

JUDGE JOHN HOLLAND AND THE VICE-ADMIRALTY COURT OF THE CAPE OF GOOD HOPE, 1797-1803: SOME INTRODUCTORY AND BIOGRAPHICAL NOTES (PART 1)

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ABSTRACT

A British Vice-Admiralty Court operated at the Cape of Good Hope from 1797 until 1803. It determined both Prize causes and (a few) Instance causes. This Court, headed by a single judge, should be distinguished from the *ad hoc* Piracy Court, comprised of seven members of which the Admiralty judge was one, which sat twice during this period, and also from the occasional naval courts martial which were called at the Cape. The Vice-Admiralty Court's judge, John Holland, and its main officials and practitioners were sent out from Britain.

Keywords: Vice-Admiralty Court; Cape of Good Hope; First British Occupation of the Cape; jurisdiction; Piracy Court; naval courts martial; Judge John Holland; other officials, practitioners and support staff of the Vice-Admiralty Court

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1 Introduction

When the 988 ton, triple-decker HCS *Belvedere*, under the command of Captain Charles Christie,¹ arrived at the Cape on Saturday 3 February 1798 on her fifth voyage to the East, she had on board a man whose arrival was eagerly anticipated locally in both naval and legal circles. He was the first British judicial appointment to the recently acquired settlement and was to serve as judge of the newly created Vice-Admiralty Court of the Cape of Good Hope.

Britain had occupied the Dutch settlement at the Cape in September 1795, and at the time had no designs on permanent colonisation. Engaged in a war with the French, her main aim was to prevent the strategically crucial port from falling into enemy hands and so to secure her trade with the East Indies.²

As a result, the occupiers left the local administration of justice largely unchanged.³ The Council of Justice was simply re-instituted in 1795 as the Court of Justice⁴ and was only in minor – and mainly compositional – respects altered in 1797.⁵ The applicable Roman-Dutch law and legal procedures, too, remained in place and the Court's jurisdictional powers continued as before.

The Council of Justice had exercised an extensive original and appellate jurisdiction in civil and criminal matters. It also had a broad maritime jurisdiction. This included all causes concerning booty or prize (“alle questien raakende Buiten of Pryzen”) captured during war by Dutch naval vessels or those Dutch vessels sailing under commissions or letters of marque. It further included actions between inhabitants of the settlement and the masters, seamen and passengers belonging to

1 For details of this Honourable (East India) Company Ship, see “Ships of the East India Company” at <http://eicships.threedecks.org> (accessed 16 Mar 2017); Gerber 1998: 393; British Library, IOR/L/MAR/B/332E (journal of the *Belvedere*, 8 May 1797-3 Feb 1800, including passenger lists). There is a painting of her in 1800 by the prolific marine artist Thomas Luny (1759-1837) – as to whom see P van der Merwe “Luny, Thomas” in *Oxford Dictionary of National Biography* (online ed Jan 2012, accessed 27 Jan 2015) – which may be viewed at (and a print of which may be bought from) <http://www.art.com> (accessed 11 Apr 2017).

2 See, generally, Freund 1989: 324-357.

3 On the administration of justice during what is known as the First British Occupation, see, eg, Visagie 1969: 91-94; Giliomee 1975: 95-98; Van Zyl 1983: 444-446; and Boucher & Penn 1992: 150-157.

4 The Proclamation on the Re-establishment of the Court of Justice of 11 Oct 1795 (see Eybers 1918: 97; *Kaapse Plakkaatboek* vol 5: 7-8) re-established the Court of Justice in the same manner as that body had existed at the time of the surrender of the settlement to Britain, and permitted it to operate according to the laws, statutes and ordinances in force in the colony.

5 In terms of the Proclamation on the Administration of Justice of 24 Jul 1797 (see Eybers 1918: 99-101; *Kaapse Plakkaatboek* vol 5: 94-96; Theal 1897-1905 vol 2: 126-128), the administration of civil and criminal law was to continue according to “subsisting laws and jurisprudence”. It made provision for a reduction in the number of members of the court, for the establishment of a Court of Appeals in Civil Matