188-190; Turner (n 12) at 167-175. On the De Meuron Regiment, see Adolphe Linder *The Swiss at the Cape of Good Hope 1652-1971* (Basel, 1997) at 169-171 and Nigel Penn “The Meuron Regiment at the Cape, 1783-1788” (2012) 66 *Quarterly Bulletin of the National Library of South Africa* 13-29.

40 See Theal (n 17) at 246-248. The Dutch navy was employed mainly to escort merchant ships from the East Indies on the last part of their voyage home and given Dutch neutrality seldom ventured as far as or beyond the Cape.

Johnstone and Suffren had left Europe for the Cape. News of their departure reached the Cape only on 12 May by the French ship *Fine*. Seven anxious weeks later, on 20 May, another French frigate, the privateer *Sérapis*,<sup>41</sup> arrived at the Cape with news of the imminent arrival (eventually only on 21 June) of Suffren's fleet with troop reinforcements for the Cape.

The local government also received a missive from the Dutch ambassador in France, dated 29 December 1780, in which he advised the taking of necessary defensive measures to protect not only the local settlement against British attack, but also all Dutch shipping there.<sup>42</sup> A letter from the Amsterdam Chamber of the DEIC, dated 12 January 1781, and received at the Cape on 11 June 1781, sent the governor a copy of the British declaration of war and drew his attention to the danger of British naval and privateering attacks.<sup>43</sup> Later on, instructions also arrived on how to deal with foreign shipping and goods arriving at the Cape in order to prevent any transgression of treaties the Netherlands had with allied and neutral states during the war with the British.<sup>44</sup>

- 41 The famous British frigate HMS *Serapis* was captured in Sep 1779 by Capt John Paul Jones of the USS *Bonhomme Richard* in the North Sea during the American Revolutionary War. She was then sold to the French and reconditioned as the privateer *Sérapis* and sent out in operations against the British in the Indian Ocean at the end of Feb 1781. She was lost in Jul 1781, shortly after her departure from the Cape, off the coast of Madagascar when a sailor accidentally dropped his lantern into a tub of brandy! Her wreck was only discovered in Nov 1999: see Willcox (n 25) at 72 n 20, Rutherford "Part I" (n 13) at 208-209; and James C Bradford *sv* "Jones, John Paul" in *ODNB* (2004 online ed, accessed 4 Mar 2015).
- 42 See *Kaapse archiefstukken* (n 34) 1781 at 294 (Incoming Letters, letter from the Dutch ambassador in France, dated 29 Dec 1780, received at the Cape 31 Mar 1781).
- 43 *Idem* 1781 at 324 (Incoming Letters, letter from the Amsterdam Chamber). It pointed out "dat lettres de marque en Represaille stonden te worden uitgegeeven [by the British government], tot het aanhouden, aantasten en neemen van Scheepen en goederen aan Hun Hoog Mogende of de Ingezeetenen van dezen staat toebehoorende, soo als de uitgave van de dusdanige brieven dan ook reeds werkelyk plaats heeft gehad".
- 44 *Idem* 1783 *Deel 1* at 351-352 (Incoming Letters, letter from the Council at Batavia, dated 27 Sep 1782, received at the Cape 23 Feb 1783, instructing, in accordance with the basic principle of "vry Schip vry goed ... volgens welke vyandelyke goederen in de Scheepen van vrienden vry zyn", that "geen goederen van de Engelsschen, die in Scheepen, of Vaartuigen van onseydigen, het zy Europese of Inlandse, gevonden worden, aanteslaan of de Scheepenen Vaartuigen, waar in dezelve geladen zyn, deswegens te besetten en bekommeren", unless the goods consisted of such as were expressly and specially declared by the treaties "voor Contrabande en Confiscabel"). See, also, *idem* 1783 *Deel 1* at 398 (Incoming Letters, letter from the Lords Seventeen in Amsterdam, dated 7 Dec 1782, received at the Cape 8 Aug 1783, concerning neutral ships chartered to convey goods to and from the Cape that came to be delayed there because of the war, and instructing the local government to observe the terms of the relevant charterparties ("Certepartijen") closely and to be careful not to do anything that would be against the wishes of the state with whose subjects "die Contracten van bevragting zyn aangeaan").

The arrival of news of the outbreak of war had immediate local consequences: arriving British ships were captured,<sup>45</sup> while British sailors present at the Cape were placed on board Dutch vessels as prisoners of war so that they could be prevented from communicating with approaching British vessels. British visitors who happened to be present in the settlement, as well as some naval personnel, were sent to outposts for the same reason.<sup>46</sup>

All Dutch ships in the roadstead were immediately ordered to remain at the Cape until convoys could be arranged, a dim prospect as a relatively small number of serviceable naval escorts were available.

The approaching winter meant that Table Bay was unsuitable for their anchorage, while Simon's Bay could not be defended effectively against a British naval attack. Four of the smaller Dutch Indiamen on their way to Europe were accordingly sent to the relatively safe Hout Bay.<sup>47</sup> However, the larger ships, it was considered, could not be accommodated there. There were six of them at the Cape at the time, five of them arriving at the Cape roadstead on or within a few days of 30 March,<sup>48</sup> fully laden from the East Indies and forming part of the homeward-bound fleet, and one of them *en route* to the East. All would play a central role in what was to follow. The Dutch ships involved were:<sup>49</sup>

- 45 See, eg, *idem* 1781 at 231, 233 and 234 (Dagregister, 1, 3, 4 and 6 Apr 1781) on the capture by the French vessels present at the Cape of the brig *Betsy* that had arrived in Table Bay from St Helena and had unknowingly dropped anchor there: see, further, Theal (n 17) at 247-248. Other ships (eg, two Danish Indiamen) were prohibited, on the advice of Suffren, from sailing north from the Cape to prevent information of the French arrival reaching the advancing British fleet or their base at St Helena: see *Kaapse archiefstukken* (n 34) 1781 at 98 (Council of Policy Resolution, 3 Jul 1781).
- 46 See *idem* 1781 at 44-45 (Council of Policy Resolution, 2 Apr 1781); see, further, in n 61 below.
- 47 See *idem* 1781 at 76 (Council of Policy Resolution, 1 May 1781: the *Batavia*, *Amsterdam*, *Morgenster*, *Indiaan* were sent there as would all still to be expected return ships); *idem* 1781 at 108 (Council of Policy Resolution, 23 Jul 1781). These Indiamen ultimately escaped British capture and subsequently arrived safely in the Netherlands: see Mollema (n 9) at 278. Also in Hout Bay with the four Indiamen, was a solitary Dutch cruiser, *Jagtrust*: see Potgieter (n 39) at 290.
- 48 See *Kaapse archiefstukken* (n 34) 1781 at 230 (Dagregister, 30 Mar 1781).
- 49 The following details of these ships were obtained from Resources Huygens ING "The Dutch East India Company's shipping between the Netherlands and Asia 1595-1795: Overview of voyages" available at <http://resources.huygens.knaw.nl> (accessed 13 Jan 2015); "De VOC Site" available at <http://www.vocsite.nl/schepen/> (accessed 9 Jan 2015); JR Bruijn, FS Gaastra & I Schöffer *Dutch Asiatic Shipping in the 17th and 18th Centuries. Vol 3: Homeward-bound Voyages from Asia and the Cape to the Netherlands (1597-1795)* (The Hague, 1979) [vol 167 *Rijks geschiedkundige publicatiën. Grote serie*] *passim*; and Leibbrandt (n 34) *passim*. The spelling of the names of the various Dutch ships and their commanders is wildly inconsistent, not only, as may be expected, in English sources (see, eg, Schomberg (n 31) vol 4 at 66n and vol 5 at 67 and (Tue 16 Oct 1781) no 1311 *Lloyd's List* sv "Marine List"), but even in Dutch ones.

- *Hoogkarspel*,<sup>50</sup> 850 tons, built for the Delft Chamber of the DEIC in 1771, under Captain Gerrit Harmeyer<sup>51</sup> – who was also the flag officer (“wimpelvoerder”) of the return fleet – *en route* from China, with a cargo for the Delft Chamber valued on invoice at Dutch fl516 911;
- *Honkoop*,<sup>52</sup> 1 150 tons, built for the Zeeland Chamber in 1770, Captain Alex Landt,<sup>53</sup> also *en route* from China, with a cargo for the Zeeland Chamber valued at Dutch fl657 355;
- *Middelburg*,<sup>54</sup> 1 150 tons, built for the Zeeland Chamber in 1775, commanded by Captain Justus van Gennep,<sup>55</sup> *en route* from China, with a cargo for the Amsterdam Chamber with an invoice value of Dutch fl643 543;
- *Paarl* (Pearl),<sup>56</sup> 1 110 tons, built for the Amsterdam Chamber in 1778, Captain Dirk Corneliszoon Plokker,<sup>57</sup> *en route* from China, with a cargo worth Dutch fl658 673 for the Amsterdam Chamber; and
- *Dankbaarheid* (Gratitude),<sup>58</sup> 850 tons, built for the Rotterdam Chamber in 1772, Captain Hendrik Steedsel,<sup>59</sup> *en route* from Bengal with a cargo<sup>60</sup> for the

50 Various spellings are encountered: *Hoogkarspel*, *Hoogcarspel*, *Hoog Carspel*, *Hoogkarspee*, *Hoegcarspel*, *Heogearsel*, and *Hoogskarpel*. The first is the correct one, being the name of a small town in the district of Drechterland in north Holland, between Enkhuizen and Hoorn on the Ijsselmeer; nearby there is a town called Bovenkarspel.

51 Also Harmeyer, Harmeyr, Harmeyer, Harremeyer, Harmier.

52 Also *Honcoop*, *Hencoop*; she was named after the Amsterdam merchant Willem Huyghens, the Lord of Honkoop.

53 Nikolaas Sevie was her commander Jul 1778 – Jul 1781, when Landt (also Land) took over and was in command at Saldanha Bay.

54 Also *Middleburg*, *Middelburgh*.

55 Also Justinus Genoep, Van Geunip, Van Gennip. Also on board the *Middelburg* and to be encountered again, was Abraham de Smidt, whose journal – an English translation of which was published as “Dutch East Indiamen attacked while sheltering in Saldanha Bay. Ship ‘Middelburg’ blown up. Journal of ship’s company’s march to Cape Town” in (Dec 1969) 18(8) *Africana Notes and News* at 328-336 – provides important information on the battle of Saldanha Bay. There are several archival copies of the original and the translation: Cape Archives A1762: Copy of the original journal of Abraham de Smidt, being an account of an attack on the “Middelburg” in Saldanha Bay; Cape Archives A1637: (containing) the English translation of the Journal of Abraham de Smidt, being an account of an attack on the “Middelburg” in Saldanha Bay, 1781; MSB173 in the Abraham de Smidt (1755-1809) Collection, SA Library: Translation of the original account of the destruction of the “Middelburg” in Saldanha Bay, 1781; and MSA214 in the JPL Strange Collection, Johannesburg Public Library: photocopy of “Journaal in dienst van de Oost-Indische Compagnie op het schip ‘Middelburg’, 1781”.

56 Also *Parel*, *Paerl*.

57 Also Plo(k)kert, Plocker, Plockker.

58 Also *Dankbaarheyt*, *Dankbaarheid*, *Donkbraykeyt*, *Dankbrakeyt*.

59 Also Steesel, Steedsee, Streetsel.

60 Later considered by the British captors to be most valuable of all: see Pasley (n 17) at 174-175.

61 They and their families had been granted passage to the Netherlands by the DEIC when the ship departed from Bengal on 20 Jan 1781. These passengers were landed and permitted, because of prevailing circumstances, to stay at the Cape for the time being. They were housed in the countryside, at the Vissershok outpost, where also other British subjects arriving on British and

Rotterdam, Delft and Amsterdam chambers worth respectively Dutch fl427 490, fl353 265 and fl130, as well as with a number of English passengers on board.<sup>61</sup>

Not part of the west-bound return fleet was the 1 110-ton Ceylon-bound Indiaman *Held Woltemade*.<sup>62</sup> Built for the Amsterdam Chamber in 1774, she departed from Texel under the command of Captain Swerus Vrolijk<sup>63</sup> on 19 December 1780, a day before the War broke out, and arrived at the Cape on 14 April 1781, in urgent need of repairs.<sup>64</sup> On board she carried stores, gunpowder and bullion (unminted silver

other (eg, Danish) ships, including the captain and officers of the *Betsy* (see n 45 above), were kept. The main condition was that they remained there and refrained from any correspondence with British subjects or forces elsewhere. See, further, eg, *Kaapse archiefstukken* (n 34) 1781 at 54 (Council of Policy Resolution, 10 Apr 1781); *idem* at 72 (Council of Policy Resolution, 27 Apr 1781); *idem* at 76 (Council of Policy Resolution, 1 May 1781); *idem* at 234 (Dagregister, 10 Apr 1781); and *idem* at 238 (Dagregister, 25 Apr 1781).

Not all the detainees were happy with this arrangement and some sought alternative arrangements: see *idem* 1781 at 313-314 (Incoming Letters: letter dated 29 Apr 1781 from an English passenger Thomas Hinchman on board the *Dankbaarheid* in Table Bay); *idem* 1781 at 327 (Dagregister, 17 Aug 1781, concerning Thomas Hinchman). Also, the local authorities balked at the cost involved in supporting the detainees (see *idem* 1781 at 115 (Council of Policy Resolution, 14 Aug 1781, indicating that the support (“onderhoud”) of English prisoners of war from 5 Apr 1781 to 14 Sep 1783 at the Vissershok outpost amounted to more than Rds2 806, which had to be paid from Company coffers) and later resolved to send a memorial to the Lords Seventeen to seek reimbursement from the English East India Company whose employees these persons were (*idem* 1783 *Deel 1* at 257 (Council of Policy Resolution, 9 Dec 1783)). There were also administrative and other problems caused by the crowded conditions at Vissershok and the constant stream of requests for special dispensation from the detainees (see, eg, *idem* 1781 at 121 (Council of Policy Resolution, 27 Aug 1781); and at 327-329 (Dagregister, 26 Aug 1781) concerning the transfer of the English detainee Richard Lewin from Vissershok to the outpost at Ganse Craal because of “de wijngige Commoditeijt, die hij met desselfs Huisvrouw en domesticquen aldaar quam te genieten, door de veelheijd der andere Engelszen”). The Council of Policy considered the whole matter problematic and observed “dat men niet weynig is g’embarrasseerd met de Engelsche Krygsgevangenen, die op differente Plaatsen verdeeld zynde” and thought it better to get rid of them sooner rather than later and not even to allow them to land in the first place (see *idem* 1782 *Deel 1* at 105 (Council of Policy Resolution, 19 Mar 1782)).

62 Also *Heldweltemade*, *Held Wolthemade*, *Held Wottemade*. On hearing of Cape dairy farmer Wolraad Woltemade’s heroic but ultimately fatal attempt to rescue those on board the Company ship the *Jonge Thomas* in June 1773, the DEIC made a substantial reward to his widow and sons and also honoured him by naming one of its vessels after him: see, further, Theal (n 17) at 263; Malcolm Turner *Shipwrecks and Salvage in South Africa – 1505 to the Present* (Cape Town, 1988) at 68.

63 Also Swerus Vrolijk, Vrolyk.

64 Two other outgoing ships, the *Mercur* and the *Vrienschap*, had departed from Texel and arrived in Table Bay together with the *Held Woltemade*. They received permission to depart for Batavia a few days later: see *Kaapse archiefstukken* (n 34) 1781 at 61 (Council of Policy Resolution, 20 Apr 1781); *idem* 1781 at 236 (Dagregister, 14 Apr 1781); *idem* 1781 at 237 (Dagregister, 20 Apr 1781); *idem* 1781 at 239 (Dagregister, 30 Apr 1781); and *idem* 1781 at 242 (Dagregister, 8 May 1781).



and gold) in chests, destined for the Ceylonese government and valued at a sum equivalent to £40 000.<sup>65</sup>

What to do with these Indiamen, then?

The five returning Indiamen, it was decided, were to be sent to Saldanha Bay, a safe and sheltered anchorage some twenty hours' sailing from Cape Town where there was a ready availability of cheap provisions and water and where, so the local authorities hoped, they and their valuable cargoes would be safe from enemy attack and capture. They would remain there, it was thought, until a naval convoy arrived that could escort them, and the others in Hout Bay, home.<sup>66</sup>

In order to lighten the ships and create space for the placement of canon, they were ordered to discharge in Table Bay the cargoes in the cabins<sup>67</sup> and in between their decks,<sup>68</sup> as well as all their sails that were not rigged. The damaged *Held Woltemade*, too, was sent to Saldanha Bay to be repaired in safety there, and then to continue to Ceylon.<sup>69</sup>

Orders – extensive but not clear nor practicable in all respects and subsequently revised and altered – were given to Captain Harmeier of the *Hoogkarspel*, who was put in charge of the squadron and had authority to call together a ships' council (“skeepsraad”) to decide on tactics to ensure the safety of the fleet. These orders included how and where they had to anchor and line up in the Bay, what lookouts had to be kept and batteries erected on land and armed with canon to warn of and prevent enemy warships entering the Bay, and how they had to obtain provisions from local farmers who had been ordered to withhold all forms of subsistence to British ships, so as also to prevent an overland attack of the Cape. Once there, all the ships' sails and ropes had to be taken down and stored in accompanying local hookers – the *Zon* and the *Snelheid*<sup>70</sup> – that had to be anchored some way off further into the lagoon near the local outpost. These hookers had to be set alight with the sails and ropes on board in the event of an enemy attack, thus thwarting any attempt

65 See Theal (n 17) at 253-254. As to the conveyance of bullion, see, further, Arent Pol *Schepen met geld. De handelsmunten van de Verenigde Oostindische Compagnie, 1602-1799* ('s-Gravenhage, 1989) at 22-23; GB Elliott “Currency and bullion carried by ships of the Vereenigte [sic] Oostindische Compagnie [sic]: Their routes, numismatic patterns and precursors” (1989) 75 *Mariner's Mirror* 241-251.

66 See *Kaapse archiefstukken* (n 34) 1781 at 232 (Dagregister, 2 Apr 1781). Saldanha Bay had since 1666 been one of the outposts (“buiteposte”, decentralised assistant service stations) of the settlement or service station (“buijten comptoir”) at the Cape of Good Hope. It was under the control of a post holder (“posthouer”). See generally D Sleigh *Die Buiteposte. VOC-buiteposte onder Kaapse bestuur 1652-1795* (Pretoria, 2007) at 94-96.

67 Part of the officers' and seamen's private-trade goods: see, further, n 146 below.

68 De Smidt in his journal ((1969) *Africana Notes and News* (n 55) at 328-330) refers to an instruction to lift the top layer of the ships' cargoes, mainly silks, fine tea, rhubarb, and aniseed.

69 See *Kaapse archiefstukken* (n 34) 1781 at 61 (Council of Policy Resolution, 20 Apr 1781).

70 Because of the War, they could no longer be employed on the coastal trade: Theal (n 17) at 247; and see, further, par 3 3 4 in Part 2 of this article.

to make off with the Indiamen and their cargoes in the event of an enemy capture. Further, preparations had to be made for the eventuality that, after a brave defence, the vessels themselves had to be abandoned as a last resort, and for their masts first to be cut down, and for them to be run aground and set alight to prevent the British taking them as prizes.<sup>71</sup>

The squadron of Dutch Indiamen departed from Table Bay on 13 May 1781 and arrived in Saldanha Bay three days later. On 28 June, the *Held Woltemade*, having been repaired, was allowed to depart from Saldanha Bay and continue on her – now roundabout – voyage to Ceylon without again touching Table Bay.<sup>72</sup> It was thought she would not encounter enemy ships but, as it turned out, that was not to be the case.

In the meantime, Johnstone's squadron had approached the Cape. He dispatched one of the frigates, HMS *Active*, accompanied by a few other smaller vessels, to sail ahead to reconnoiter and gather intelligence of the position and activities of the French fleet. On 1 July, the British detachment, flying French colours, encountered the *Held Woltemade*, south of False Bay, *en route* from Saldanha Bay to Ceylon. Deceived by their false colours, Captain Vrolijk surrendered to the British without any resistance and “with almost indecent alacrity”.<sup>73</sup>

Crucially, the British thus obtained intelligence from both the correspondence and the passengers<sup>74</sup> and the crew on board the *Held Woltemade* – considered of greater value than the vessel and her cargo which was taken prize – of the arrival

71 See *Kaapse archiefstukken* (n 34) 1781 at 45-46 (Council of Policy Resolution, 2 Apr 1781) and *idem* 1781 at 243 (Dagregister, 13 May 1781, pointing out that Harmeyer, as flag officer of the return ships (and the *Held Woltemade*) was handed “een ampele Ordre en Instructie, wat bij arrivement dier kielen in de Saldanha baaij, tot beveiliging van deselve in't werk gesteld, en hoedanig bij onverhoopte vijandelijke attacque aldaar, met de scheepen selve sal moeten werden gehandeld”); *idem* 1782 *Deel 2* at 307 (Outgoing Secret Letters, letter to Lords Seventeen, dated 20 Apr 1781: as the supercargo of the *Middelburg*, Egbert van Carnebeek, was about to depart with a Danish ship to Europe, the governor instructed him to report orally – it was not deemed advisable to give details in the letter itself – to the Lords Seventeen “nopens de Schickingen die door ons zyn genoomen om meerm Vier Chinaasse Scheepen en haare Kostbare Ladingen ten besten doenlyk te secureeren ... in hoope dat sulx van uwer Wel edele Hoog agtb geEerde approbatie zal mogen zyn”).

72 *Idem* 1781 at 253 (Dagregister, 30 Jun 1781).

73 Jose Burman & Stephen Levin *The Saldanha Bay Story* (Cape Town, c1974) at 59; see, also, Schomberg (n 31) vol 2 at 65-66 and vol 5 at 67; Beatson (n 13) at 323-324.

74 On board when she was captured, was, in the words of Pasley, the Cape “Fiscal's Sister bound (poor Girl) on a Matrimonial Voyage to Ceylon”. She was one of those “examined” for information on board the *Active* by Johnstone and the other officers. She also gave up her private letters to be copied for Johnstone's information. Dining with her on board the *Romney*, Pasley described her as “the fair Dutch captive”: see Pasley (n 17) at 116, 169, 170. The lady in question was Miss Adriana Boers, sister of independent fiscal Willem Cornelis Boers: see *Kaapse archiefstukken* (n 34) 1781 at 414-415 (Outgoing Letters, letter to the governor of Ceylon, dated 18 Jun 1781, informing that with the ship *Held Woltemade* had been sent letters and papers with their bearer “Juffr Adriana Boers”; the papers included a sealed parcel containing “de secrete zeinvlaggen te worden vertoond, in het gezicht van Ceilon komende”).

of the French contingent and the landing of military reinforcements at the Cape and, crucially, of the presence of the unprotected Dutch Indiamen in Saldanha Bay. Importantly, too, the authorities at the Cape and hence also the Indiamen in Saldanha Bay were then still blissfully unaware of her capture.<sup>75</sup>

After some initial and heated difference of opinion between Johnstone and Medows as to the viability of the options open to them – a naval attack or an overland attack on the settlement – Suffren’s presence at the Cape was deemed to exclude the success of proceeding with any such attack.<sup>76</sup>

However, the Dutch merchantmen in Saldanha Bay presented the tardy Johnstone with the opportunity of gaining a “substantial consolation prize”.<sup>77</sup> He accordingly determined, and Medows quickly came around to agreeing, to attack them in the Bay.<sup>78</sup>

Accordingly, whatever dissension there may have been between the naval and military components as to how to proceed with expedition after having been beaten to the Cape by the French, the lure of prize meant that there was broad general consensus among the British that the next step would be to capture the Dutch Indiamen in Saldanha Bay.<sup>79</sup>

75 See *Kaapse archiefstukken* 1781 at 146 (Council of Policy Resolution, 9 Oct 1781, from which it appears that on that date they still hoped that the *Held Woltemade* would arrive safely in Ceylon).

76 The two commanders also disagreed on other issues, eg, whether to proceed to India as Medows wanted, or to abandon the mission and sail to South America, as was Johnstone’s idea: see, further, Rutherford “Part I” (n 13) at 201, 203, 300, 302-304, who points out that Johnstone and Medows had to discuss and broadly agree on the conduct of the expedition as it was (at least informally, practically) “a joint sea and land operation” and as the two officers were on equal terms of command; Pasley (n 17) at 300-301 likewise observes that nothing could be done on the expedition without Medows’s consent.

77 Rodger (n 27) at 349. Willcox (n 25) at 78 observes that Johnstone was saved by circumstances from losing the battle of Porto Praya but not from losing his campaign; Killion (n 21) at 254 explains that after his indecision at Porto Praya, Johnstone “gave up on the Cape too soon, settling for some rich but strategically unimportant prizes without checking Suffren’s dispositions”.

78 Pasley (n 17) at 300-301: “Agreement could only be reached on the capture of the East Indiamen, which was too good a chance to be missed”; *idem* at 169 and 171 further observes that if Johnstone could have divided the squadron, he would have attacked Indiamen in Saldanha Bay with only one of the warships (the *Jupiter*) to assist him in the *Romney* and without the presence of any of the troop carriers: “it wou’d have been a noble affair” as he would not have had to face the possibility of having to share the prize with the military component of the expedition. Pasley himself (*idem* at 173) was critical of Johnstone’s plan of attack as it “seems more to serve the Army than Navy”, it not being clear to him what the troops would do once landed, for they could not assist even in the smallest degree in the attack on and capture of the merchantmen. However, the exclusion of the Army was not possible as Medows would not pass up on the possibility of sharing in any prize. He accordingly gave orders for his troops to be landed during the action, “expecting by that means to share Prize Money if they are taken” (*idem* at 170). Pasley at 302 suggests that the prospect of prize money “was one cause of the lack of harmony in the squadron”.

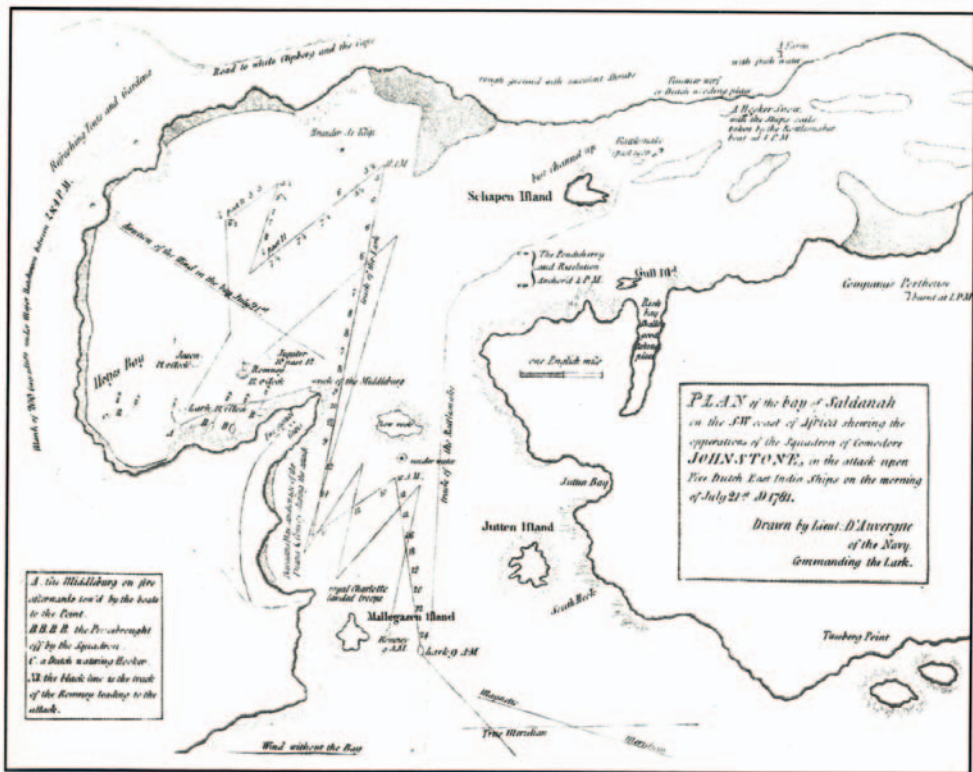
79 Harlow (n 11) at 117.

## 2.5 The “battle” of Saldanha Bay<sup>80 81</sup>

Unaware of the British arrival and their plans, the Dutch merchant ships anchored in the calm of Saldanha Bay in a roughly defensive formation, replenished and carried out minor repairs, and allowed the crews and troops on board to fish and hunt ashore. Because of practical difficulties, the Council of Policy agreed that no batteries had to be erected on land as had been instructed: the landing of heavy canon proved impossible and lighter canon would have been ineffective because of their shorter range.<sup>82</sup> By the time Johnstone’s squadron arrived at the Bay, they had been there a little more than two months, and had heard of the arrival of the French squadron under Suffren. They expected, any day, to be ordered to leave, what was by at least some considered to be a “decidedly exposed place of concealment”,<sup>83</sup> for Europe or at least for the Cape, a belief strengthened by the departure of the *Held Woltemade* at the end of June. Vigilance was at a low level, despite the news having been received in the meantime of the subsequent capture of the Ceylon-bound ship.

On the morning of Saturday 21 Jul 1781, at just after nine, under cover of a thick fog and flying French colours (and hence when sighted by the bored Dutch lookout at first taken to be part of the French squadron sent to escort them home), ships of the British squadron entered Saldanha Bay with speed and in close formation. They were lead in by Johnstone on HMS *Romney*. The attackers knew the layout of the Bay and the positions of the Dutch ships there and also of their instructions to destroy the vessels to avoid capture.

- 80 See, generally, Theal (n 17) at 254-255; Pasley (n 17) at 164-177; Beatson (n 13) at 325-328; Sleight (n 66) at 462-464. For Johnstone’s account of the action at the Cape, see (1781) 2 *The New Annual Register or General Repository of History, Politics, and Literature ... sv* “Principal Occurrences” at 89-90. For a Dutch version, see De Smidt (1969 *Africana Notes and News* (n 55)) at 330-331. Popular accounts include Tim Couzens *Battles of South Africa* (Johannesburg, 2004) at 17-24; John Gribble “The battle of Saldanha and the loss of the Middelburg” in Gabriel & Louise Athiros (eds) *The Best of The Cape Odyssey. A Journey into the Colourful and Fascinating History of the Cape vol 1* (Cape Town, 2007) at 31-33 (also in Gabriel, Louise & Nikolai Athiros & Mike Turner (eds) *A West Coast Odyssey. A Journey into the Colourful and Fascinating History of the Cape’s West Coast Peninsula* (Cape Town, 2008) at 29-31); [John Gribble] “‘Shooting a Fish in a Barrel’. Middelburg – 1781” in Gabriel Athiros & John Gribble (eds) *The Cape Odyssey 104. Wrecked at the Cape. Part 1* (Cape Town, 2014) at 57-64; Coenraad Potgieter *Skipbreuke aan Ons Kus* (Kaapstad, 1969) at 1001-1006; and Burman & Levin (n 73) at 57-64.
- 81 One should distinguish the first “battle” of Saldanha Bay in 1781 from the second, proper battle of Saldanha Bay in 1796: see, eg, Couzens (n 80) at 32-36; Turner (n 62) at 75-77; Burman & Levin (n 73) at 65-75. See, further, my “The First British Occupation of the Cape of Good Hope and two prize cases on joint capture in the High Court of Admiralty” (2005) 11 *Fundamina. A J of Legal History* 155-182.
- 82 See, further, *Kaapse archiefstukken* (n 34) 1781 at 84-85 (Council of Policy Resolution, 26 May 1781); *idem* 1781 at 245-246 (Dagregister, 26 May 1781). The Council retained the instruction concerning storage of sails and ropes on the hookers.
- 83 De Smidt (1969 *Africana Notes and News* (n 55)) at 328-330, who points out that Suffren had several times suggested that the Indiamen should return under his squadron’s protection, advice governor Plettenberg chose to ignore.



Cape Archives, M748: Plan of Saldanha Bay showing the operations of the squadron of Commodore Johnstone in his attack on the five Dutch East India Company's ships on 21 Jul 1781 [drawn by Lieutenant D'Auvergne on the Lark (see further n 99) and published in the rare pamphlet "A Letter to Lord Viscount Howe on the subject of a late determination at a Cockpit in a Prize Cause, 1787"]; see, also, M1/951: map of Saldanha Bay with soundings showing the inland expedition of Admiral Johnstone in 1781 (1786).

Only when the approaching ships struck their French colours and opened fire did the surprised and ill-prepared Dutch realise what was happening. Unable to escape from the Bay and from inevitable British capture, they did not even contemplate defence but immediately cut their cables, loosened the top-foresails, and drove the ships on or close to the shore. There they landed the crews and troops on board, hastily set or tried to set fire to them, and then abandoned them. It was all over in less than two hours.

The British were quick to react, launch their boats, board the abandoned Dutch ships and get the ill-prepared fires on board under control. Then they got the stranded vessels afloat with the assistance of the soldiers, and thus managed to save all their prizes, except one.<sup>84</sup>

84 See Campbell (n 26) at 45.

The *Middelburg* alone escaped capture. Her captain, Van Gennepe, had heeded the orders to resort to self-destruction more precisely, and had made proper preparation for her destruction to avoid capture by having a quantity of combustible materials (bundles of rope soaked in tar, sulphur and tallow) at the ready. After the rest of the crew had abandoned her, the *Middelburg's* first mate, Abraham de Smidt,<sup>85</sup> stayed behind and lit several fires earlier prepared in the bowel of the ship. She was soon ablaze and drifted off, and nearly collided with two of the other Indiamen were it not for intervention on the part of the captors (Johnstone himself was said to have been involved) to tow her away from the remaining Dutch ships on which fires had already been extinguished. Shortly after, the *Middelburg* exploded when the fire reached her powder magazine and her remains and the cargo that were not destroyed in the explosion, sank in relatively shallow water.<sup>86</sup> She was the only Dutch vessel not to fall into British hands on that day.

- 85 De Smidt, born in Middelburg in the Netherlands on 17 Jun 1755 and whose journal has already been referred to (n 55 above), first visited the Cape in Apr 1780. He became permanently domiciled there after the incident at Saldanha Bay, his effective action in the face of certain enemy capture winning him gubernatorial approval. He became a free burgher in 1784 and an influential citizen – *inter alia* president of the insolvency branch of the Orphan Chamber – with wide business interests. He remained at the Cape during the Batavian administration and died in Cape Town on 29 Dec 1809. His son Abraham (1793-1868) became a civil servant in the Cape Colony. See, further, MJ Bull *sv* “De Smidt, Abraham” in *DSAB* vol 4 (Cape Town, 1981) at 122-123; [Georgina Lister] *Reminiscences of Georgina Lister* (Johannesburg, 1960) at 16 (the author was Abraham de Smidt’s great granddaughter).
- 86 There had been several attempts at salvaging the scuttled vessel and her cargo, consisting mainly of Chinese porcelain. In 1794 Gerhardus Munnik, former “heemraad” of Drakenstein but then from Stellenbosch, who had obtained permission to salvage goods from the wreck of the *Middelburg* on condition that one-third went to the Company, declared that he had already salvaged a considerable amount of goods but requested an advance of Rds2 000 to cover his expenses, those goods to serve as security for the loan: see Leibbrandt (n 34) at 1537 (Memorial, 27 Mar 1794). According to Sleight (n 66) at 438, Munnik had salvaged no more than five canon and some porcelain. Other salvage attempts at the end of the nineteenth century likewise had limited success while also damaging the wreck site by the use of explosives: see Turner (n 62) at 75-77; John Gribble “Past, present and future of maritime archaeology in South Africa” in Carol V Ruppé & Janet F Barstad (eds) *International Handbook of Underwater Archaeology* (New York, 2002) 553-567 at 555-556. The most successful salvage operation took place in 1969 when the Dodds brothers from Cape Town recovered almost 200 pieces of Ch’ien Lung china (1736-1795), including some figurines, in an almost perfect condition: see Turner (n 62) at 76 for a list of the pieces of china recovered from the *Middelburg* and at 51, 82, and 110 for photos. Most of the salvaged ceramic items and also some coins were auctioned off in Cape Town and Johannesburg in Jan and Apr 1972: see John Marcus & Sons Galleries (Cape Town) *Catalogue of Priceless Treasure and Antique China Recovered from Beneath the Sea Off the South African Coast from the Two Famous Dutch East Indiamen, “Meresteijn” (1702), “Middelburg” (1781), as also the “Fame” (1823)* (Johannesburg, 1972) available at <http://www.sunken-treasurebooks.com/catalogs.htm> (accessed 20 Feb 2015). See, further, also <http://wrecksite.eu/wreck> (accessed 20 Feb 2015) *sv* “Middelburg”.



“Capture of the Dutch East India Company Fleet in Saldanha Bay 1781”, by Thomas Luny (1759-1837), a lesser but prolific English marine painter, especially of naval battles and incidents: see Pieter van der Merwe sv “Luny, Thomas” in *Oxford Dictionary of National Biography* (online ed Jan 2012, accessed 27 Jan 2015). The painting reproduced here is in the collection of Museum Africa (ex Africana Museum), Johannesburg, L96: see RF Kennedy (comp) *Catalogue of Pictures in the Africana Museum Vol 3: E-L* (1967) at 235. It is also reproduced in Lister (n 85) opp 36; Turner (n 62) at 74; *Gribble Cape Odyssey 104* (n 80) at 62-63. For an explanation of the painting, see “Wat heeft HONKOOOP met de VOC te maken?” at <http://home.planet.nl/~choncoop/> (accessed 20 Jan 2015): the painting shows Saldanha Bay on the morning of 21 Jul 1781; in the middle front is the British flagship *Romney* with Johnstone at the rail; on the *Middelburg* the fire had reached her powder room and we see her explosion; to the right of the *Middelburg* lies the *Hoogkarspel*; to the left of the *Romney* is the *Dankbaarheid*; close behind the *Middelburg* is a DEIC ship on the beach and further on in the Bay, to the right behind the rocks, the masts are visible of other merchantmen: one of these two therefore is the *Honkoop* and the other the *Paarl*. On the Dutch ships (except the *Middelburg*) Union Jacks are already fluttering above the Dutch tricolour; the British ships fly the red ensign.

To their delight the British then also discovered the two packets or hookers, the *Snelheid* and the *Zon*, at the other end of the Bay<sup>87</sup> laden with some of the sails and cordage of the captured Indiamen.<sup>88</sup> The *Snelheid* had been abandoned by her captain,

87 The packets, called “hookers” by the Dutch, were, according to Beatson (n 13) at 327n, a type of coastal or fishing craft “peculiar to the Cape of Good Hope”. According to Theal (n 17) at 223, one of them, the *Zon*, of about 300 tons, was the vessel that had taken the first ever cargo of Cape produce (wheat, rye, barley, tallow and assorted wines, including some from Constantia) to Amsterdam in 1772. Such consignments continued annually until the outbreak of the Anglo-Dutch War.

88 Some of the sails that had initially been stored on them, had been retrieved to enable the Indiamen to move to better anchorages, and had not been returned but were still on board the captured ships.

Roeloff Pietersz, and his crew and had not been destroyed as instructed despite there having been ample opportunity to do so.<sup>89</sup> The British captors were therefore able, a few days later, to sail the four captured and refloated Dutch Indiamen out of Saldanha Bay, leaving the two empty hookers behind.<sup>90</sup>

The crews of the Dutch ships, who had either been landed or had waded ashore from their abandoned ships, pursued by British salvos, fled in panic, fearful of being taken prisoner of war by the landing troops. They reached Cape Town overland a few days later, shedding personal earthly possessions as they went.<sup>91</sup> British prisoners of war on board the Dutch ships were either released or had jumped overboard and were picked up by the British boats, or accompanied their captors.<sup>92</sup>

- 89 Sleigh (n 66) at 464-465 and 513-514 recounts that at first sight of the British, and without any attempt at defence or giving orders, Pietersz simply climbed into the hooker's boat with her crew and joined the fleeing Dutch crews on land. The postholder at the Saldanha Bay outpost, Jacobus Stofberg (he held the post from 1780 to 1807), who had been instructed to ensure that on the arrival of an enemy fleet, cattle and food were moved away from the post – he also had to send news of arrival by horse to the Cape – burnt down the posthouse (although never instructed to do so) and drove away the cattle there before the British sailors that had been landed could reach it. Stofberg came across Pietersz on the nearby Geelbeksfontein, the farm of – or leased by – Johannes Heufke. They set the farm buildings and corn in a warehouse alight and when Heufke later complained to the government and sought damages, he was simply turned away and never received any compensation for his loss: see *idem* at 443, 458-459, 465. On the Heufkes (or Höffkes or Heuffken), see, also, CG de Villiers, revised and rewritten by C Pama *Genealogies of Old South African Families* vol 1 (Cape Town & Amsterdam, 1966) at 312, and on Stofberg, see *idem* vol 3 at 935. See, also, EC Godée Molsbergen *Reizen in Zuid-Afrika in de Hollandse tijd. Tweede Deel: Tochten naar het Noorden 1686-1806* ('s-Gravenhage, 1916) at 278, where there is a description of plates depicting maps, including one of Saldanha Bay at the end of the eighteenth century, and where there is mention of “J Heufke, Geelbeksfontijn”.
- 90 The British version was that they had been left behind as being too old and decayed to be of any use to them. According to Beatson (n 13) at 327, Johnstone, “being determined to shew no marks of barbarity towards a settlement in which the wants of the British had so often been relieved, would not permit them to be destroyed”. The Dutch version was that the hookers were irreparably damaged by the enemy and had to be dismantled, the equipment on board being sold or, like their crews, otherwise employed by the Company and the salvaged wood later being used to build a new outpost: see *Kaapse archiefstukken* (n 34) 1782 *Deel 1* at 105-107 (Council of Policy Resolution, 19 Mar 1792); *idem* 1782 *Deel 1* at 342 (Dagregister, 26 Jun 1782); *idem* 1783 *Deel 1* at 130-131 (Council of Policy Resolution, 29 Apr 1783); *idem* 1783 *Deel 1* at 309 (Dagregister, 30 Jun 1783); Sleigh (n 66) at 465, 513-514.
- 91 See De Smidt (1969 *Africana Notes and News* (n 55)) at 332-336 for a description of their overland journey; the captains went on horseback and arrived there on 24 Jul, the fleeing (or, in official terms, “saved”) Dutch crews arrived on 26 Jul, having received food *en route* from other outposts.
- 92 In a letter from A de Smidt, the grandson of the original Abraham, to archivist Leibbrandt, dated 20 Jul 1886, concerning the probable fate of British prisoners of war allegedly secreted on board the *Middelburg*, he observed that British statements that the Dutch had either forgotten or intentionally left their chained prisoners behind on the burning ships, were without proof. The letter is in the Unisa Archives, WAGE4757.



The loss at the Cape in 1781<sup>93</sup> of six Indiamen (the *Held Woltemade*, *Hoogkarspel*, *Honkoop*, *Dankbaarheid*, *Paarl*, and *Middelburg*) with their valuable cargoes, five of them being captured as prize by Johnstone's squadron after what was a sea "battle" only by some stretch of the imagination, was a great financial loss to the already financially strained DEIC, and hastened its eventual bankruptcy in 1796.

After the events at Saldanha Bay, and although both remained reluctant – the realistic Medows probably more so than Johnstone – to land troops and engage either or both the French naval or military forces at the Cape, the debate between Johnstone and Medows continued as to which ships had to be sent on to India and which were to return to England. Ultimately a part of the squadron proceeded to India, arriving there only in February 1782. It consisted of five warships, including the *Monmouth* under Captain James Alms Senior and with General Medows and his staff now on board, the *Hero* and the *Isis*, and the frigate *Active* which was sent ahead, as well as all the troopships, storeships and the Indiamen in the convoy. The remainder of the fleet, including Johnstone on the *Romney*, departed for England via St Helena on 6 August,<sup>94</sup> after the *Romney*, *Jupiter* and the cutter *Lark* had fruitlessly and, fearing an attack from Suffren's squadron, unenthusiastically cruised Cape waters for ten days in the hope of obtaining some further advantage from the expedition by capturing French vessels as prizes.<sup>95</sup>

## 2 6 A diversion: Some interesting personalities at Saldanha Bay

There were several interesting personages involved in and present at the incident in Saldanha Bay.

- 93 In Jan 1782, the Indiaman *Groenendaal*, built in 1770 for the Amsterdam Chamber and sailing under Capt Christoffel Beem, was captured in the Bay of Trincomalee on the return-leg her fourth India voyage with a valuable cargo on board. Beem's objections to undertaking the return voyage on the basis that he had a very valuable cargo on board and that his ship was not in fit state for defence and would become an easy prey to any enemy, had been overruled by the local governor. Beem himself was taken prisoner by the British and later exchanged for Capt Edward Harvey of the *Betsy* (see n 45 above), which had earlier been taken capture by the Dutch at the Cape. See, further, Leibbrandt (n 34) at 143 (Memorial 20 of 1784); *Kaapse archiefstukken* (n 34) 1782 *Deel 1* at 345 (Dagregister, 15 Jul 1782); *idem* 1783 *Deel 1* at 158-159 (Council of Policy Resolution, 17 Jun 1783, approving the prisoner exchange, subject to ratification by the Lords Seventeen and the English East India Company).
- 94 *En route*, Johnstone interrupted his voyage at his old station at Lisbon where he married the daughter of the vice-consul on 31 Jan 1782 (in Florida, he had fathered four illegitimate children with a woman with whom he was then in a long-term relationship).
- 95 Harlow (n 11) at 117-120 points out that Johnstone was shrewd enough to realise that if he returned empty-handed from the otherwise failed Cape expedition, his career would be ruined. He therefore sought to gain whatever other, personal and financial, advantage from it that he could. Hence the attempts at capturing further prizes (he also later accompanied a few vessels in the squadron to cruise off the River Plate in South America, likewise without any success) and the attempt at colonisation of the Island of Trinidad (see nn 99 and 154 below) to provide a substitute for the Cape of Good Hope that he had failed to secure.

In command of HMS *Jupiter*, one of the warships in Johnstone's squadron, was Captain, later Admiral, Sir Thomas Pasley, whose private sea journals provide an intimate, insider's account of the commodore's Cape expedition. After the Cape mission, Pasley served in HMS *Bellerophon* in 1790, and again in 1793, lost a leg in the battle of the Glorious First of June 1794, and was present at the second battle of Saldanha Bay on 17 August 1796.<sup>96</sup>

One of the 350 men aboard HMS *Jupiter* on the Cape expedition and present in Saldanha Bay on 21 July, was Micheal Hogan, then an ordinary seaman but later a resident merchant at the Cape during the First British Occupation and infamous for his nefarious dealings in slaves and collusion with corrupt British officials.<sup>97</sup> Also serving in HMS *Jupiter* was a nephew of Pasley, the future Admiral Sir Pulteney Malcolm.<sup>98</sup>

The commander of another of Johnstone's vessels at Saldanha Bay, the sloop HMS *Lark*, was the colourful Lieutenant, later Vice-Admiral, Philip D'Auvergne, subsequently a – an unsuccessful – claimant to the Duchy of Bouillon.<sup>99</sup>

- 96 Pasley (1734-1808) had been with Johnstone on the Lisbon station when the expedition to the Cape was put together. He had been to the Cape earlier, in Feb 1780, when he was sent there to protect two home-ward bound East India Company ships. At the Cape, Pasley found the *Resolution* and *Discovery* (see n 18 above) returning home from Capt Cook's voyage and escorted them (and duplicates of Cook's journals and drafts) home, arriving in Aug 1780. His private sea journals, 1778-1782, were published in 1931: see n 17 above. See, further, PK Crimmin "Pasley, Sir Thomas" in *ODNB* (online ed 2004, accessed 8 Jan 2015). In his report on the battle at Porto Praya, in (1781) 2 *The New Annual Register or General Repository of History, Politics, and Literature ... sv* "Principal Occurrences" at 78, Johnstone acknowledged his indebtedness to "the indefatigable attention of Captain Paisley, whose zeal on this, and every other occasion, I wish may be presented to his majesty".
- 97 See, further, Michael H Styles *Captain Hogan: Seaman, Merchant, Diplomat on Six Continents* (Fairfax Station, VA, 2003) at 4-7, 9-14.
- 98 See, further, JK Laughton, rev Roger Morriss *sv* "Malcolm, Sir Pulteney" in *ODNB* (online ed Jan 2008, accessed 8 Jan 2015).
- 99 D'Auvergne (at first merely Dauvergne) (1754-1816), a Channel islander (Jersey), was later a claimant to the Duchy of Bouillon through having allegedly been adopted by Charles Godefroy de la Tour D'Auvergne, the duke of Bouillon, who was proclaimed the (last) duke only in Dec 1814, after the abdication of Napoleon. Rival claimants soon appeared, disputing D'Auvergne's claim of inheritance which he lost when the duchy was awarded to the Netherlands by the Congress of Vienna the next year. D'Auvergne was a doctor of laws (1785) and a British spy-master who had contact with the royalist French resistance. He was further interested in and worked on the improvement of navigational instruments (he wrote a book on sea compasses in 1789) and was an accomplished mathematician and naval calculator, as appears from the map he drew when captain of HMS *Lark* at the battle of Saldanha Bay (see at nn 83-84 above). He was one of Johnstone's favourite captains on his Cape expedition: Rutherford "Part II" (n 13) at 303 and 307. In his dispatch of 21 Aug 1781 to London, Johnstone referred to D'Auvergne as "a very promising young officer" (see (1781) 50 *The London Magazine or Gentleman's Monthly Intelligencer* at 503 and (1781) 2 *The New Annual Register or General Repository of History, Politics, and Literature ... sv* "Principal Occurrences" at 89). In an apparent promotion, D'Auvergne was later removed from the *Lark* to the cutter *Rattlesnake* which was, with two warships under Johnstone, detached from the squadron on its return at St Helena and sent to survey and possibly settle the fertile island of Trinidad, 800 miles east of Rio off the Brazilian coast as an alternative refreshment

On board the Dutch ships were no less interesting figures.

The French traveller and botanist, François le Vaillant, was a passenger on board the *Middelburg*. He had travelled to the Cape on the *Held Woltemade*, but then accepted an invitation from Captain Van Gennepe to join the *Middelburg* when she was sent to Saldanha Bay. He was therefore not on board the *Held Woltemade* when she was captured and so escaped being taken prisoner of war. Van Gennepe's invitation was also fortuitous in another sense in that a stay in the desolate Bay allowed for an exploration of the local fauna and flora.<sup>100</sup> Le Vaillant was ashore on a hunting expedition at the time of the battle, but lost his papers and what he subsequently referred to as "a considerable and precious collection of birds, shells, insects, madrepores [corals], etc" in her destruction. "It was agony", he later wrote, "to see my collections, and my fortune, and my projects, and all my hopes gone into mid-air and there dissolve in smoke".<sup>101</sup>

Also on board one of the captured Dutch ships, probably or supposedly for their own safety, were the princes of the islands of Tidore and Ternate<sup>102</sup> with their respective

station on the sailing routes to both the East Indies and the Pacific. Johnstone, aware of the failure of his Cape mission, thought the establishment of a settlement on the uninhabited island might compensate to some extent, even if it was never part of the original scheme. The aborted attempt at colonisation gained Johnstone little credit: see Harlow (n 11) at 117-120; Pasley (n 17) at 301. D'Auvergne's ship, having been left there by the warships, was lost in a storm off the island and he and his party of settlers were marooned for almost two months and only fortuitously rescued by a passing naval ship with a convoy of Indiamen in Dec 1782. A subsequent court martial led to his acquittal. See, further, James Falkner *sv* "D'Auvergne" in *ODNB* (online ed Jan 2008, accessed 24 Feb 2015); Henry Kirke *From the Gun Room to the Throne, Being the Life of Vice-Admiral HSH Philip D'Auvergne, Duke of Bouillon* (London, 1904).

100 Le Vaillant (1753-1824) is famous for his paintings and identification of birds: the streaky-backed Lavaillant's cisticola (*cisticola tinniens*), redwinged francolin (*francolinus levaillantii*) and crested barbet (*trachyphonus vaillantii*) are named after him. Le Vaillant was financially and logistically backed by the wealthy Amsterdam merchant, co-collector, and treasurer of the DEIC, Jacob Temminck, after whom Temminck's courser (*cursorius temminckii*) was named: see, also, LC Rookmaaker *The Zoological Exploration of Southern Africa 1650-1790* (1989, Rotterdam) at 250-251 for the species Le Vaillant identified on this (the first of three) collecting expedition. He eventually left the Cape only in Jul 1784. Le Vaillant is now known for his travelogues on Southern Africa and his ornithological works: see, further, François le Vaillant *Travels into the Interior of Africa via the Cape of Good Hope* 2 vols (Eng tr by Ian Glenn with the assistance of Catherine Lauga du Plessis and Ian Farlam, Cape Town, 2007 [Second Series No 38 Van Riebeeck Society]) at 23-40 for his sojourn at Saldanha Bay; M Bokhorst *sv* "Le Vaillant, Francois" in *DSAB* vol 2 (Cape Town, 1972) at 396-399; Jane Meiring *The Truth in Masquerade. The Adventures of François le Vaillant* (Cape Town, 1973) at 5-13. Le Vaillant is today in some quarters considered a self-promoting exaggerator with a lively imagination whose ornithological work is largely unreliable. In his first ornithological work, *Histoire naturelle des oiseaux d'Afrique* (1796), he described some 134 Southern African bird species, another fifty recognisable species that he claimed occurred there but in fact do not, ten species that do not occur anywhere at all, and a further 110 species that are unrecognisable: see Penny Olsen "The independent ornithologist" (Mar 2009) 1(1) *The National Library Magazine* 18-20 at 19.

101 See his *Travels* (n 100) at 29.

102 Two adjacent islands in the north of the Maluku Islands (Moluccas), in eastern Indonesia. Both were sultanates, major producers of cloves, and under the influence of but not directly controlled by the DEIC, even though it did have forts and settlements on both and a governor on Ternate.

families. The Batavian government had banished them and had them imprisoned and confined on Robben Island for political offences after they had resisted DEIC endeavours on the islands. Robben Island had long been used as a prison not only for local criminals, but also for those exiled from other DEIC settlements.<sup>103</sup> The prisoners had recently been moved from the Island to Saldanha Bay with the fleet.<sup>104</sup> During the action there, they managed to escape and seek refuge with the British,<sup>105</sup> a matter that caused some concern in Batavia and necessitated an explanation from the Cape authorities.<sup>106</sup>

While contemporary sources do not identify the prisoners with more precision, it may be speculated that one of them may well have been the well-known Cape religious leader Tuan Guru.<sup>107</sup>

- 103 See, further, Kerry Ward *Networks of Empire. Forced Migration in the Dutch East India Company [Studies in Comparative World History]* (Cambridge, 2009) at 51, 56, 71, 179, 191-192, 236, 245, 258, 285 for details of the main circuit of DEIC penal transportation and political exile (“forced migration”) along the shipping routes from Batavia to, *inter alia*, the Cape. The Cape was an important exile site not only for convicted criminals (“bandieten”) but also for high-ranking political and religious leaders (“bannelingen”) from the Indonesian archipelago.
- 104 On receipt of news of the outbreak of the War, the Council ordered all “bannelingen” on Robben Island to be sent to Cape Town: see *Kaapse archiefstukken* (n 34) 1781 at 42-43 (Council of Policy Resolution, 2 Apr 1781). From *idem* 1781 at 233, 235-236 (Dagregister, 4, 11 & 12 Apr 1781) it appears that the hooker *Snelheid* had departed to Robben Island to fetch “de aldaar leggende Besettelingen en Bandieten”. See, also, (1781) 50 *The London Magazine or Gentleman’s Monthly Intelligencer* at 503 and (1781) 2 *The New Annual Register or General Repository of History, Politics, and Literature ... sv* “Principal Occurrences” at 90.
- 105 According to Beatson (n 13) at 326-327, during the battle a boat was observed rowing from the shore to the *Romney*, filled with “people in the eastern garb” who “made the most humiliating signs of supplication”; they were East Indian rulers who had been deposed by the Dutch “according to the harsh and cruel maxims which have ever disgraced their Government in the East”.
- 106 See *Kaapse archiefstukken* (n 34) 1783 *Deel 1* at 351 (Incoming Letters, letter from the governor general and Council in Batavia, dated 14 Sep 1782, received at the Cape 23 Feb 1783, referring to the escape to the British of “een Tidors en een Ternaats prins” as “een Zaak van vry nedeelige gevolge Soude konnen zyn in den presenten tyd”, requesting further information from governor Plettenberg as to their identities, and recommending that exiles (“der bannelingen van staat”) be properly guarded); *idem* 1783 *Deel 1* at 421 (Incoming Letters, letter from the same, dated 19 Aug 1783, received at the Cape 29 Oct 1783, requesting clarification about the “balier adbul Radeff” who had reportedly fallen into British hands at Saldanha Bay and was taken by them to Madras, and was still listed in Jan 1783 by the Cape government as being a prisoner, but no longer included in a list compiled in Mar 1783); *idem* 1783 *Deel 1* at 543 (Outgoing Letters, letter by the Cape governor to the governor general and Council in Batavia, dated 8 Sep 1783, expressing dismay at the Batavian Council’s dissatisfaction with local government’s handling of those confined on Robben Island and explaining that the receipt of news of the outbreak of war had necessitated the relaxation of the conditions of their captivity “om een aantal van meer dan 100 zo Europeesche als Indiaansse Ballingen elders te kunnen bewaren”).
- 107 Imam Adbullah ibn Qadi Abd al-Salam (1712-1807) was a prince from the island of Tidore who was exiled to the Cape as a political or “state” prisoner in Apr 1780 for conspiring with the English against the Dutch in the East Indies. He wrote a 600-page manuscript in 1781 on Islamic jurisprudence (*Ma’rifah al-Islam wa al-Iman*, or *The Manifestation of Islam and Faith*) in Arabic and Malayu and also made copies of the *Qur’an* from memory while imprisoned on Robben Island. After his release from the island in 1793, he remained at the Cape and eventually became

## 2.7 Some consequences of the events in Saldanha Bay and the fate of the Dutch prizes

Before coming to the legal consequences of the battle of Saldanha Bay, some of the other, non-legal consequences may be mentioned briefly.

News of the sighting of an enemy fleet in Saldanha Bay, sent from the outpost there, reached Cape Town on 22 July. Fearing an attack by the British forces, the Cape came on high alert and rumours abounded.<sup>108</sup> Then came the terrible news of the fate of the Dutch Indiamen<sup>109</sup> and that the enemy had left with their prizes. The captains of the merchantmen in Hout Bay were alerted and ordered to Table Bay,<sup>110</sup> the batteries were manned, and the local military forces readied. However, Suffren and his squadron stayed put.

Tension remained high, but a week later the authorities assumed that in view of their reported departure from Saldanha Bay and given the favourable prevailing wind, the British squadron had already left the Cape for the East.<sup>111</sup>

The Dutch captains also reported to the Cape authorities, stressing the role of the element of surprise, the numerical superiority of the enemy, and the urgency of

the first imam of the first mosque established there, in Dorp Street. Earlier he had also established the first organised religious school (“madrassah”) at the Cape where he taught the *Qur’an* to slaves and free (manumitted) black children (hence his nickname Tuan Guru, Mr Teacher), where the literary teaching of Arabic-Afrikaans first emerged, and where several later prominent Cape imams were first taught. He is buried in the Tana Baru kramat (a Muslim tomb or shrine) in the Bo-Kaap. See, further, Yusuf da Costa & Achmat Davids *Pages from Cape Muslim History* (Pietermaritzburg, 1994) at 47-56; Frank R Bradlow & Margaret Cairns *The Early Cape Muslims. A Study of Their Mosques, Genealogy and Origins* (Cape Town, 1978) at 9-10, 14, 19, 21-23, 66-67, 106; “Kramats” at <http://bokaap.co.za/kramats> (accessed 10 Mar 2015) and at <http://www.sahistory.org.za/archive/1700-1799> (accessed 10 Mar 2015); “History of Muslims in South Africa” at <http://www.bosmontmasjid.co.za> (accessed 10 Mar 2015). Ward (n 103) at 231 has it that Tuan Guru was a prisoner on the Island during the 1780s and before his release in 1792; Sleigh (n 66) at 386-387, again, holds that various princes had been banished to the Cape from the 1760s and that one of them, Prince Achmet of Ternate and his three sons were, after their lamentable request, transferred from the Island to Cape Town in 1786, where they afterwards tried to promote the Muslim faith amongst slaves.

108 See *Kaapse archiefstukken* (n 34) 1781 at 108 (Council of Policy Resolution, 23 Jul 1781); *idem* 1781 at 258-259 (Dagregister, 22 and 23 Jul 1781).

109 *Idem* 1781 at 109-110 (Council of Policy Resolution, 26 Jul 1781); *idem* 1781 at 261 (Dagregister, 26 Jul 1781, referring to the “smertelijk berigt” of the “fataal geval” from Saldanha Bay).

110 But could for various reasons, including insufficient manning, not do so. Only the frigate *Jagtrust* (see n 47 above) came around to “deeze Caabse Rheede”.

111 *Idem* 1781 at 110-111 (Council of Policy Resolution, 3 Aug 1781); *idem* 1781 at 264-265 (Dagregister, 3 Aug 1781).

112 *Idem* 1781 at 111-113 (Council of Policy Resolution, 3 Aug 1781).

getting their crews ashore safely as the main factors contributing to the loss of the Indiamen.<sup>112</sup>

The Company's reaction to the disaster, both in Batavia and in the Netherlands, was not unexpected and in any event not ameliorated by the Cape's inexplicably delayed and incomplete reporting of events.<sup>113</sup> After all, it soon appeared, the Saldanha Bay losses were enormous – “zeekerlijk een der grootste en gevoeligste Slagen welke de comp'e gedurende dezen Oorlog getroffen hebben”<sup>114</sup> – and came at a time when the DEIC was already in increasingly dire financial straits. The losses sustained in Saldanha Bay were emblematic of the direct losses it suffered during the Fourth Anglo-Dutch War<sup>115</sup> and from which it never recovered.

At first there was some incredulity back home. The Lords Seventeen, in a letter to the Cape, refused to believe the rumours that had reached them via England and had been reported locally, the more so as these had it that the Indiamen had been captured without putting up any defence.<sup>116</sup> They also wrote to Batavia requesting further information of the events in Saldanha Bay as they expected that the Cape authorities had sent a report to the East.<sup>117</sup>

Once it had transpired what had happened, the Cape authorities were requested to explain, or were criticised for taking, certain decisions: why they had decided to allow the *Held Woltemade* to depart,<sup>118</sup> why only the cargo in the cabins and

113 See Leibbrandt (n 34) at 793-794 (Council letter, dated 14 Jun 1786 at 675).

114 So thought the Council in Canton about the capture of the China ships in Saldanha Bay, in a letter sent to the Cape: see *Kaapse archiefstukken* (n 34) 1783 *Deel 1* at 368-369 (Incoming Letters, letter from the Council at Canton, dated 2 Jan 1783, received at the Cape 21 Apr 1783).

115 Estimated at some 40 million guilders (see Jur van Goor “Continuity and change in the Dutch position in Asia between 1750 and 1850” in Moore & Van Nierop (n 10) 185-200 at 193), mostly from the loss of ships to the British (*idem* at 194).

116 See *Kaapse archiefstukken* (n 34) 1782 *Deel 2* at 174-175 (Incoming Secret Letters, letter from the Lords Seventeen, dated 2 Nov 1781, received at the Cape 6 May 1782, which was sent “[i]n dat vertrouwen dat kunnen wij geen geloof slaan, aan de tyding, welke in Engeland verspreijd is”, but which appeared to be true: “alles breeder blykende bij de hier neevens gevoegde Leydsche Courant van den 22 Octob laasleeden”. However, this story contained “zoo veele onwaarschynelikheden ... dat wij ons naauelyks van de echtheid van het zelve kunnen overtuygd houden” and that the Lords could not imagine (“kunnen ... van de geval geen denkbeeld vormen”) what had happened to make the rumours true. See, also, Leibbrandt (n 34) at 793-794 (Council letter, dated 14 Jun 1786 at 675).

117 See *Kaapse archiefstukken* (n 34) 1782 *Deel 1* at 418-419 (Incoming Letters, letter from the Lords Seventeen to the Council in Batavia, dated 8 Dec 1781, referring to the events “van al t welk wy niet twyfelen of de caabsche ministers zullen alle de omstandigheden welke daar by hebben plaats gehad zo omstrent het geval van voorn'e Retourscheepen als van het schip *de Held woltemade*, indien de daar van ingekome tyding conform de waarheid is aan UE hebben bedeed, voor zo verre dezelve, tot huner kennisse zyn gekomen”).

118 See *idem* 1783 *Deel 1* at 391 (Incoming Letters, letter from the Lords Seventeen, dated 7 Dec 1782, received at the Cape 8 Aug 1783, referring to the decision as “te beklagelijker” as it probably lead to the discovery of the return ships in Saldanha Bay).

on the in-between decks had been discharged rather than all the (most valuable) cargo so that the Indiamen could be sent to Saldanha Bay with ballast,<sup>119</sup> why the initial instructions on the defence of the Bay and where the Indiamen had to anchor had been given, and later altered, without apparently consulting experts;<sup>120</sup> why the hookers in which the sails and ropes had been stored, were not ordered to return to the Cape to prevent the enemy, after taking the merchantmen, from simply sailing them out of the Bay;<sup>121</sup> and why, with Suffren having arrived at the Cape with his squadron, the Indiamen were not ordered back from Saldanha Bay to False Bay where they would have been much safer.<sup>122</sup>

The conduct of the commanders, too, came in for severe criticism<sup>123</sup> and with allegations of a criminal failure in their duties, further action against them was in the offing.<sup>124</sup>

As for the Dutch seamen, the authorities in Batavia instructed their immediate repatriation on foreign ships bound for Batavia or the Netherlands so that they could be redeployed for the Company's benefit.<sup>125</sup> However, that did or could not happen in all cases and a considerable number of seamen remained stranded at the Cape<sup>126</sup> and

119 See *idem* 1783 *Deel 1* at 391-393 (Incoming Letters, letter from the Lords Seventeen, dated 7 Dec 1782, received at the Cape 8 Aug 1783, observing that from the manifests ("Carga") of the *Hoogkarspel* and the *Paarl* published in England it appeared, "tot ons leedweezen", that the captured vessels still contained a considerable amount of goods).

120 *Ibid*, expressing "onse verwondering" that the orders were given "sonder alvorens van de mogelijkheid van derselver executie door deskundigen te weesen geïnformeerd".

121 *Ibid*.

122 *Idem* 1783 *Deel 1* at 368-369 (Incoming Letters, letter from the Council at Canton, dated 2 Jan 1783, received at the Cape 21 Apr 1783, concerning the capture of the China ships, the loss of which was considered "te beklaglijker om dat het zelve is gebeurt na dat uw Gouvernement reeds was voorzien van een toereijkende Land en Zeemagt ter afweering van het Gevaar waar mede de Colonie en aldaar zijnde Schepen bedriegt weird", and expressing surprise that for ships detained at the Cape there was "geen betere Schijl Plaats ... als een weerlooze Baaij").

123 See Sleigh (n 66) at 465-466, who points out that the incident was but an example of the low morale and unreasonable fear of the British that plagued the DEIC at the time.

124 For the fate of the captains, see, further, at n 411 in Part 2 of this article.

125 See *Kaapse archiefstukken* (n 34) 1783 *Deel 1* at 354 (Incoming Letters, letter from the Council in Batavia, dated 18 Oct 1782, received at the Cape 23 Feb 1783, renewing an earlier order to send "het daar op bescheijden en door vlugt g'echapeerde volk soo spoedig mogelijk voor het grootste gedeelte herwaarts"). One possibility was to redeploy them on neutral ships the DEIC had chartered (see at n 138 below) to carry its goods from the Cape: *idem* 1783 *Deel 1* at 395 at 399 (Incoming Letters, letter from the Lords Seventeen, dated 7 Dec 1782, received at the Cape 8 Aug 1783, instructing that for the manning of those ships "het Volk zo van even gem Scheepen [ie, those detained and still at the Cape, presumably the *Amsterdam*, *Morgenster*, *Indiaan*, *Batavia*, which had been sent to Hout Bay] als van de in Saldanhabaaij genomen Vier Scheepen, en het aldaar Verbrande Schip *Middelburg* zal kunnen worden geëmployeerd"). The local authorities were not clear about these instructions and sought clarification: *idem* 1783 *Deel 1* at 542-543 (Outgoing Letters, letter to the Council in Batavia, dated 8 Sep 1783).

126 By Jun 1783 there was said still to be 200 men from the captured Saldanha Bay ships who were locally employed and "dienst doende als vooren": *idem* 1783 *Deel 1* at 310 (Dagregister 30 Jun 1783); but *cf idem* 1783 *Deel 1* at 516 (Outgoing Letters, letter to the Lords Seventeen, dated 22 Jul 1783, stating the number of Company servants at the Cape at the end of Jun 1783 to be 2 177

in Company employment and on its payroll for some time.<sup>127</sup> Clearly not all of them could be gainfully employed at the Cape;<sup>128</sup> some found employment on passing ships,<sup>129</sup> while others soon got into trouble.<sup>130</sup>

There is record of many requests directed by these sailors to the local authorities.

A few requested and were granted permission to stay at the Cape.<sup>131</sup> Many others requested and obtained permission to return to the Netherlands or Europe, with any

in total, including 339 men from the captured return ships who were “dienst doende als vooren”). There are more specific details of these numbers (ie, at the end of Jun 1783) in a subsequent letter to Batavia: *idem* 1783 *Deel 1* at 548-550 (Outgoing Letters, letter to the Council in Batavia, dated 8 Sep 1783). According to this return, there were a total of 1 946 employees at the Cape which included forty-six men – there is a precise breakdown of their ranks and occupations – from the *Middelburg*, thirty-five from the *Honkoop*, fifty-nine from the *Paarl*, thirty-two from the *Hoogkarspel* and thirty-six from the *Dankbaarheid* as well as eighteen from the *Zon* and five from the *Snelheid*, the two hookers.

- 127 They requested to receive their earned salaries (“haare bij d’E Comp’ie verdiende en te goed behoudene Maandgelden”) locally, and that the pay still to be earned would also be paid to them every month. The Council decided that the salary books (“Soldij-Boeken”) of the return ships would be closed off (“afgesloten”) on 21 Jul, the date on which they had to leave their ships, and that they would be taken on to the local government’s payroll as from that date, that the pay due to them would be paid at the end of August, and that they would receive future payments monthly rather than only every four months: see *idem* 1781 at 117 (Council of Policy Resolution, 20 Aug 1781).
- 128 A few were employed, even if not properly qualified for it, on various batteries and redoubts (“tot bediening van het geschut zijn geplaatst geworden”): *idem* 1783 *Deel 1* at 542-3 (Outgoing Letters, letter to the Council in Batavia, dated 8 Sep 1783).
- 129 See *idem* 1781 at 120 (Council of Policy Resolution, 27 Aug 1781) for a request by the captain of a Danish ship in False Bay for officers so that she could continue the voyage to Europe. The Council decided that as events in Saldanha Bay had resulted in sailors (“stuurlieden”) being without employment at the Cape, some of them could be assigned. Accordingly the chief mate (“Opperstuurman en Derdewaak”) of the *Paarl*, Hermanus Kikkert (see, also, n 166 below) from Burg on the Texel and Laurens Steenboom from Visby were dismissed from the Company’s service and allowed to transfer to the Danish ship.
- 130 In Nov 1783, the governor gave notice that a number of sailors who had been on board the return ships that were captured by the enemy or burnt in Saldanha Bay, “verscheijden baldadigheeden hadden gepleegd, die egter niet Sodanig waaren om deselve diesweegens Crimineel te doen actioneeren”. Some of these were demoted (“degraderen”) to ordinary seamen (“Mattroosen”) at a (lower) salary of f9 per month and the others (who were still at that level) were sent to Batavia: *idem* 1783 *Deel 1* at 231-232 (Council of Policy Resolution, 18 Nov 1783).
- 131 Eg, Hendrik Jacobus [Jan] Colijn, who had arrived as a sailor in the *Middelburg* from China, asked for burgher papers: Leibbrandt (n 34) at 269 (Memorial 67 of 1781, 11 Sep 1781); Johan Godlieb Mader, from Bareuth, who had served as chief surgeon (“opperchirurgijn”) on the *Middelburg* and had since remained at the Cape, was on the death of the chief surgeon in False Bay appointed in his place at a salary of f6 per month, subject to approval by the Lords Seventeen: *Kaapse archiefstukken* (n 34) 1782 *Deel 1* at 218 (Council of Policy Resolution, 16 Jul 1782); Claas Vreedenburg, from Oud-Loosdregt in Holland, former chief surgeon on the *Paarl*, arrived back at the Cape in 1782 and requested permission to settle and practise here as burgher-surgeon: Leibbrandt (n 34) at 1297 (Memorial 52 of 1782); and Johannes Boomgard [Bongard], from Dusseldorf and formerly junior mate on the *Paarl*, asked for burgher papers: *idem* at 137 (Memorial 86 of 1783).



available (foreign) ship or, sometimes, with the ship on which they specified they had obtained a passage.<sup>132</sup> Some were only able to leave in 1783.<sup>133</sup>

Many who found themselves stranded and unemployed at the Cape (also) requested the severance of their employment with the DEIC so that they could, either locally or elsewhere, obtain employment on foreign ships.<sup>134</sup>

Then there was the cargo on the Indiamen that had been off-loaded at the Cape before the vessels were sent to Saldanha Bay.

The DEIC made elaborate plans to charter and send ships under neutral flags to the Cape and Batavia in an attempt to continue its trade during the Anglo-Dutch War, plans which made provision for forwarding the goods stranded at the Cape. That

132 Eg, the supercargo on the *Middelburg*, Egbert van Karnebeek, was allowed to depart for Europe on a Danish ship so that he could inform the “heeren majores in ’t Patria” of what had transpired in Saldanha Bay: *Kaapse archiefstukken* (n 34) 1781 at 237 (Dagregister 20 Apr 1781). David Vis, who had left the Netherlands in 1779 as a gunner’s mate (“constabelsmaat”) on the *Middelburg* for China, and arrived back at the Cape on her return voyage, mentioned that he had been unable to obtain any passage home in any Company ship and, as he longed to serve his country in these anxious times, requested and was granted permission to leave on a Danish ship: Leibbrandt (n 34) at 1296-1297 (Memorial 38 of 1782, 18 Apr 1782); *Kaapse archiefstukken* (n 34) 1782 *Deel 1* at 148 (Council of Policy Resolution, 18 Apr 1782); *idem* 1782 *Deel 1* at 490-491 (Outgoing Letters, letter to the Middelburg Chamber concerning approval of Vis’s request). Permission was also granted, eg, to the former quartermaster (“equipagiemeester”) at Surat, Johannis Boelen, (apparently a passenger) on the *Honkoop*: *idem* 1782 *Deel 1* at 502 (Outgoing Letters, letter to the Lords Seventeen, dated 28 May 1782); and to Johannes Henricus Geevels [Gevels], chief mate of the *Hoogkarspel*: Leibbrandt (n 34) at 483 (Memorial 117 of 1782); *Kaapse archiefstukken* (n 34) 1782 *Deel 1* at 303-304 and 305 (Council of Policy Resolutions, 24 and 27 Dec 1782).

133 Eg, Lourens Smidt, of Amsterdam, mate (“onderstuurman”) on the *Honkoop* (*Kaapse archiefstukken* (n 34) 1782 *Deel 1* at 171 (Council of Policy Resolution, 14 May 1782); *idem* 1782 *Deel 1* at 502 (Outgoing Letters, letter to the Lords Seventeen, dated 28 May 1782), Leibbrandt (n 34) at 1118 (Memorial 53 of 1783); Cornelis van Vlaenderen, chief mate (“opperstuurman”) on the *Middelburg* with his young son, “den jong Matroos” Leendert van Vlaenderen (*idem* at 1298 (Memorial 28 of 1783)), *Kaapse archiefstukken* (n 34) 1783 *Deel 1* at 44-45 (Council of Policy Resolution, 18 Feb 1783); and Gerrit Esman, chief mate on the *Dankbaarheid* (Leibbrandt (n 34) at 430 (Memorial 45 of 1783)); *Kaapse archiefstukken* (n 34) 1783 *Deel 1* at 60 (Council of Policy Resolution, 25 Feb 1783). Hans Barentse, formerly third officer on the *Paarl*, who had been permitted to proceed to India in 1782, returned to the Cape and requested to be permitted, should his service no longer be required by the Company, to continue his journey to Europe (Leibbrandt (n 34) at 138 (Memorial 101 of 1783)).

134 See, eg, *Kaapse archiefstukken* (n 34) 1783 *Deel 1* at 44-45 (Council of Policy Resolution, 18 Feb 1783); *idem* 1783 *Deel 1* at 60 (Council of Policy Resolution, 25 Feb 1783); *idem* 1783 *Deel 1* at 85-86 (Council of Policy Resolution, 11 Mar 1783). Hans Barendse, “derdewaak” on the *Paarl*, was permitted to resign from Company service and to transfer to a Danish ship to travel to and from China, on condition though that when on return to the Cape his services were required by the Company, he would have to return to its service (*idem* 1782 *Deel 1* at 208 (Council of Policy Resolution, 18 Jun 1782)). The request of Anselmus Bernard, chief surgeon on the *Honkoop* to be released from Company service and to return to Europe, was granted on condition that he be dismissed “met afgeschreeven gagie uijt den dienst der E Compagnie” (ie, that he would not earn any salary on that voyage): *idem* 1783 *Deel 1* at 77 (Council of Policy Resolution, 6 Mar 1783).

included not only the cargoes on board the Indiamen still stuck there – those that had been sheltered in Hout Bay – but also the goods discharged from the ships later captured or destroyed in Saldanha Bay.<sup>135</sup>

In the meantime, the Cape authorities sent some smaller chests and parcels from the captured Indiamen (“eenig kleine Cassen en Pacquetten met papieren”) as well as from the other returning ship detained locally with a Danish ship to Copenhagen.<sup>136</sup>

They also managed to ship the Company’s own home-bound cargo that had been discharged (“de ... hier ontloste Thee en verdere Cinaase goederen”) to Europe in another way. The opportunity to do so arose when the – neutral – Portuguese ship, *Senhor de Bonfim e Sancta Maria*, under command of Captain Philippo Nery da Silva, arrived at the Cape in April 1782, *en route* for India.<sup>137</sup> When the French bought her whole cargo to be conveyed to Mauritius by Suffren’s squadron, she was free and available for hire and was chartered for the Company’s account.<sup>138</sup> She departed for Europe in early June 1782, “voor Reecq onser Comp’ie beladen naar Lissabon geretourneerd”<sup>139</sup> with the relevant goods.<sup>140</sup> Although she was destined for Lisbon, the cargo would either be discharged there or carried onwards to the Netherlands, depending on conditions and the state of the War.<sup>141</sup> The Cape authorities instructed the former quartermaster (“equipagiemeester”) at Surat, Johannes Boelen, who was a passenger on board the *Honkoop*, to return to Europe with the Portuguese ship and to ensure the proper delivery of the goods shipped on her; he had to report on the ship’s arrival at Lisbon “bij den Heer Consul Gildemeester”, to deliver despatches to him, and to obtain further instructions concerning the goods.<sup>142</sup>

135 *Idem* 1783 *Deel 1* at 395, 399 (Incoming Letters, letter from the Lords Seventeen, dated 7 Dec 1782, received at the Cape 8 Aug 1783).

136 *Idem* 1782 *Deel 1* at 152 (Council of Policy Resolution, 23 Apr 1782).

137 *Idem* 1782 *Deel 1* at 325 (Dagregister, 11 Apr 1782).

138 *Idem* 1782 *Deel 1* at 137 (Council of Policy Resolution, 16 Apr 1782, instructing fiscal Boers and cellarmaster JJ le Seur to negotiate with the Portuguese). *Idem* 1782 *Deel 1* at 141-147 (Council of Policy Resolution, 18 Apr 1782) and *idem* 1782 *Deel 1* at 327 (Dagregister, 16 and 18 Apr 1782), indicating that the papers of the Portuguese ship, provided by her supercargo Caetano Januario de Souza, were examined and found in order and that the Council of Policy unanimously resolved to the lease of the ship, even if the hire of Rds45 000 seemed high, as the goods lay “renteloos” at the Cape and the tea was deteriorating and depreciating.

139 *Idem* 1782 *Deel 1* at 338 (Dagregister, 6 Jun 1782).

140 *Idem* 1782 *Deel 1* at 484 (Outgoing Letters, letter to the Lords Seventeen dated 18 Apr 1782, from which it appears that the cargo was valued at “f9-10’00’000” and consisted of “fijne Thee Zyde Stoffen en ruuwe Zijde”).

141 *Ibid.* Supercargo De Souza requested the Cape authorities “een briefje aan zijnen Vader op een secure Wijse met onse brief [to the Lords Seventeen] te mogen overzenden rakende de Assurantie van het Schip”, which was acceded to.

142 As appears from *idem* 1782 *Deel 1* at 501-503 (Outgoing Letters, letter to the Lords Seventeen, dated 28 May 1782); this letter also contained, for the information of the Lords Seventeen, the relevant authenticated copies of the ship’s papers, the lease, and the “cognoscement factura der Chinase goederen” shipped on her.

At a later stage, after some deliberation in the Political Council,<sup>143</sup> further goods, both from the captured vessels and from the other, smaller Indiamen detained at the Cape, were sent to Europe with other chartered, neutral vessels as the opportunity arose.<sup>144</sup>

Perishable cargo or cargo in broken chests that could not be forwarded, were sold locally by public auction.<sup>145</sup>

Some of those seamen who had private-trade goods,<sup>146</sup> mainly tea in chests (“afgepakte thee”), that had been off-loaded and left behind in Cape Town, requested its release and permission to sell it by auction locally.<sup>147</sup> When granted, a common

143 See *idem* 1783 *Deel 1* at 91-92 (Council of Policy Resolution, 21 Mar 1783, concerning cargo “alhier in Retour hebbende moeten werden belaaide en ten dien eijnde in deselve afgescheept zijnde geworden zo veel van de goederen die aan handen waaren en gehoort hebben tot de Ladingen der door den vijand uijt Saldanhabaaij vervoerde Chinaase Retour scheepen, mitsgaders dewelke uijt de Bataviase en Ceylonsse Retourbodems zijn gelost geworden”).

144 See *idem* 1783 *Deel 1* at 469 (Outgoing Letters, letter to the Council in Batavia, dated 2 Apr 1783, listing among the goods sent with the chartered French ship *l'Angelique Benech*, “80 Cassen Thee in zoort” from the *Hoogkarspel* and 3 000 cases of tea from the *Honkoop*, and with the Prussian ship *Kroonprins van Pruijssen*, 273 cases from the *Hoogkarspel* and 927 cases from the *Honkoop*). See, also, *idem* 1783 *Deel 1* at 559 (Outgoing Letters, letter to the Lords Seventeen, dated 21 Oct 1783, listing among the goods loaded on the “Zeeuws particulier schip” the *Factor*, which was about to sail, items from the cargo of the *Middelburg* (“35 cassen Rhabarbar, 10 cassen porcelain, 579 cassen thee Souchon, 133 cassen thee Pecco, 88 cassen thee Heijisan, 270 cassen thee Heijisan Schin, 9 cassen thee Joosjes”), the *Hoogkarspel*, and the *Paarl*).

145 *Idem* 1783 *Deel 1* at 519 (Outgoing Letters, letter to the Lords Seventeen, dated 22 Jul 1783) and *idem* 1783 *Deel 1* at 533 (Outgoing Letters, letter to the Council in Batavia, dated 30 Jul 1783, referring to different sorts of tea from the cargo of the China return ships “dewelke door het ontramponneerd raken der Cassen niet weederom gevoeglijk hebben kunnen werden afgescheept” and to “bedurvene” coffee beans and damaged “Lijwaaat Pakken”).

146 After failing to prevent the corruption connected to and the threat to its monopoly trade presented by private trade conducted by its employees, including officers and crew on its ships, the DEIC from the mid-eighteenth century onwards sought to regulate rather than prohibit the so-called private trade (“vrije vaart”). It recognised but controlled (through various, constantly changing decrees promulgated from 1743 onwards) the right of employees to trade for their own, private account inside the structures of, and, eg, with ships belonging to, the Company. Officers of DEIC ships and local governors or directors obtained the right to ship a particular number of chests to and from Batavia, filled with their own goods. The underlying idea with this change in policy was that the income lost to the Company by allowing such trade in particular goods and on particular trade routes (at first, intra-Asian, later the Asia-Europe trade) could be recouped by the imposition of taxes. These private traders were even from 1745 supported by a financial institution called the “Bank van lening” (known, from 1751, as the “Bataviasche bank-courant”). This freedom of trade was subject to a general condition, viz, that it had to be to the advantage of the DEIC (“tot voordele van de Compagnie”) and therefore not in products close to the Company’s monopoly but only in goods the Company was not or no longer interested in trading with, and only on Company ships so that it could in that way exercise control over the trade. See, further, Chris Nierstrasz “Reguleren of corrumperen? De VOC en hervorming nein de privé-handel (1743-1799)” (2006) 25 *Tijdschrift voor zeegecheidenis* 165-176.

147 Such requests were also made by some sailors who had powers of attorney (“het afschrift eener procuratie”) on behalf of their companions who were no longer at the Cape: see, eg, *Kaapse archiefstukken* (n 34) 1783 *Deel 1* at 159-161 (Council of Policy Resolution, 17 Jun 1783).

condition was that the Company had to receive the duties due on the goods.<sup>148</sup> Requests were also made to take such cargo back to Europe.<sup>149</sup> Such requests were granted on condition that the consignment had to be delivered on arrival to the relevant chamber in the Netherlands, presumably so that the duty could be levied on it there.<sup>150</sup> Requests were also made for the release of personal goods, referred to as being contained in “voets Casjes”.

As far as the prizes were concerned that the British had taken during the battle of Saldanha Bay,<sup>151</sup> Johnstone had them fitted out and placed prize crews on board the *Honkoop*, the *Dankbaarheid*, the *Paarl* and the *Hoogkarspel* and on 25 July sent them ahead to St Helena in the company of a few frigates and under the command of Captain James Alms Junior<sup>152</sup> in the fireship *Infernal*.<sup>153</sup> Johnstone himself arrived at St Helena on 17 August and found the four prizes and also the *Held Woltemade* there. From there they were sent home on 2 November under escort of Johnstone’s former flagship, the *Romney*.<sup>154</sup>

- 148 See, eg, *idem* 1783 *Deel 1* at 12-13 (Council of Policy Resolution, 21 Jan 1783, involving requests for the release (“afgeeven”) of cargo in permitted chests (“gepermitteerde kisten”) that had been discharged and remained at the Cape (“hier ontscheepte en verbleevne”) and for their sale by public auction, which were approved, on condition that from the proceeds of their sale “het geene d’E Comp’ie daarvan toekomt door d’Eijgenars alhier in cassa zal moeten werden betaald”). The duty was 1,5 per cent: see, eg, *idem* 1782 *Deel 1* at 165 (Council of Policy Resolution, 7 May 1792).
- 149 Eg, the two permitted chests of the chief mate of the *Hoogkarspel*, Johannes Henricus Geevels, who had obtained permission to return to Europe, were released to him on condition that he did not sell the contents locally: see *idem* 1782 *Deel 1* at 303-304 (Council of Policy Resolution, 24 Dec 1782). One such request came from the Amsterdam Chamber on behalf of a trading house (Brinkman and Determeyer Wesling) and sailors on the *Honkoop*, either for the chests, discharged but left behind at the Cape, to be repatriated directly with one of the Company’s ships, or with another ship on the payment of freight: see *idem* 1783 *Deel 1* at 383 (Incoming Letters, letter from the Amsterdam Chamber, dated 6 Mar 1783, received at the Cape 18 Jun 1783).
- 150 Eg, the request by Gerrit Esman, chief mate of the *Dankbaarheid* for permission to return to Europe and for the release of his two permitted chests to be taken with him, was granted on condition that he provided proper security to the satisfaction of the Cape authorities that the chests would be delivered to the India House of the Rotterdam Chamber in whose employ he was: see *idem* 1783 *Deel 1* at 60 (Council of Policy Resolution, 25 Feb 1783).
- 151 The Cape authorities would later send the passes (“de Turkse Passen met de daar toe behoorende Bijlaagen”) of the *Hoogkarspel* and the *Paarl* to the Netherlands, as well as sworn copies of those of the *Middelburg*, the *Honkoop* and the *Dankbaarheid* that had been “door de op die kielen geCommandeert hebben Schippers in zee zyn geworpen”: see *idem* 1782 *Deel 2* at 309 (Outgoing Secret Letters, letter to the Lords Seventeen, dated 28 Apr 1782).
- 152 Alms snr was in charge of the convoy of vessels sent on to India: see at n 94 above.
- 153 She was formerly under the command of Henry d’Esterre Darby, who was captured at Porto Praya (see n 29 above); for his court martial, see n 177 below. Burman & Levin (n 73) at 64 are wrong to state that the prizes were sent to St Helena unescorted.
- 154 Johnstone himself did not accompany them, but returned home via Trinidad and Lisbon (see, again, nn 95 and 99 above), arriving only at the end of Feb 1782. A warship, HMS *Hannibal*, had been sent out from Britain to St Helena to escort home-bound merchantmen if Johnstone did not turn up. He promptly sent her on 29 Sep to cruise off the Cape, during which voyage she managed to capture two French prizes (the *Severe* and the *Neckar*) that were brought back to St Helena: see, further, Rutherford “Part II” (n 13) at 306; Beatson (n 13) at 328-329.

*En route*, the convoy ran into a gale at the mouth of the Channel in January 1782 and two of them, the *Honkoop* and the *Dankbaarheid* were lost as a result.<sup>155</sup> The rest straggled home to Portsmouth separately, the damaged *Hoogkarspel* and the *Paarl* fortuitously escaping pursuit and capture by French warships and privateers in the Channel. Fortunately the two lost prizes were insured at Lloyd's so the captors still benefitted from the insurance payout. Although the premiums were high,<sup>156</sup> prizes taken by either naval ships or privateers were regularly insured for their voyages to the nearest prize court if the value of the prize justified it and if such insurance had been or could be arranged in time.<sup>157</sup>

- 155 According to Pasley (n 17) at 175 n 1, the *Dankbaarheid* went down before she got home but the prize crew on board escaped and reached Lisbon safely, while the *Honkoop* was supposed to have foundered. Beatson (n 13) at 329 refers to the account given by the prize crew of the *Dankbaarheid* of her loss and observing that as the *Honkoop* was never heard of, she was supposed to have sunk.
- 156 As appears from the decisions referred to in n 157 below; see, also, David J Starkey *British Privateering Enterprise in the Eighteenth Century* [Exeter Maritime Studies] (Exeter, 1990) at 64 and 233, mentioning that in 1778 the premium on a sum insured of £57 000 on a valuable French prize was £1 194.
- 157 The captor (eg, the officers and crew of a capturing naval vessel or the captain and crew of a privateer) did not acquire ownership – and therefore had no perfect or absolute right – in the prize until the capture had been adjudicated as lawful and the prize property condemned to it by a prize court, at which time the captor acquired a retrospective right of ownership in it or, usually, in the proceeds derived from its judicial sale. If the capture was declared unlawful, the property was restored to the owner with compensation. However, after the capture and prior to such adjudication, the captor's imperfect and inchoate right gave rise to a defeasible and contingent interest (which automatically ceased when the property was placed in the custody of a prize court) that was insurable. See, eg, *Le Cras v Hughes* (1782) 3 Dougl 81, 99 ER 549, holding that the officers and crew of a capturing squadron had an insurable interest in a captured ship and her cargo (which they had insured for £500 at a premium of 20 per cent) prior to her condemnation and could recover from the underwriter on her loss on the insured voyage. Lord Mansfield held (at 85, 551) that the policy was not a gaming policy; the claimants had an interest based on the Prize Act and “the possession and ... the expectation [of a future benefit, founded on the contingency of a condemnation as lawful prize] warranted by almost universal practice” were sufficient to amount to an insurable interest. See, also, eg, *Curling & Others v Long & Others* (1797) 1 Bos & Pul 634, 126 ER 1104 obiter at 639, 1107: “the mere hope or expectation of interest is sufficient to entitle the insured in a policy of insurance to recover against the underwriters”.

Accordingly, it was held in *Boehm & Others v Bell* (1799) 8 TR 154, 101 ER 1318 that where a prize was insured but its capture was afterwards declared unlawful and the prize restored to the owners, the captors who had insured it, as they were entitled to do given that they doubtlessly had an insurable interest, were not entitled to a return of their premium. (In this case the prize was the Dutch Indiaman *Westcapelle*, captured off the Cape of Good Hope in Jan 1797; the captors had insured her at a rate of 20 or 8 per cent, depending on whether she sailed to England without or with a convoy; and her capture was declared unlawful by the Admiralty Court in London as there was at the time not, yet, a Vice-Admiralty Court at the Cape.) Given their interest, the underwriters who had insured it, had run a risk (of the prize not arriving and being lost on the insured voyage home, and not of her capture being declared lawful) and had, therefore, earned the premium. Cf, also, *Routh v Thompson* (1809) 11 East 428, 103 ER 1069 holding that in the absence of any interest, because the capture had been made before the outbreak of war, the premiums were returnable.

Prizes were usually insured in his own name by the captors' prize agent who himself had an insurable interest in his profits, though they were likewise contingent (see *Craufurd & Others v*

The *Held Woltemade*, too, arrived in Portsmouth on 3 February 1782, presumably with her valuable cargo of bullion.<sup>158</sup>

On 4 September 1782, the Dutch prizes, referred to in contemporary publications as the Saldanha Bay prizes, were decreed by the High Court of Admiralty in London sitting as a Prize Court – that is, exercising its prize jurisdiction – to be lawful prizes and were accordingly condemned. However, Sir James Marriot then specifically reserved the question as to who were the captors and as such entitled to share in the prize money derived from the sale of the vessels and their cargoes. Although the suit had been brought in June of that year by the Navy, claiming the sole interest in the prizes, there was an argument that the Army too may be entitled to a share. The decision of the High Court of Admiralty in May 1785, that it was a case of joint capture entitling the Army to share, saw the commencement of prolonged litigation on the sharing of the prize money to which I will return in due course.

The reason for the fierce legal battles that ensued must be seen against the background of the value of the prizes. Soon after the initial decision of the High Court of Admiralty, the prize agents who had been appointed to oversee the Navy's interests, caused the ships and their cargoes to be sold and started paying out the sums derived from the proceeds of those sales, as well as the insurance money received for the lost prizes, to the various naval officers and seamen involved.<sup>159</sup>

*Hunter* (1798) 8 TR 13, 101 ER 1239 at 23, 1245: “an agent for prizes, though he has not the possession, has such an interest in the ships coming home that he may insure”; and stating at 24, 1245 that the insurance of a prize “would be good, as a matter of public notoriety”). However, even if commonly made, such insurances were not (yet) considered a necessity so that the premiums could be included in the captor's expenses that the owner had to pay in cases where the captured property was ordered to be restored: see *Catherine and Anna* (1801) 4 C Rob 39, 165 ER 528, so holding on the basis that the captor's insurance was incurred voluntarily and for his own benefit and was not chargeable to the owner.

158 How she got there is not immediately clear. Having been captured before the others, her arrival at St Helena may have been unconnected. Sleigh (n 66) at 464 has it that she was first taken to Madras; according to Rutherford “Part II” (n 13) at 303, she and another transport became separated from the squadron in a storm and only turned up at St Helena later. She appears to have departed from St Helena in convoy with the others, but may again have become separated at some stage and arrived separately. However, she was certainly considered to be part of the prizes captured at Saldanha Bay: see (1781) 50 *The London Magazine or Gentleman's Monthly Intelligencer* at 503, where she is referred to as “prize”, although she is not mentioned at 504, where the list of prizes is given; see, also, the advertisement in (22-26 Feb 1785) no 12624 *London Gazette*, referred to in n 159 below, and Johnstone's report of the action at the Cape in (1781) 2 *The New Annual Register or General Repository of History, Politics, and Literature ... sv* “Principal Occurrences” at 89).

159 See, eg, (6-9 Nov 1784) no 12593 *London Gazette* (notice to those officers and crew actually on board HMS *Active* at the capture of the Dutch Indiamen *Dankbaarheid* and *Honkoop* in Saldanha Bay by the squadron under Johnstone of how and when their respective shares of proceeds of the insurance made on the two ships would be made); (22-26 Feb 1785) no 12624 *London Gazette* at 104-105 (notice to the company of HMS *Rattlesnake* and HMS *Lark* who were actually on board at the capture of the Dutch East Indiaman *Held Woltemade* of the payment of the remainder of their respective shares of that prize); (7-11 Jun 1785) no 12654 *London Gazette* (notice to officers and crews of a list of named warships and armed transports who were actually on board them at the capture of the *Paarl* and the *Hoogkarspel* of the payment of their respective shares of the

Large sums were involved. All the prizes were insured for a sum of £1 700 000<sup>160</sup> and the prize money for the *Hoogkarspel* and the *Paarl* alone amounted to at least £68 000.<sup>161</sup>

One final and unexpected but culturally invaluable consequence of the battle of Saldanha Bay and the condemnation of three of the Dutch Indiaman captured there was the fact that a large collection of official, commercial and private correspondence on board them at the time survived. Also still extant are some papers taken off the other two prizes before their loss. This confiscated correspondence, known as “intercepted sailing letters”, together with the ships’ papers (inventories of their crews, equipment and provisions, maps, receipts) and other official instructions and documentation, were delivered over to the High Court of Admiralty together with the other prize goods. And they came to be kept, together with similar items from other captures in the Fourth and earlier Anglo-Dutch wars, first in the Court’s archives and later in the British National Archives.<sup>162</sup>

Altogether there are some 38 000 letters alone from the second half of the seventeenth to the early nineteenth century, some 15 000 of them private correspondence. Both correspondence originating in the Netherlands (in the case of the outgoing *Held Woltemade*) and in the East (in the case of the homecoming *Hoogkarspel* and *Paarl*) are contained in the prize letters taken at the Cape. When this collection of letters, many of them still unopened, were “rediscovered” by a Dutch researcher in 1980, interest was rekindled and their historical and linguistic value was immediately appreciated. They have since been catalogued, digitalised, studied and have, as part of the Letters as Loot Project (“Brievenalsbuitproject”), resulted in a number of websites<sup>163</sup>

prize money); (18-21 Jun 1785) no 12657 *London Gazette* at 303 (notice to the officers and crew of HMS *Monmouth* who were actually on board at the capture of the *Paarl* and the *Hoogkarspel* of payment of their respective shares of the prize money, an earlier obstacle to such payment that prevented her being listed with the other vessels in the earlier advertisement, having been removed).

160 Rutherford “Part II” (n 13) at 304, referring to Schomberg (n 31) vol 2 at 160.

161 See (7-11 Jun 1785) no 12654 *London Gazette*; cf, also, *Sutton v Earl of Scarborough* (1803) 9 Ves Jun 71, 32 ER 528 at 72, 528 (see, further, par 3 2 9 in Part 2 of this article) where it was likewise stated that the proceeds of the two ships captured in Saldanha Bay and condemned in London were £68 000 (and that a captain’s share was £1 416 213s 4d). This may well have been only the amount initially paid to and distributed by the Navy’s prize agent: see n 350 in Part 2 of this article as to the redistribution of the prize proceeds.

162 In the HCA 30 series (High Court of Admiralty and Supreme Court of Judicature: Admiralty Miscellanea, including registers) in the British National Archives (“NA”) are to be found ship’s and DEIC papers and commercial and private letters taken from the Saldanha Bay prizes, more specifically in HCA 30/719/1; HCA 30/722; HCA 30/723; HCA 30/724; HCA 30/735; HCA 30/336; HCA 30/745; HCA 30/747/1; HCA 30/747/2; and HCA 30/750. See, also, HCA 65/28 (papers of the ship *Hoogkarspel*, 1780).

163 The gateway site to the project is at <http://www.brievenalsbuit.nl/zeebrieven> (accessed 21 Jan 2015) where there are clickable references to other relevant sites, including <http://www.hum.leidenuniv.nl/onderzoek/brieven-als-buit> (an online searchable database of transcribed letters); <http://gahetna.nl/collectie/index/nt00424/>; and <http://www.gekaaptebrieven.nl/tekst/> (all accessed 21 Jan 2015).

and a flood of publications,<sup>164</sup> including some as part of an ongoing sociolinguistic and lexicographic project.<sup>165</sup>

There are some fascinating letters and much further information on the ships and those on board them.<sup>166</sup> The letters, and the private correspondence in particular, provide a fascinating glimpse of personal relations between and the living conditions of Dutch serving in the East Indies and their families at home at the end of the eighteenth century. They also constitute valuable evidence of the state of the Dutch language as used at the time by ordinary, often uneducated, lower and middle class people, including women. There are not only letters still *en route*, that is, carried on board as post,<sup>167</sup> but also a few letters written by or addressed to the inhabitants of Cape Town, letters sent and received earlier and still in possession of members of the crews at the time of the capture, as well as, poignantly, an undated and uncompleted letter by Captain Gerrit Harmeier to his mother, brother and family.<sup>168</sup>

Some of them pose mysteries yet to be solved<sup>169</sup> and provide the opportunity for further historical investigation.<sup>170</sup>

- 164 Including a collation and publication of some of the letters in a series entitled *Sailing Letters Journaal* (2008- ): see, further, at <http://www.nationaalarchief.nl/internationaal/preject-sailing-letters/> (accessed 21 Jan 2015). One of these publications is Erik van der Doe, Perry Moree & Dirk J Tang (eds) “Buitgemaakt en teruggevonden: Nederlandse brieven en scheepspapieren in een Engels archief” (2013) 5 *Sailing Letters Journaal*.
- 165 See, eg, Marijke van der Wal, Gijsbert Rutten & Tanja Simons “Letters as loot. Confiscated letters filling major gaps in the history of Dutch” in Marina Dossena & Gabriella del Lungo Camiciotti (eds) *Letter Writing in Late Modern Europe* (Amsterdam, 2012); Gijsbert Rutten & Marijke van der Wal *Letters as Loot: A Sociolinguistic Approach to Seventeenth- and Eighteenth-Century Dutch* (Amsterdam, 2014).
- 166 See, eg, Perry Moree, Vibeke Roeper, Ingrid Dillo & Theo Timmer (eds) *Kikkertje lief. Brieven van Aagje Luijtsen, tussen 1776 en 1780 geschreven aan haar man Hermanus Kikkert, stuurman [op de Paarl] in dienst van de VOC* (Texel, 2003). On Kikkert, see, also, n 129 above.
- 167 As to which see Perry Moree “*Met vriend die God geleide*”. *Het Nederlands-Aziatisch postvervoer ten tijde van de Verenigde Oost-Indische Compagnie* (Zutphen, 1998).
- 168 See NA, HCA 30/735/24. There are also earlier letters by Harmeier to his father, dated Batavia 1 Dec 1780 and to his brother, dated Batavia Dec 1780 (see HCA 30/735/24), and an eight-page letter by Harmeier to his father from the Cape of Good Hope dated Feb 1781 (see HCA 30/735/31 or 33)). There are also several official letters, debit notes, and the like to and from Harmeier; and also three loose pages to him, dated 19, 22 and 23 May 1781, and signed “R Pietersz”, indicating that he had obtained ballast and tools from the hooker *Snelheid* (see HCA 30/735/32). There are also some further documents relating to Harmeier in HCA 30/747/1.
- 169 See, eg, Perry Moree “Het superbe legaat van Tante Pieper en andere mysteries: Een inventaris van twaalf bundels Sailing Letters uit de Vierde Engelse Oorlog” available at <http://prizepapersconsortium.huygens.knaw.nl/> at 47-65 (accessed 21 Jan 2015). The author provides an inventory and a brief discussion of the letters contained in one of the boxes in HCA 30 series, viz HCA 30/735, in bundles 22-33 (including letters from the three Dutch prizes captured at the Cape). He also speculates on mysteries such as how and why certain unexpected items – eg, a letter written in 1768, the resolution of an extraordinary ship’s council held in 1767/9 (?) on board the *Jonge Thomas* (see, again, n 62 above), and a scabrous verse – came to be present on one of the Dutch East Indiamen in Saldanha Bay in 1781.
- 170 For a fascinating piece of detective research based on one of the letters from the *Held Woltemade*, see the pieces entitled “De brief uit Surhuizum die nooit aankwam (1779)” (Oct 2013) and “De brief uit Surhuizum die nooit aankwam (1779), Deel 2” (Apr 2014), both available on the website “Stamboompagina Sake Wagenaar” at <http://www.sakewagenaar.nl> (and both accessed 8 Jan 2015).



### 3 Legal consequences

The legal consequences arising from Commodore Johnstone's expedition to the Cape and the action in Saldanha Bay may conveniently be considered under three topics: litigation in England on matters pertaining to naval law and, more specifically, intra-naval immunity; litigation there on matters pertaining to prize law and, more specifically, the question of joint captures; and finally litigation at the Cape and in Batavia involving the Dutch naval officers present in Saldanha Bay on that fateful day in July 1781.

#### 3 1 Naval Law

##### 3 1 1 Introduction

One legal consequence of Johnstone's expedition was the litigation concerning issues of naval discipline. The commodore was inexperienced in naval matters, leading to several tactical miscalculations on his "inglorious but lucrative expedition" to the Cape.<sup>171</sup>

Although no official action was ever taken against him, Johnstone was generally and widely<sup>172</sup> blamed for the failure of his expedition, one that was in any event rendered more difficult by imprecise orders, the involvement of a military element, and an overriding obsession with financial gain through the capturing of enemy prizes. "[P]rize and plunder seem to have been uppermost in his mind during and after the expedition to the Cape."<sup>173</sup>

He further did not always enjoy the best of relationships with all those serving under him and was certainly more than ready to place the blame on them when things did not go according to plan.

One example that occurred on the Cape expedition concerned the French capture of the fireship HMS *Infernal* under the command of Captain Henry d'Esterre Darby at Porto Praya.<sup>174</sup> She was captured because Darby had, on arrival, dropped anchor

171 Ralfe (n 14) at 372. Pasley (n 17) at 16 had written *en route* to the Cape that in the event of the French foiling the British there, "I should blush to shew my face in Manchester Buildings after so unsuccessful an Expedition"; at 120 he observed that Johnstone lacked the special qualities of firmness and initiative required by a commodore of a squadron detached for a distant service in days of slow communication.

172 Eg. James Madison (1751-1836), statesman, political theorist and fourth president of the US (1809-1817), wrote in a letter on Christmas Day 1781 to Edmund Pendleton (1721-1803), politician, lawyer and at the time president of the Virginia Supreme Court of Appeals, concerning a newspaper report of the success of Commodore Johnstone in taking five returning Dutch East Indiamen as prizes and destroying a sixth, that "[w]hatever may be thought of this stroke of fortune by him and his rapacious crew, the Ministry will hardly think it a compensation to the public for the danger to which the remains of their possessions in the East will be exposed by the failure of his expedition": *Letters and Other Writings of James Madison ... Vol I: 1769-1783* (Philadelphia, 1867) at 58.

173 Harlow (n 11) at 110.

174 See, again, n 29 above.

outside of the warships and not inshore as all the small vessels in the squadron had been ordered to do. Although she was shortly after her capture abandoned by the French and then rejoined Johnstone's squadron only slightly damaged, Darby was taken prisoner by the French and only managed to return to England much later.<sup>175</sup>

Johnstone then promptly had him court-martialled at Portsmouth.<sup>176</sup> The Court, though, found that it did not appear from Johnstone's evidence that he gave any orders directly to Darby, after the *Infernal* had anchored at Porto Praya, to shift his birth and move further in. Darby was accordingly honourably acquitted. He went on to serve with distinction under Nelson and to knighthood.<sup>177</sup>

Darby also subsequently gave evidence at another and, for present purposes, more prominent court martial instigated by Johnstone, that against Captain Sutton.

### 3 1 2 The Sutton court martial

Another incident at Porto Praya, involving Captain Evelyn Sutton<sup>178</sup> of HMS *Isis*, had more serious implications for and resulted in litigation involving Commodore Johnstone that occupied him right until the end of his life. The litigation lasted from 1783 until 1787, was a *cause célèbre* in naval and political circles,<sup>179</sup> and quickly

175 See, further, Rutherford "Part I" (n 13) at 206 n 2, 211 n 1, 297, 298; Beatson (n 13) at 321.

176 The proceedings are to be found in NA, PRO Ad 1/5319 (Court Martial Papers, 1 Jan 1781 to 30 Apr 1782). For Johnstone's version of what had transpired, see his report on the battle of Porto Praya in (1781) 2 *The New Annual Register or General Repository of History, Politics, and Literature ...* sv "Principal Occurrences" at 78.

177 Darby (1750-1823), an Irishman whose uncle George was a vice admiral, rose through the naval ranks slowly but steadily. He became a naval lieutenant in Nov 1776, a commander – of the *Infernal* – in Jan 1781, and was promoted to post captain in Jan 1783. In 1796 he was appointed to command HMS *Bellerophon* ("Billy Ruffian") and served under Lord Nelson at the Battle of the Nile in Aug 1798 where he was injured while forty-nine of his officers and crew were killed and 148 wounded. He was made rear admiral in 1804, vice admiral in 1810 and admiral in 1819 and, finally admiral of the Blue in the year of his death. See, further, "Sir Henry D'Esterre Darby" in <http://threedecks.org> (accessed 4 Mar 2015) and "Battle of the Nile" in <http://www.nelson-society.com> (accessed 5 Mar 2015); David Cordingly *Billy Ruffian. The Bellerophon and the Downfall of Napoleon. The Biography of a Ship of the Line, 1782-1836* (London, 2003) at 106 (observing that Darby, her fourth captain, spent several of his early naval years serving in frigates, and first came to prominence at the battle of Porto Praya). Thomas Joseph Pettigrew *Memoirs of the Life of Vice-Admiral Lord Viscount Nelson ...* 2 vols 2 ed (London, 1899) vol 1 at 204 n 1 observes that John Jervis, First Earl St Vincent (1735-1823), referred to Darby as "my old friend, ... who is a good humoured blundering Irishman".

178 Born in Screveton, near Bingham, Notts, Sutton was the illegitimate son of Lord Robert Manners-Sutton, son of the Third Duke of Rutland. He married his cousin Roosilia (1752-1829, the daughter of Thomas Thoroton), was made a captain in 1771, and ultimately became a rear admiral (superannuated) in 1794. He died in 1817.

179 It gave rise to a spate of publications, mainly of the pamphlet type, in defence of the one or the other of the litigants, or by way of dissemination to lawyers and naval men of further information on the litigation. Three examples should suffice: Anon *Letters which passed between Commodore Johnstone and Captain Sutton, in 1781, with respect to the bringing Captain Sutton to Trial* (London, 1784, reissued 1787); William Paultney *Considerations on the Question lately agitated*

became a textbook example of the different ways in which a judicial decision could be appealed and reviewed.<sup>180</sup>

It will be remembered that British reaction to and pursuit of the retreating French attackers was delayed by some hours as a result of which the French managed to escape further British attention and counter-attack.<sup>181</sup>

In Johnstone's view, most of the blame for the delay belonged squarely on the shoulders of Sutton. The latter had failed to respond quickly enough to bring his vessel out of the port and put her to sea when Johnstone had verbally ordered and by signals instructed the warships in the squadron to do so. And after eventually joining, Sutton had further failed to obey repeated signals to join the others in pursuit of the French. However, as Sutton had signalled in response and also later explained to Johnstone, the *Isis* had been seriously damaged in the French attack and that had prevented him from obeying with the required alacrity. He might also have pointed out that the commodore could as well have pursued the enemy without waiting for the *Isis* to get ready.<sup>182</sup>

So enraged was Johnstone at what he perceived to be Sutton's cowardice<sup>183</sup> or at least his insubordination without a proper excuse, and no doubt at having lost the opportunity of going after the withdrawing French and, possibly, capturing some valuable prizes, that he accused him of numerous offences. He then suspended and deprived him of command of the *Isis* and, on 22 April 1781, had him arrested and imprisoned on his own ship until he could be court-martialled. He appointed another of his officers, the Hon Thomas Lumley of the *Porto*, to take command of the *Isis*.

*in Westminster-Hall, whether the proceedings of Commanders .... acting within the Military Powers delegated to them, and in the course of discipline, are subject to the review of the Civil Courts of Law ...* (London, 1787); and Anon *The Speeches of the Judges of the Court of Exchequer, upon granting a New Trial in the Case of Captain Sutton, against Commodore Johnstone, on the 30th of June 1784; together with Baron Eyer's Speech, on the Motion to arrest the judgment ... The Report of the two Chief Justices, Lords Mansfield and Loughborough, to the Lord Chancellor, on an Appeal from the Judgment of the Court of Exchequer, in the Case of Sutton against Johnstone* (London, 1787).

180 See Anon *Considerations Concerning a Proposal for Dividing the Court of Session into Classes or Chambers ....* (London, 1807) at 107-110: after a discussion of the different methods in English law of reviewing a judicial verdict, namely by a new trial, an arrest of judgment, and a writ of error or appeal, the illustrating example provided was of the litigation involving Johnstone and Sutton.

181 See, again, at n 30 above.

182 See Ralfe (n 14) at 371.

183 Sutton had been under such suspicion before and was therefore an easy scapegoat: Rutherford "Part II" (n 13) at 299 n 1. In Dec 1780, in the Channel, the *Isis* under Capt Sutton encountered the Dutch warship *Rotterdam*. However, Sutton withdrew when they became engaged on the pretense of his being some sixty men short of a full compliment and of the rawness of the rest of his crew. An enquiry was ordered into Sutton's conduct, but he was absolved of any misconduct or want of courage. Finding the report not in all respects satisfactory, Sutton was brought before a court martial, and as his conduct did appear in some degree reprehensible, he was reprimanded. See Schomberg (n 31) vol 2 at 37-38.

Rather than calling together a court martial without further delay, as Sutton kept demanding and as he may have been entitled<sup>184</sup> and able<sup>185</sup> to do, Johnstone kept Sutton under arrest on the *Isis*, throughout the subsequent voyage to the Cape and during the battle of Saldanha Bay. Although Johnstone himself returned home, Sutton then accompanied his old ship to India as a prisoner when she was detached shortly after the battle and sent there with other warships in the squadron. In India, too, Sutton was not brought to a court martial. That happened only when he returned to England in December 1783.<sup>186</sup>

The court martial of Captain Evelyn Sutton took place on board HMS *Princess Royal*, in Portsmouth Harbour, on 1 December 1783, on charges exhibited against him by Commodore George Johnstone.<sup>187</sup>

On 11 December 1783, the Court Martial acquitted Sutton on the charge of delaying or discouraging the public service on which he was ordered on 16 April 1781. As to the particular order of Johnstone which he was also charged with disobeying, the sentence proceeded to say that from the circumstances proved and the condition the *Isis* was in, the Court merely found that not immediately cutting or slipping the cable of the *Isis* “was justifiable” and that afterwards Sutton had done “his utmost to gain his station in the line of battle”. However, it “honourably acquitted him of the whole of the charge”.<sup>188</sup>

Thus failed, for a second time, an attempt by Johnstone to discipline one of his officers for the disastrous outcome of the battle of Porto Praya. Certainly, what the Navy thought of his conduct there “was clearly shown at the courts martial of

184 But see William Hickman *A Treatise on the Law and Practice of Naval Courts-Martial* (London, 1851) at 10, pointing out that specific authority from the Admiralty was required for a court martial in foreign parts or at sea, which Johnstone, not being under Admiralty authority, did not have on his mission.

185 There being sufficient a number of warships in the squadron whose captains could have constituted a proper court martial.

186 As the alleged offence did not take place within the limits of Sir Hugh Edward’s command in the Indian Ocean, he would therefore not take cognizance of it (the lack of evidence and the absence of witnesses in India no doubt also contributed to this decision), but sent Sutton back to England (see Ralfe (n 14) at 372n), seemingly only after Sutton had appealed to the Admiralty (see Hickman (n 184) at 11-12). Sutton’s letter to the Admiralty of 28 Apr 1781 is in NA, PRO Ad 1/2485.

187 The proceedings are in NA, PRO Ad 1/5323 (Court Martial Papers, 1 Jan 1783 to 31 Mar 1784). See also: *Minutes of the Proceedings at a Court-Martial ... for the Trial of Captain Evelyn Sutton ... upon a charge exhibited against him by Captain George Johnstone ...* (London, 1789); *The Defence of Captain Sutton, as pronounced to ... the Court-Martial, that tried him upon a complaint exhibited against him by Captain George Johnstone and the Court’s Sentence thereon* (London, 1785).

188 The specific wording – and the implication that Sutton did disobey orders, but was justified by the circumstances and, accordingly, that he was acquitted not on the ground of not having disobeyed, but on the ground of his justification – caused some discussion in the litigation that followed (see n 205 below). However, that is not germane for present purposes. On the importance of the wording of a court-martial sentence acquitting an officer, see, further, John Delafons *Treatise on Naval Courts Martial* (London, 1805) at 280-281.

Captain Darby of the *Infernal* and of Captain Sutton when at last he returned to England”.<sup>189</sup>

Not surprisingly, as the affair was already prominently in the public eye, Sutton felt himself aggrieved and sought redress. Not only did he suffer hardship during the unnecessarily long period it took to bring him to trial,<sup>190</sup> but, he felt, the damage that this did to his reputation was not properly restored by the ultimate verdict while he also lost out on sharing in the prizes captured at Saldanha Bay.<sup>191</sup>

Sutton therefore brought a civil suit against his former commander, Johnstone. The result was a remarkable series of decisions on what may be referred to as the vexed question of intra-military immunity. The fact that these decisions, and those that came after them, were, by and large, different interpretations of the (ever changing) public-policy principles underlying the issue, may explain why, even today, the matter cannot be regarded as having been finally settled.<sup>192</sup>

### 3 1 3 Sutton's claim against Johnstone in the King's Bench

At common law, no action for damages lay in a civilian court against an officer in his personal capacity for bringing a subordinate to court martial, nor for arresting or suspending him in anticipation. Such acts were clearly within the limits of the superior's authority to maintain discipline. The same applied, in principle, to all other civil wrongs committed by one officer or seaman in the exercise of his naval duties against another fellow officer or seaman. If the power or duty was

189 Rutherford “Part II” (n 13) at 308.

190 Delafons (n 188) at 203-204, referring to the “discretionary power of ascertaining the proper time to assemble courts martial” being “lodged in the breast of the commander-in-chief ... [and] not to be unnecessarily prolonged”, considers the Sutton case an instance “of an extraordinary portion of time elapsing between the initial suspension and the eventual trial”, and observes that Sutton was only absolved from blame “after laying under suspension and public opprobrium for the space of two years and two hundred and thirty-four days!”. Johnstone's delay, and not his arrest of or the unfounded charges he brought against Sutton, appears to have been the main aggravating circumstance in Sutton's injury: see, eg, Harris Prendergast *The Law relating to Officers of the Navy Part I* (London, 1852) at 381-382 who points out that the issue “came repeatedly before the Courts of Westminster and gave rise to very elaborate considerations of the whole question concerning the due exercise of a commander's authority”.

191 See, eg, Delafons (n 188) at 281 for the important point that although a court martial can restore credit and reputation to an absolved officer, it has no power to award pecuniary damages for injuries which may have been sustained in consequence of his suspension. See also, eg, *Warden v Bailey* (1811) 4 Taunt 67, 128 ER 253 (CP) at 78, 257: “A court-martial cannot give damages for injurious conduct, as a jury can.”

192 See, generally, for further background to and an elucidation of the principles involved, WS Holdsworth “The case of *Sutton v Johnstone*” (1903) 19 *Law Quarterly Review* 222-229; Donald Zillman “Intramilitary tort law: Incidence to service meets constitutional tort” (1982) 60 *North Carolina LR* 489-541; and Christopher G Froelich “Closing the equitable loophole: Assessing the Supreme Court's next move regarding the availability of equitable relief for military plaintiffs” (2005) 35 *Seton Hall LR* 699-737. See, also, Ernest C Thomas *Leading Cases in Constitutional Law Briefly Stated* (London, 1876) at 67-68; Herbert Broom *Constitutional Law viewed in relation to Common Law, and Exemplified by Cases* (London, 1866) at 650-733.

exercised oppressively or improperly, the superior's conduct could, in appropriate circumstances, merely constitute a distinct offence cognizable by a court martial.<sup>193</sup>

In short, there was intra-naval<sup>194</sup> immunity – in civil courts – against tortious claims resulting in personal or financial loss.<sup>195</sup>

The underlying rationale, or at least some of its tenets, was founded in the recognition of the separateness of a naval community governed by its own exhaustive system of law, in the national importance of naval discipline, and in the perceived inappropriateness of allowing civilian courts to intervene in this arena. An analogous, but by no means identical, immunity was enjoyed by other officials of the Crown acting within the scope of their authority, as also by the Crown itself.

But what if the wrong was committed when the superior exceeded or abused his authority; if he exercised his authority maliciously and without reasonable or probable cause?<sup>196</sup>

A naval officer, it was clear, was certainly liable to damages by proceedings in the Admiralty Court for improperly capturing merchant ships and goods on an unfounded suspicion of their being lawful prize.<sup>197</sup> But was there such liability outside the realm of prize law? That was the dilemma faced by Captain Sutton in bringing a civil claim against Commodore Johnstone.

Sutton's claim for damages against Johnstone, instituted in the Court of King's Bench in January 1784,<sup>198</sup> was therefore not based merely on his arrest, or his suspension, or on his being brought before a court martial: Johnstone certainly had the authority and power to do so. Rather it was for Johnstone having maliciously and without probable cause charged him with offences of which he was not guilty, and

193 See, eg, Prendergast (n 190) at 380. But, of course, a court martial's jurisdiction is criminal and its sentences penal and it has no authority to award damages in favour of the subordinate, even if it did find the superior officer guilty: see, again, n 191 above.

194 Or intra-military: whatever is said about the Navy and naval discipline below, applies equally to the Army and military discipline generally. One has to bear in mind, as was pointed out in *Dawkins v Lord Paulet* (1869) LR 5 QB 94 at 117, that intra-military (as opposed to intra-naval) disputes were relatively rare as a standing army was unknown to the common law.

195 For a useful introduction to intra-military immunity from tort liability in the English common law, see Anon "On the liabilities of naval and military officers for private wrongs" (1848) 8 *LR & Quarterly J of British & Foreign Jurisprudence* 17-61; Zillman (n 192) at 491-493; Froelich (n 192) at 701-706.

196 To be distinguished from the issue of the actionability or otherwise in a civil court of intra-naval wrongs, are other matters that are not in dispute. They are that a court martial acting within its jurisdiction cannot be prohibited by a civil court of law, and that a conviction obtained before a court martial acting within its jurisdiction cannot be challenged before such a court. See, further, Holdsworth (n 192) at 223.

197 When a prize court adjudicated the capture unlawful and ordered restoration of the property to the owners, it could additionally also award damages against the captors. See at n 288 in Part 2 of this article. But there was no action against a naval officer in a civil court of law for merely seizing and detaining a vessel on suspicion of her being a hostile prize (*Le Caux v Eden* (1781) 2 Dougl 594, 99 ER 375), at least not if the suspicion was reasonable and the exercise of power not malicious.

198 The King's Bench proceedings and decisions are not reported, but are reflected in the published reports of subsequent proceedings in higher courts.

for aggravating that measure by having maliciously and without probable cause kept him under arrest until his trial and for longer than was necessary and as a result of which he suffered damage.<sup>199</sup>

Johnstone pleaded the general issue. His defence was that of immunity: no civil cause of action for redress could ever be established where claims involving court-martial proceedings were based on actions taken by superior officers in the course and enforcement of military discipline. In any event, even if there were no absolute but merely a qualified immunity, Johnstone argued he did have probable cause to suspend and court-martial Sutton, given the latter's admitted refusal to obey his orders.

On 19 June 1784, after a trial lasting twenty-three hours, the special jury found for Sutton and awarded him damages in the amount of £5 000.

Johnstone then applied for and obtained a new trial, alleging the jury had mistaken the case in that there existed no grounds for charging him with malice, but on 11 December 1784 the jury again returned a verdict for Sutton, now awarding him £6 000 in damages.

### 3 1 4 Johnstone's recourse to the Exchequer Court

Johnstone submitted to the last verdict and made no application for a third trial, but early in 1785 he applied for a reversal or "an arrest of judgment" before the Exchequer Court at the Guildhall in London.

After elaborate discussion, Eyre CB refused to arrest the judgment and dismissed Johnstone's application in *Johnstone v Sutton*,<sup>200</sup> thus confirming the earlier verdict in Sutton's favour.

Johnstone's first and for present purposes his main objection in arrest of the earlier judgment was that no action for malicious prosecution lay for a subordinate officer against his commanding superior officer for an act done in the course of discipline and under powers incident to his situation; in any event, the issue was not cognizable by a court of common law but only by a naval court.<sup>201</sup>

In response, Eyre CB observed that Johnstone could refer to no adjudged case or other authority in English law, save for analogous decisions that granted immunity to judges and jurors. He could merely refer to "general principles of public policy and convenience" in support of his objection. In fact, there were several decisions

199 Having been relieved of his command before the battle of Saldanha Bay, Sutton argued that he was deprived of several sums of money amounting to £20 000 which he would otherwise have gained from prizes and captures taken from the enemy by the *Isis* and the other ships in Johnstone's squadron. He also suffered severe hardship and was put to great expense in the sum of £5 000 in defending himself against Johnstone's charges; and he was further also injured in his good name and character in an amount of £30 000.

200 The Court's judgment is contained in *Sutton v Johnstone* (1786) 1 TR 493, 99 ER 1215 (Exch Ct) at 501-510, 1220-1225; some, older sources refer to TR (Term Reports) as Durn & East TR (Durnford & East's Term Reports).

201 See at 502, 1220-1221.

that went the other way, and that provided support for actions against military men in command by a subordinate officer or another person subject to their authority. These decisions undermined arguments based on public policy and inconvenience. Further,<sup>202</sup> the immunity of judges and jurors were distinguishable as the law presumed that they would do nothing maliciously. A naval commander, as superior officer, by contrast, “is in the condition of every other subject of this country, who, being put in authority, has responsibility annexed to his situation” and arguments to distinguish him along the lines of judges and jurors, the Court thought, “are dangerously loose and indefinite”.

Likewise, the Court rejected<sup>203</sup> the argument that the issue was not cognizable in a court of law as it concerned naval matters peculiarly within the specialisation of naval courts: “considerations of this nature cannot exclude the established jurisdiction of the country” and in fact “those jurisdictions must be presumed to be equal to their functions” and that courts of law will do their duty honestly and competently.

The Court accordingly dismissed Johnstone’s main objection “upon the mere abstract state of it” and unsupported as it was by any reported decisions.<sup>204</sup>

In short, the Court thought that there was no absolute immunity against civil actions for superior officers, nor any reason to extend such immunity to them by analogy to the immunity enjoyed by judges and jurors. Further, naval conduct could be examined or reviewed by a civil court and there was no reason to suppose naval discipline would suffer if superior officers were faced by the prospect of civil litigation.

The Court likewise rejected Johnstone’s other objections<sup>205</sup> and ruled against him by discharging the rule for arresting judgment.

202 See at 503-504, 1221.

203 See at 504, 1221.

204 See at 504-505, 1222.

205 His second objection was that Sutton’s action, being one founded on a want of probable cause for making the charge against him, had to fail because on the face of the record and Sutton’s own admission that he had disobeyed orders, there probably was cause to have charged him (see at 505, 1222). On this point the Court did express some hesitation, given the specific wording of the sentence of the court martial (see at 505-506, 1222, considering whether, if circumstances are such that an order given cannot be obeyed, not obeying can actually amount to disobedience for which there is justification, or whether there ought not to have been an acquittal on the ground of the charge of disobedience not having been made out at all; and see, again, n 188 above and Delafons (n 188) at 282 and 283-284). However, ultimately the Court thought that it was bound to accept that Sutton did disobey an order, but was justified in doing so and that there was therefore a reasonable suspicion in this case to have charged him for that disobedience (see at 506-507, 1222-1223). But, the justifiable cause, the Court thought, existed only as regards one of the charges against Sutton and not as regards the other one – he was found innocent of having delayed the public service – and the jury must be taken to have awarded him damages on that basis and in respect of that charge (see at 507-508, 1223).

Johnstone’s third objection (see at 508-509, 1224) was that the jury’s award of damages was improper as there had been no averment or allegation of Sutton’s title to any prize money or, given



### 3 1 5 Johnstone takes the matter to the Exchequer Chamber

In November 1785, Johnstone brought a writ of error in the Exchequer Chamber, the next superior court.<sup>206</sup>

The case was argued twice, on 2 and 4 February 1786, at Serjeant's Inn, before Lord Mansfield, Lord Chief Justice of the King's Bench, and Lord Loughborough, Lord Chief Justice of the Court of Common Pleas. In *Johnstone v Sutton*<sup>207</sup> their Lordships declared that the judgment of the Court of Exchequer ought to be reversed and each reported his reasons to the Lord High Chancellor.

Johnstone again argued that exposing superior officers to civil claims for the consequences of their conduct in enforcing naval discipline would undermine that very discipline. They should enjoy absolute immunity against such claims. Also, the specialised nature of naval matters made it impossible for a civilian court of law, judge or juror to assess a naval dispute and offences properly and those matters should therefore be determined by naval proceedings only. A court martial was the proper institution to punish a superior's excess towards a subordinate. He again also contended that, supposing an action did lie, he did have reasonable and probable cause to arrest, suspend and bring Sutton to trial and, alternatively, that Sutton had not established any loss for which damages could be awarded.<sup>208</sup>

that a suspended captain remaining on board was probably generally still entitled to prize-money for captures made during his suspension, that any was in fact lost. The Court, again, thought that although it was a matter outside its jurisdiction and only within that of a prize court (see, further, at n 292 in Part 2 of this article), a captain who had been suspended and removed from his rank when a prize is taken is not or no longer "the captain of such ship actually on board" within the meaning of the applicable proclamation (see, further, par 3 2 2 in Part 2 of this article). It held, but only for purposes of the matter before it, that by reason of his suspension and removal, Sutton did lose the prize money which he would have gained from prizes taken by the *Isis* and that damages had been awarded on a proper basis.

The Court likewise gave short shrift to Johnstone's final objection, namely that as by law no term had been fixed, short of three years, within which courts martial had to be held, he was under no obligation to have one called together for Sutton within three years, or as soon as reasonably and conveniently possible after the charge against him had been exhibited. The Court was of the view (see at 509-510, 1224) that the three-year period referred to was merely the limit of time beyond which no court martial could be held, and that the superior's duty to bring a subordinate to a court martial, as many other of his duties, had to be exercised within a reasonable time and thus possibly much sooner. The superior certainly did not have the power to hold a charged subordinate imprisoned for up to three years prior to having him court-martialled.

206 The Court of the Exchequer Chamber was the appeal court for common-law civil actions from the King's Bench, from (as in this case) the Court of the Exchequer (whose equity jurisdiction ceased in 1880) and (from 1830) from the Court of Common Pleas. It was constituted by judges belonging to those inferior courts. From it there was a further appeal to the House of Lords. The Chamber was superseded by the Court of Appeal in 1873.

207 (1786) 1 TR 510, 99 ER 1225 (Exch Ch).

208 The full list of errors upon which Johnstone relied are set out at 510-511, 1225 (see, also, the House of Lords judgment below n 225 at 92, 438). The arguments for Johnstone are to be found at 511-528, 1225-1235. His objections are summarised by their Lordships at 545, 1244.

Sutton was against such absolute immunity and relied on the general rule that if an individual suffers damage from the unlawful act of another, the law gives him a civil remedy, as well as on earlier decisions in which the recovery of civil damages was in fact allowed in naval or quasi-naval situations.<sup>209</sup>

Their Lordships found in Johnstone's favour.

Their main reasoning<sup>210</sup> was that he could not be held liable because his prosecution of Sutton by court martial had not been without probable cause. For liability to ensue, it was essential that the prosecution was carried on maliciously and without a probable cause, and that had to be substantially and expressly proved and could not be implied. Sutton's acquittal by the court martial alone was not sufficient to establish want of probable cause on the part of Johnstone.<sup>211</sup>

The question of probable cause, it was clear, is a mixed proposition of law and fact<sup>212</sup> and here there had not been any proof of a lack of probable cause.<sup>213</sup> Although Sutton's defence raised "a most complicated point", there appeared to their Lordships under all the circumstances to be no difficulty to support their opinion that, in law, Johnstone had had a probable cause to bring Sutton to trial by court martial.<sup>214</sup>

This particular part of the opinion assumed, of course, that intra-naval claims were not absolutely barred, irrespective of the presence or absence of probable cause,

209 These (unreported) decisions were *Swinton v Molloy* (1783, KB), where a false imprisonment action by a ship's purser against her captain was entertained, and *Wall v M'Namara* (1779) where there was a false imprisonment claim by a captain in the Africa Corps against the governor of Senegambia and where the direction by Lord Mansfield to the jury, who ultimately awarded damages, was in striking contrast to his opinion in *Sutton v Johnstone*: see Holdsworth (n 192) at 225 and also *Hannaford v Hunn* (1825) 2 Car & P 148, 172 ER 68 in note\* at 157-158, 72. Both decisions are referred to at 536-537, 1239. The arguments for Sutton are to be found at 528-544, 1235-1243.

210 The reasons for the opinions of Lords Mansfield and Loughborough are at 544-550, 1243-1246 and at 544, 1243 respectively.

211 The point was made at 545, 1243 that from a want of probable cause, malice may and most commonly is implied; the defendant's knowledge of the lack of probable cause may also be implied in such a case. However, even from the most express malice, a want of probable cause cannot be implied, for a man may prosecute another with a malicious motive also where there is a probable cause. And there is therefore no action if he prosecutes upon an apparent guilt, even if he acted maliciously.

212 See at 545, 1244: whether or not circumstances were true and actually existed that showed there was a cause, is a question of fact; but whether, if such existed, they amounted to a probable cause, is a question of law. See also, eg, *Panton v Williams* (1841) 2 QB 169, 114 ER 66 at 193, 75-76, where it was observed that the authorities referred to, and the judgment in *Sutton v Johnstone* itself, "prove incontestably that it is a question for the jury, whether the facts brought forward in evidence be true or not; but that what is reasonable or probable cause is [a] matter of law".

213 Sutton had disobeyed Johnstone's orders and then justified himself by physical impossibility to obey. That and "nothing less could be a justification", but whether it existed was a most complicated and subjective matter, depending on circumstances and the view taken of them: see at 545, 1244.

214 Their Lordships further chose at 547, 1245 to give no opinion on whether Sutton had established his loss as the right to prize money was still in litigation between him and others (ie, Capt Lumley) not party before them: see, further, par 3 2 8, n 359 in Part 2 of this article.

but that there was the possibility of an action. But, as their Lordships recognised,<sup>215</sup> “the great and important question now brought into judgment for the first time, is, whether such an action can lie?”. They noted<sup>216</sup> that frequently in the past men before a court martial have thought the charge without probable cause and have felt the injury of such act of malice; yet, “till this experiment”, it has never arisen that an action such as this can be brought; “consequently there is no usage, precedent, or authority, in support of it”; “[t]his case stands upon its own special ground”.

On this – perceived to be novel – issue of intra-naval immunity, though, their Lordships were less firm and ultimately stressed that they expressed no final opinion on it.

Lord Mansfield seems to have supported the notion of absolute immunity as naval discipline would be threatened if every acquittal before a court martial could give rise to a civil suit against the superior officer who had acted, often in difficult circumstances and on “delicate suspicions”, to enforce and maintain discipline by arresting and suspending subordinates and then later bringing them to trial.<sup>217</sup> “But what condition will a commander be in,” he asked, “if, upon the exercising of his authority, he is liable to be tried by a common law judicature?”, for “[i]f this action is admitted, every acquittal before a court-martial will produce one”.

He also pointed out<sup>218</sup> that a person unjustly accused is not without remedy but has “the properest remedy” as reparation is done to him by an acquittal, and the unjust accuser “is blasted forever, loses his reputation and may be dismissed from the service”.<sup>219</sup>

Further, Lord Mansfield reasoned that naval law, not the civil system, was appropriately equipped to address all grievances by servicemen, even where superior officers used discretionary powers maliciously to abuse or oppress subordinates. Naval men were governed by their own “sea military code” which prescribed and regulated the duties of every man in the fleet by rules and ordinances adapted to sea military discipline. This “code” also provided that every man in the fleet had to be tried by a court martial for any offence against his duty. If a man is charged with an offence against the articles or (if silent) against naval usage, his guilt or innocence “can only be tried by a court-martial”.<sup>220</sup> In the case of complaints arising from a court martial held without probable cause, the same jurisdiction which tries the original charge must also try the probable cause, which is in effect a new trial; every reason which requires the original charge to be tried by a naval jurisdiction equally holds to try the probable cause by that jurisdiction.

215 See at 548, 1245.

216 *Ibid*; not in all respects correctly, it appears: see n 209 above for the cases relied upon by Sutton.

217 See at 549, 1246.

218 See at 550, 1246.

219 But, of course, there is no claim for damages: see, again, n 191 above.

220 See at 548-549, 1245-1246.

But then, although clearly and outspokenly in favour of absolute intra-naval immunity for the sake of naval discipline, Lord Mansfield significantly observed that he had found no authority of any kind either way. While the question certainly seemed to require a resolution “by the highest authority”, it was not necessary to do so for purposes of the matter before him, given that even supposing an action to lie, judgment had to be given for *Johnstone*.<sup>221</sup>

In short, their Lordships’ opinion considered and touched on two distinct aspects.

First, as to whether an intra-naval action did lie in a civil court of law, although they thought it was doubtful that such an action was available and rather favoured absolute intra-naval immunity for the sake of maintaining naval discipline, they stressed that their view on this aspect was merely *obiter*.<sup>222</sup>

Secondly, supposing that such an action did lie and that there was therefore no absolute but only limited intra-naval immunity, it was clear that no action will lie and that there will be immunity for merely bringing a person to a court martial, or for an earlier arrest or suspension for that purpose, as such acts are clearly within limits of naval authority. Only if those limits had been exceeded, such as where the conduct had been performed maliciously and without probable cause, was the immunity lifted and could a civil action lie. Here *Johnstone* did in law have probable cause for arresting and suspending Sutton and the requirements for intra-naval litigation in a civil court, supposing such to be possible, had therefore not been established.

As Holdsworth explains,<sup>223</sup> the decision proceeded not on the broad ground that no such action would (ever) lie – even though, without deciding the issue, their Lordships did express themselves very strongly in favour of that ground – but on the narrow ground that an action did not lie in the present case because there was reasonable and probable cause for Sutton’s prosecution. Put differently, the view expressed by the Exchequer Chamber in *Sutton v Johnstone* on the issue of actionability was *obiter* and the only point it decided was that, assuming an action

221 See at 550, 1246: “These considerations incline us to lean against introducing this action. But there is no authority of any kind either way; and there is no principle to be drawn from the analogy of other cases, which is applicable to trials by a sea court-martial under the marine law, confirmed, directed, and authorized by statute. And therefore it must be owned that the question is doubtful; and when judgment shall depend upon a decision of this question [which was not case here], it is to be settled by the highest authority.”

222 According to *Anon* (n 195) at 30, the Exchequer Chamber’s *obiter* opinion was that no civil action was ever available against a superior or fellow officer. The aggrieved naval man had to seek recourse against the superior by way of a court martial. But, *Anon* deduced, once the second court martial had found the superior guilty of an offence (and had thus established improper conduct for a lack of probable cause, a matter properly only within naval jurisdiction), it was possible for the subordinate to take civil action and for a court of law to hear the matter and award damages. According to this view, a civil action was thus not excluded, but merely postponed.

223 (n 192) at 222-223.

could lie, there was probable cause for the superior's conduct so that an action did not lie.

The judgment of the Exchequer Court was accordingly reversed by the Lord Chancellor on this opinion of the Exchequer Chamber.

### 3 1 6 And then Sutton goes to the House of Lords

Having lost, Sutton then took the matter further to the House of Lords. After hearing arguments on his writ of error,<sup>224</sup> the following question was put to the judges: "What judgment or other award ought to be made on the record as it now lies before the House?"

On 22 May 1787 Gould J delivered the unanimous opinion of the judges present, namely that the judgment given in the Exchequer Chamber should be affirmed.<sup>225</sup> Thus, the House of Lords confirmed the decision that Captain Sutton had no right of action against Commodore Johnstone. Sutton had lost and Johnstone had won their long-running and costly battle of litigation. This provided no more than some small consolation for the commodore, who died two days later.<sup>226</sup>

Although Sutton was unsuccessful, his legal battles were not yet over as he was still in the process of attempting to recover his share of the prize money the *Isis* received from the captures in Saldanha Bay.<sup>227</sup>

As for naval law, the litigation in *Sutton v Johnstone* did no more than express an *obiter* opinion on the scope of intra-naval immunity and the possible success of a future action such as that of Sutton. The matter was still open for final argument and decision. However, as will appear, subsequent cases read the judgments rather differently.

### 3 1 7 The aftermath of Sutton v Johnstone in the nineteenth century

In the century after the litigation in *Sutton v Johnstone*, a long line of decisions covered the same, or at least analogous, ground. They sought to interpret, in particular, the decision in the Exchequer Chamber and, because none of them ever reached the House of Lords again, the matter ultimately remained undecided. For

224 These are set out in *Sutton v Johnstone* (1787) 1 Bro PC 76, 1 ER 427 (HL) at 93-100, 439-443.

225 The judgment of the House of Lords is reported (without reasons) in *Sutton v Johnstone* (1787) 1 Bro PC 76, 1 ER 427 (HL) at 100, 443, and in *Sutton v Johnstone* (1787) 1 TR 783, 99 ER 1377 (HL). As to the proceedings in the House, see (May 1787) 37 *House of Lords J* 603, 656-659.

226 After the Cape expedition, Johnstone returned to politics in England, was again elected to Parliament in 1781-1784 and 1786-1787, and was also nominated a director of the India Company in 1784. Illness necessitated his retirement from politics and business and it has been surmised that Hodgkin's disease, the probable cause of his ultimate death, may have been responsible for some of the lapses of judgment in his earlier naval career: see, again, n 14 above for the biographical references. Rutherford "Part II" (n 13) at 299 n 1 opines that his death was regretted by Sutton's supporters who would otherwise have carried the matter yet further.

227 See, further, pars 3 2 8 and 3 2 9 in Part 2 of this article.

present purposes some of the decisions that came in the wake of *Sutton v Johnstone* may be considered very briefly.<sup>228</sup>

In *Warden v Bailey*<sup>229</sup> it was decided that an action for false imprisonment lay for an inferior military officer against his superior military officer who imprisoned and later court-martialled him for disobedience to an order that was invalid for not being within the scope of the superior's military authority. In the course of argument Lawrence J remarked<sup>230</sup> that he had "heard from good private information that the reasons assigned by Lord Mansfield for reversing the judgment of the Court of Exchequer, were not adopted by the House of Lords, though the judgment of the Chief Justices was affirmed". As the House did not provide reasons for its affirmation of the Exchequer Chamber's decision, this observation sowed the first seed of doubt as to the scope and weight of the views taken in *Sutton v Johnstone*. But, the Court stressed, the Exchequer Chamber had not decided on the validity of, nor established, the alleged doctrine that an inferior cannot ever maintain an action against a superior officer.<sup>231</sup> Their Lordships had there expressly avoided determining the matter though they had intimated a very strong opinion and had observed that it was an important case and had allowed it to be sent it "to the dernier resort".<sup>232</sup>

The decision went on appeal to the King's Bench,<sup>233</sup> which did not refer to *Sutton v Johnstone* but held that there was insufficient proof of the alleged improper conduct (disobedience) on the part of the subordinate to have justified his imprisonment. The Court, per Lord Ellenborough, clearly did not decide nor assumed that no action lay, for then it would not have found it necessary to determine the sufficiency of the evidence presented by the plaintiff; it appears that the Court in fact thought that an action could and would lie in appropriate circumstances.<sup>234</sup>

In *Hannaford v Hunn*<sup>235</sup> where there was no reference to *Sutton v Johnstone*, the jury in an action for false imprisonment by the master of a warship against her captain<sup>236</sup> gave verdict for the plaintiff and awarded him damages.

228 I will not recount their facts in any detail, but rather focus on their interpretation of *Sutton v Johnstone*. For further analysis, see, eg, Zillman (n 192) at 489-499; Froelich (n 192) at 699-706.

229 (1811) 4 Taunt 67, 128 ER 253 (CP & KB).

230 See at 75, 256.

231 See at 88, 261. Sir James Mansfield CJ of CP observed that the view that such doctrine had been established by the case of *Sutton v Johnstone* was "a very wide inference" to draw from that decision which in any case concerned orders issued in the heat of battle, when obedience, and instant obedience, was necessary.

232 See at 89, 261.

233 *Bailey v Warden* (1815) 4 M & S 400, 105 ER 82 (KB).

234 For an explanation of the proceedings and *dicta* here, see *Dawkins v Lord Paulet* (1869) LR Q5 QB 94 at 105-106 and *Dawkins v Lord Rokeby* (1873) LR 8 QB 255 (Ex Ch) at 272; see, generally, Holdsworth (n 192) at 225-226.

235 (1825) 2 Car & P 148, 172 ER 68.

236 A master, strictly speaking, is the sailing officer, responsible for a ships's navigation; the captain is her commanding officer. The same person could be both, as in Patrick O'Brian's *Master and Commander* (London, 1969), adapted for the screen as *Master and Commander: The Far Side of the World* (2003).

Likewise there was no such reference in *Dickson v Earl of Wilton*<sup>237</sup> but apparently there was no issue that an intra-military action for libel could lie in a civil court, the only question being if the defendant commanding officer's claim to privilege on the basis of an absence of malice could be upheld. On it being decided that there had been malice on the part of the superior, the jury found for the plaintiff and awarded damages.<sup>238</sup>

*Keighly v Bell*<sup>239</sup> held that a military person cannot maintain an action against an officer for acts (imprisonment and prosecution) done by or under orders from superiors and which they have the right to give and he the duty to obey, unless the officer acted maliciously and also without any reasonable or probable ground. The question, therefore, was whether the acts done by the superior were done in discharge of his military duty, or done without any reasonable or probable cause and merely for the malicious purpose of injuring the subordinate, in which case they could not be acts done in discharge of any military duty.<sup>240</sup> The Court, per Willes J, found insufficient evidence of any malicious motive "such as would sustain an action" and accordingly non-suited the plaintiff. Thus, the Court recognised, or at least assumed, actionability in appropriate circumstances and hence merely a limited intra-military immunity.<sup>241</sup>

Then came a series of decisions, all involving the rather litigious Colonel Dawkins.

In *Dawkins v Lord Rokeby*<sup>242</sup> Dawkins sued his commanding officer, Lord Rokeby, for false imprisonment, malicious prosecution and false testimony before a Court of Enquiry, and conspiracy to cause his removal or early retirement from the Army. Now, though, the Court of Common Pleas held that there was no cause of action on any of the counts as those matters were purely military. The Court, per Willes J, referred<sup>243</sup> to the absolute necessity of maintaining the constitutional liberties of subjects, but thought that they had to be confined within proper limits. As regards the liberties of the military, "military men must determine them" as persons entering the military, although they do not cease to be citizens, "yet they do, by a compact which is intelligible ..., become subject to military rule and military discipline". As authority for this he referred to *Sutton v Johnstone*.<sup>244</sup> In that case,

237 (1859) 1 F & F 419, 175 ER 790.

238 Cf, also, *Dickson v Viscount Combermere & Others* (1863) 3 F & F 527, 176 ER 236 (QB), concerning an action against the military authorities for causing the plaintiff's removal from his military post and doing so maliciously and without reasonable or probable cause.

239 (1866) 4 F & F 763, 176 ER 781.

240 See at 801, 798.

241 See at 784, 791, Willes J referring *in arguendo* to "just exceptions to the discussion of military jurisdiction in a court of law".

242 (1866) 4 F & F 806, 176 ER 800 (Ct of CP); see, further, Zillman (n 192) at 495, Froelich (n 192) at 704-705.

243 See at 831, 811.

244 See at 832, 811, describing it as a case decided by the highest authority (the House of Lords), upon the advice of one of the greatest lawyers who ever sat in our courts (Lord Mansfield), assisted by a man of very considerable weight and authority (Lord Loughborough).

Justice Willes continued, “was it shown that military matters, properly brought within the true limits of military jurisdiction, are not to be called in question in civil courts”, and elsewhere<sup>245</sup> he referred to “the doctrine that military men are to dispose of military questions”.

Thus, the Court continued,<sup>246</sup> even if it had been established – which it had not<sup>247</sup> – that the superior officer here had acted maliciously and without reasonable and probable cause, Dawkins could not have obtained redress in a civil court. He was accordingly non-suited.

And, it appears, Willes J had no doubts on the matter: “I cannot entertain a doubt that this is the law”<sup>248</sup> and “I have no doubt that this is the law, and I have no doubt that it is that which is most beneficial to the community”.<sup>249</sup>

However, his Lordship’s view that – what was clearly no more than *obiter dicta* in – *Sutton v Johnstone* had established the “doctrine” of absolute intra-naval immunity is further rather inexplicable, given that he had apparently thought otherwise in the recent decision in *Keighly v Bell*.<sup>250</sup>

While his litigation against Lord Rokeby had not yet been completed, Dawkins took on another of his superiors, Lord Paulet. The decision in *Dawkins v Lord Paulet*<sup>251</sup> shows, if nothing else, what difference of opinion there was on the precise scope of intra-military immunity against civil actions and, also, on the weight to be attached to *Sutton v Johnstone*.

Dawkins sued Lord Paulet for libel in letters the latter had sent and reports he had made concerning his (Dawkins’s) military conduct, duties and qualifications. Lord Paulet’s defence was that he had compiled those documents in the ordinary course of and as an act of military duty. Dawkins, though, contended that the libel was made maliciously and without reasonable, probable or justifiable cause.

The majority of the Court, per Mellor and Lush JJ, held against Dawkins on the basis that no action lay against a military officer for an act done in the ordinary course of his duty as such an officer, even if it had been done maliciously and without reasonable or probable cause.

According to Mellor J,<sup>252</sup> the immunity for officers in such circumstances rested on grounds of policy and convenience. The reasons advanced in *Sutton v Johnstone*, an analogous case of an action for malicious prosecution of a naval officer by his superior, applied equally here and, even though *obiter* and thus not binding, were of

245 See at 837, 813.

246 See at 833, 812.

247 See at 834, 812; 836, 813; 839, 814.

248 See at 833, 812.

249 See at 841, 815.

250 See at n 239 above and, eg, Holdsworth (n 192) at 226. Willes J did refer to that decision, stating (at 839, 814) that he had acted upon *Sutton v Johnstone* in it and that as his ruling was not questioned, he had to be consistent and act on his own earlier ruling!

251 (1869) LR 5 QB 94. See, further, Zillman (n 192) at 496-497, Froelich (n 192) at 705.

252 His judgment (with whom Hayes J agreed before his death) is at 111-120.



“greatest weight” and given “after the fullest consideration”. And, he continued, the exposition of the law in that case “has been generally accepted”. The judgment in *Sutton v Johnstone*, Mellor J continued, “proceeds upon the principle that ‘the law will rather suffer a private mischief than a public inconvenience’”. The reasons of public policy and convenience applicable in cases of immunity for judges, jurymen and witnesses, as also of members of Parliament, applied equally to the conduct of superior officers in the execution of their duty. Furthermore, given that both parties were military men and that the issues here related purely to military duties and discipline, Dawkins was bound to make his complaint to the tribunal specially provided for that purpose and best equipped to adjudge military matters.

In a much shorter judgment, Lush J agreed with these sentiments.<sup>253</sup> Referring to the elaborate judgments of Lords Mansfield and Loughborough in what he described as the analogous though not similar judgment in *Sutton v Johnstone*, he thought that although *obiter*, they were of “high authority”. Further, despite the many years that had passed, no change had been made to the military law so that the Legislature “must have concurred” in it, and despite the many occasions for questioning it, the judgment stands “unassailed”.<sup>254</sup> In short, his Lordship considered the judgment “as one which has received the tacit assent of both the legislature and the profession”.

In a minority judgment of considerable eloquence and weight, Cockburn CJ extensively surveyed what he termed the “great question of absolute privilege in military matters”.<sup>255</sup>

His conclusion was that an action would lie against a military officer if reports, though made under the circumstances alleged, were made with actual malice and without reasonable or probable cause. He agreed that “acts done in the honest exercise of military authority are entirely privileged”, but could not concur with the “startling and apparently unjust” view that that applied also to acts intentionally done in the exercise of military authority for the purpose of injury and wrong. Such absolute immunity for the superior would leave the inferior officer entirely at the mercy of his superior acting under the disguise of duty and leave him without protection as far as “civil redress” or “redress in court of law” was concerned.

253 His judgment is at 120-122. The question raised, he thought, was one of purely military cognizance – it was a report about Dawkins as a soldier, not as a citizen, made to a military authority and not for public circulation – and therefore not within the province of a court of law. He also referred to the argument that the only remedy open to an inferior, namely to have his commanding officer court-martialled, was “imperfect, because no pecuniary compensation is given to the injured party”. If it were a defect, it is one in the military code, and not one a court of law could rectify by adding to a plaintiff’s rights and remedies under military law. Dawkins could not complain as he had everything which military law, to which he submitted himself when he had joined, entitled him to have.

254 Although in both *Dickson v Lord Whilton* (n 237 above) and *Dickson v Lord Combermere* (n 238 above) the question of malice had been left to the jury, in neither was the point now in controversy (ie, whether an action lies) pertinently raised; contrarily, in *Dawkins v Lord Rokeby* (n 242 above) the Court ruled that an action was not maintainable.

255 His judgment is at 100-111. He was also the judge in *Dickson v Combermere* (n 238 above).

To entitle an otherwise libellous matter to the protection attached to communications made in the course of duty, honesty of purpose was necessary, that is, it must have been made not only in the course of duty but also from a sense of duty and thus not maliciously and also with belief in its truth and thus with reasonable cause.

In coming to this conclusion, Cockburn CJ considered three angles.

First, the legal authority.<sup>256</sup>

When the issue was first raised in 1875 in *Sutton v Johnstone*, Cockburn CJ explained, there were two questions: first, whether an action lies by an inferior against a superior officer, and second, whether on the facts in that case there was reasonable and probable cause for the superior's conduct. On the first question, the Court of Exchequer had no doubt: an action does lie.<sup>257</sup> The reversal in the Exchequer Chamber was not on the ground that an action would not lie, but solely on the ground that the facts sufficiently showed the existence of reasonable and probable cause. Lord Mansfield "in a masterly argument" gave reasons for thinking the action ought not to be allowed, but he stopped short of deciding the point. This decision was subsequently affirmed in the House of Lords, but apparently on the same grounds, namely the existence of a reasonable and probable cause. After referring to the judgments in the subsequent decisions, his Lordship observed "that so much of the decision of the Court of Exchequer [in *Sutton v Johnstone*] as is immediately in point in the present case, stands unreversed".<sup>258</sup>

Turning in the second place to the underlying general principles,<sup>259</sup> Cockburn CJ considered the argument that as a matter of public policy, actions of this nature ought not to be allowed and that affording anything less than absolute immunity to superior officers acting in the course of military authority would impact negatively on the maintenance of military discipline.<sup>260</sup>

256 See at 102-107.

257 Cockburn CJ referred at 104 to Eyer CB's "remarkable and, to my mind, satisfactory judgment".

258 At 107. The view that an action does lie – and thus that there is no absolute immunity – was, his Lordship explained, not overruled either by the judgment in error in *Sutton v Johnstone*, nor by subsequent decision of the Court *in banco*, while it was supported by decision of the Court of Common Pleas in *Warden v Bailey* and incidentally and indirectly so by the decision of the Court of King's Bench when that case came to it in error. Although the decision in *Dawkins v Lord Rokeby* was no doubt to the contrary, he thought that he could not be held bound by a single ruling at *nisi prius*, however positively expressed, in a matter in which the Court of Exchequer in *Sutton v Johnstone* expressly, and the Court of Common Pleas in *Warden v Bailey* incidentally, entertained a different opinion, and which Lord Mansfield himself declared to be open to grave doubt and fit to be decided by the highest authority.

259 See at 107-110.

260 The argument has it that obedience to all orders, however desperate and peremptory, should be enforced and not be hampered by the apprehension of vexatious actions in civil courts, whose juries were in any event incompetent to form a proper judgment in matters of a military or naval character. If those who submitted themselves to military law should suffer injustice or oppression at the hands of a superior, they had to be content with such redress as military law afforded them.

He thought the reasoning unconvincing. The possibility of harassment by vexatious actions was no more than an idle apprehension that would have no effect on superior officers' exercise of their duty to enforce discipline. They would have no reason to fear ill treatment in civil courts.<sup>261</sup> In any event, it could not be essential to the well-being of the forces that where authority is intentionally abused for the purpose of injustice or oppression,<sup>262</sup> an injured inferior, whose professional prospects may be ruined and reputation blasted, can be told that in the Queen's Courts, in a system where it is boasted that there is no wrong without redress, he cannot complain. In short, his Lordship thought that it would be far more beneficial to the forces that its subordinate members know that redress may be found in the civil tribunals of the country against intentional oppression and manifest wrong resulting in consequences disastrous to their professional aspirations.

Further, his Lordship was not convinced that a person who joins the forces consents to being subject to military law and being entitled only to – limited, non-compensatory – military redress in a case where he suffers injury by the dishonest exercise of superior authority. And in any case, there was no express prohibition in the military code on a resort to civil tribunals in cases of wrong inflicted under the colour of military authority, which would have settled the matter authoritatively.

Thirdly, Cockburn CJ dismissed<sup>263</sup> the notion that an analogy could be drawn between judges, jurors and witnesses to whom absolute immunity is afforded in the interest of the administration of justice,<sup>264</sup> and members of the forces. It did not follow that because the principle of absolute immunity is required for the proper administration of justice, it is to be applied, without positive enactment or precedent, to a wrong inflicted by one member of the forces on another and in so doing to refuse redress in a case of an admitted wrong “simply because on grounds of public convenience the action between the particular parties ought not to be allowed”.

Finally, Cockburn CJ thought that what was involved here was a question of policy, and that if the law had to be settled so that no action lies in a court of law against a superior officer, that should be done by legislative enactment, or at least

261 His Lordship thought that while a military tribunal was certainly better qualified and equipped in military matters, in cases of manifest wrong and proved malicious motives, no tribunal was better qualified than a jury, under the instruction of a judge and assisted by professional evidence, to form a correct and just judgment: “trial by jury in matters of wrong between man and man is an essential part of our judicial system”. In short, the issue of the competency of the tribunal cannot be admitted as an element in deciding the question of whether an action lies.

262 Such as where charges are preferred against a subordinate which the superior knows are intentionally unjust, or where representations are made which the superior knows are slanderous and false.

263 See at 110-111.

264 An immunity, he thought, in any event settled by authority and decision rather than resting on sound or satisfactory principles.

by a superior court. Until then, a court of first instance, confronted by the question, should allow Dawkins his action.

Despite the setback of a majority decision going against him, Dawkins would not lie down and pursued his earlier claim against his commanding officer Lord Rokeby in a higher court, alleging libel and slander for comments made by the latter during the hearing before the Court of Enquiry. He did so on the basis that he could recover upon showing those defamatory statements were made maliciously and lacked any probable cause. Lord Rokeby again claimed absolute immunity.

And again Dawkins failed in his claim.

In *Dawkins v Lord Rokeby*<sup>265</sup> the Exchequer Chamber held, on the narrower ground, that statements before a Court of Enquiry, even though it was not a court of record nor a court of law nor a court of justice in the ordinary sense of the word, were absolutely privileged, even though they had been made in bad faith, with actual malice and without reasonable and probable cause.

But Kelly CB then also decided<sup>266</sup> that there was “a higher ground” upon which the action could be dismissed. All the issues here were “purely questions of a military nature”, to be determined by military tribunal and not by a court of law. His Lordship approved of the reasoning of Lord Mansfield in *Sutton v Johnstone* and that in *Keighley v Bell* and in the Court below and held that these decisions “are all authorities to shew that a case involving questions of military discipline and military duty alone are cognisable only by a military tribunal, and not by a court of law”. By contrast, he noted, Dawkins’s case was “really destitute of all authority to support the action”. After referring to the contrary minority judgment of Cockburn CJ in *Dawkins v Paulet*, the Court remained satisfied that questions of privilege, “though governed, and, as we think, for the present decided, by the decisions referred to in the Exchequer Chamber, [are] yet open to final consideration before a court of last resort”. It therefore agreed with the majority in *Dawkins v Paulet* that the motives as well as the duty of a military officer, acting in a military capacity, were questions for a military tribunal alone, and not for a court of law to determine.

The inexhaustible Colonel Dawkins then had a last stab at recovering damages when he appealed to the House of Lords, sadly for him, again without any success.

In *Dawkins v Lord Rokeby*<sup>267</sup> the House, by a unanimous decision, affirmed the outcome in the Exchequer Chamber and additionally also held Lord Rokeby entitled to recover £258 18s from Dawkins for his costs, charges and damages from the delay in the execution of judgment.

265 (1873) LR 8 QB 255 (Ex Ch); also (1873) 28 LTR 134 (Ex Ch); see, further, Zillman (n 192) at 496; Froelich (n 192) at 705 n 47.

266 See at 270-271.

267 (1875) LR 7 HL 744 (HL).

The decision was merely on the narrow ground determined below, that of (military) witness immunity in civil litigation; nothing was said about the conduct of military officials in other capacities.<sup>268</sup> The House of Lords held that the rule, based on public policy, that no action will lie against a witness for what he says when giving evidence before a court of justice, applies where a military man was bound to appear and give evidence before a military court of inquiry. His statements were absolutely privileged and evidence of falsehood and malice was immaterial and irrelevant.

Kelly LCB referred to the long series of decisions, numerous and uniform, that had settled the principle of public policy that no action will lie against a witness for what he says or writes in giving relevant evidence before a court of justice.<sup>269</sup> For Cairns LC the “narrowly circumscribed principle” was settled law, while public-policy considerations also supported the extension of the principle applicable to witness in judicial proceedings to witnesses before military courts of inquiry concerning matters of military discipline and in respect of statements relevant to that inquiry. Finally Lord Penzance dismissed the supposed hardship of law in this case on the injured and remediless subordinate and thought it was outweighed by the policy consideration that to allow an action may impinge on the freedom of a witness to give evidence in the administration of justice.

The upshot of the series of decisions in the *Dawkins* cases<sup>270</sup> was an apparent acceptance, on suspect grounds, including the elevation of – admittedly strong – *obiter dicta* in *Sutton v Johnstone* to a principle, by the majority in *Dawkins v Lord Paulet* of the rule of absolute intra-military immunity. That was contrasted by a less than ringing support, on pertinently narrow grounds, of the rule by the House of Lords in *Dawkins v Lord Rokeby* and by a powerful minority judgment in *Dawkins v Paulet* opposing so broad a principle and allowing intra-military litigation in appropriate circumstances.

By the end of the nineteenth century, therefore, it could not yet be said that the question of the scope of intra-military immunity had been settled finally and conclusively. Although it could no longer be raised in a court of first instance, the

268 Holdsworth (n 192) at 224 points out that the House of Lords at 754 carefully guarded itself from the supposition that it decided anything else except the absolute privilege of a witness giving evidence before a military court of enquiry.

269 He merely observed at 271 that *Sutton v Johnstone* provided authority “that a case involving questions of military discipline and military duty alone are cognisable only by a military tribunal and not by a court of law”.

270 In *Dawkins v Prince Edward of Saxe-Weimar* (1876) 1 QBD 499, too, Dawkins lost. He brought actions claiming damages charging the defendants with conspiring to make false statements concerning him to his commanding officer that resulted in his being placed on half pay. The defendants’ case was that the conduct complained of involved acts done by them in the due course of their duty as members of a military court of enquiry. The Court stayed the actions on the ground that the decision of the House of Lords in *Dawkins v Lord Rokeby* had determined “the precise point” that an action under such circumstances would not lie.

broad issue remained open for argument in the Court of Appeal or before the House of Lords.<sup>271</sup>

### 3 1 8 Resolution in the twentieth century?

Although a few decisions did once more touch on the question of intra-military immunity and whether an action will lie, in appropriate circumstances, for a subordinate against a superior officer, the main development in the twentieth century was legislative.

In *Fraser v Hamilton*<sup>272</sup> the Court of Appeal decided that an action will not lie in a civil court against a superior official – here Admiral Hamilton, formerly the Second Sea Lord of the Admiralty – of the Navy or Army for wrongly and maliciously causing a subordinate to be retired from the service. It was pointed out that since the decision of the House of Lords in *Dawkins v Lord Rokeby*, it was doubtful whether the House itself had jurisdiction to entertain an appeal of this kind, in a purely military matter, but in any event the Court of Appeal certainly had not.<sup>273</sup>

Shortly after, in *Fraser v Balfour*,<sup>274</sup> the same subordinate brought another action against the naval authorities – in the person of Admiral Balfour, the First Lord of the Admiralty – claiming damages for false imprisonment and for maliciously causing his wrongful retirement from the Navy. At issue was whether the conduct of the naval authorities in retiring him could be reviewed in a civil court.

Earlier the Court of Appeal had held that the matter had been settled against Fraser by its previous decision in *Fraser v Hamilton*. The House of Lords, though, observed that although in *Dawkins v Lord Rokeby* it (the House of Lords) had affirmed the decision of the Exchequer Chamber below, a close reading of its decision showed that it proceeded solely on the privilege of witnesses and did not affirm the other and wider proposition laid down in Exchequer Chamber that questions of intra-military liability were not cognisable in a court of law. Thus, it thought, the question remained open, at least in the House of Lords. And as the question involved “constitutional questions of the utmost gravity”, a decision upon it should be given only when the full facts were before the House in a complete and satisfactory form. Therefore, their Lordships felt, on the materials before them they could not affirm the decision

271 See Holdsworth (n 192) at 227, who points out that the underlying policy issues for and against absolute intra-military immunity had forcibly been expressed, on the one side by Lords Mansfield and Loughborough’s *dicta* in *Sutton v Johnstone* (in favour) and, on the other side by those of Eyre CB in *Sutton v Johnstone* and Cockburn CJ in *Dawkins v Paulet* (against).

272 (1916) 33 TLR 431 (CA).

273 The Court expressed support for the view that when a man became a member of the services, he subjected himself to a code of law which ousted the jurisdiction of ordinary courts and confined him to redress in military courts. The fact that the latter would award no damages was not something a civil court could do anything about.

274 (1918) 87 LJKB (ns) 1116 (HL); see Zillman (n 192) at 497.

of the Court of Appeal, dismissing an action, without deciding the most important question which the House in *Dawkins v Lord Rokeby* had left unresolved. It therefore remanded the action for further evidence.

Lastly, in *Heddon v Evans*<sup>275</sup> there was if not a refinement of the principle of absolute immunity, then at least a focus on another requirement for such immunity that may have been lost sight of in the debate on whether malicious and groundless actions were also immune.

The King's Bench accepted – and was bound to accept<sup>276</sup> – that a military officer will not be liable in damages if he commits an act which amounted to false imprisonment or another common-law wrong within his jurisdiction or authority and actually done in the course of military discipline solely on the ground only that he had done it maliciously and without reasonable and probable cause.

However, as was “reasonably clear” from authorities and on principle, he may be liable if the act done was in excess of or without his jurisdiction even though he may have purported to act in the course of actual military discipline. And, of course, it was open to a civil court to determine whether or not the act complained of was done within or outside jurisdiction.<sup>277</sup>

If it was outside and the superior had exceeded his powers, the court may award damages; if it was within his powers, the court cannot award damages even if it was a malicious and groundless abuse of that authority.

Thus was the – still unsettled – state of English law at the beginning of the last century. The uncertainty should not come as a surprise. After all, the issue, that of the scope of intra-military immunity, is solidly based on considerations of public policy. And not only are such considerations not fixed, but the weight attached or to be attached to each of them differs according to the perceptions of the valuer.

Temporal and societal factors that may have played a role and have to be borne in mind in evaluating the approach of the English courts up to the end of the nineteenth century include the fact that in the age of empire, the Navy and, later, the Army constituted, or were at least considered to constitute, a distinct society separate from the civilian world to a greater extent than either before or afterwards; there was then a

275 (1919) 35 TLR 642 (KB); see Zillman (n 192) at 497 n 39.

276 McCardie J explained at 645 that while the question may still be open to the House of Lords, it was not open to him as a judge of first instance, nor even to the Court of Appeal. Only the House of Lords could hold that an action will lie for a malicious abuse of military authority. He had to follow the “vast preponderance of authority on this point” that there is no such action, which seemed to him to have been fully established by *Dawkins v Paulet*, *Dawkins v Lord Rokeby*, *Fraser v Hamilton*, and *Fraser v Balfour*.

277 It may be pointed out that the same distinction is drawn when a military man's liability towards an outsider is at issue. Broom (n 192) at 714-717, eg, makes it clear that an officer incurs no tortious liability towards a (non-military) stranger for an act done in discharge of his ordinary duty, but does incur personal liability if the act is not within the scope of his duty and hence not justifiable by virtue of being authorised by the Crown.

greater reliance on force and harsh discipline to secure military performance; and the protection of superior officers against possibly vexatious civil litigation by inferiors may have weighed heavier than the protection and compensation of subordinates against malicious and baseless acts that were nevertheless within the scope of the superior's authority.

The difficulty of even just formulating, let alone weighing up against one another, all the considerations on either side of the argument, for and against absolute immunity for actions, within the scope of military authority, already explains the state of uncertainty.<sup>278</sup>

It was not surprising, then, that rather than await another opportunity for the House of Lords to pronounce on the issue, the Legislature intervened.<sup>279</sup>

The Crown Proceedings Act, 1947,<sup>280</sup> which removed governmental common-law immunity from suits in tort, contained provisions relating to the armed forces in section 10. Subsection (1) absolved members of the armed forces (and also the Crown) from liability in tort for acts done by such members while on duty as such and causing the death of or personal injury to another person, in so far as that death or personal injury was due to anything suffered by that other person while he is a member of the armed forces and on duty as such.

This measure therefore finally and clearly established intra-military immunity, as the common-law right of action in tort by one member of the armed forces against

278 See, further, Holdsworth (n 192) at 227-228 for a summary and Zillman (n 192) at 497-499 for some conclusions.

In favour of absolute immunity (no action): • absolute immunity is necessary for the maintenance of discipline and superiors must be able to maintain discipline without fear of vexatious actions by subordinates at law; any possible gains from access to civilian courts (subordinates compensated and liability imposed on superiors) are outweighed by the harm to the maintenance of military discipline; • military matters are regulated by a code of military law and by military courts alone; just as a subordinate must be put on trial before a military tribunal, if that is done allegedly without probable cause, the same tribunal which tries the original charge must also, and for all the same reasons, determine the issue of probable cause by way of a new trial; • civilian courts are not competent and qualified to determine military matters involving military expertise, including issues of malice and probable cause in the exercise of military authority.

Against absolute immunity (action in appropriate cases, when malicious and without reasonable cause): • liability and hence accountability at law will not undermine but rather strengthen military discipline as superiors will be held accountable in suitable cases; • acts performed maliciously and without probable cause are an abuse of military authority and no different from an act outside such authority; • there is no need to assume civil courts are incapable of dealing with military matters, including determining whether or not there is sufficiently clear evidence of abuse (malice and an absence of reasonable cause) on the part of a superior officer; in any event, the absence or presence of malice and reasonable cause is not a military matter; • military men must like all others be liable in a civil court for civil wrongs.

279 Elsewhere, and in the absence of legislation, *Sutton v Johnstone* therefore still casts its spectral shadow: see, eg *Colonel AD Nargolkar v Union of India & Others* (2011) 4 Indian LR (Delhi) 114 (HC) at 142-143 in par 45.

280 10 & 11 Geo VI c 44.



another member was abolished. A proviso made it clear, though, that there would be no exemption from liability in tort for a member in any case where the court was satisfied that the act (although committed while on duty) was not connected with the execution of his duties as member. Also, the exemption only applied to tortious liability for injury or death and not to other heads of damage.<sup>281</sup>

As if to confirm the pendulum-like motion of the fluctuating policy considerations underlying the notion of intra-military immunity, section 1 of the Crown Proceedings (Armed Forces) Act, 1957,<sup>282</sup> suspended section 10 of the 1947 Act. Observe, section 10, and the immunity it granted, was not repealed, merely suspended. It therefore merely ceased to have effect, until such time as it is revived.<sup>283</sup>

(to be continued in (2016) 22(1) *Fundamina*)

## ABSTRACT

Commodore Johnstone's secret mission to the Cape of Good Hope in 1781 had a surprisingly large number of legal consequences, not only in England but also at the Cape. In the main they concerned two matters, namely naval law, more specifically intra-naval immunity, and prize law, more specifically, the question of joint captures.

281 Eg, defamation, trespass, or property damage. See, further, Harry Street "Crown Proceedings Act, 1947" (1948) 11 *Modern LR* 129-142 at 136-137.

282 c 25.

283 Provision for which is made in s 2.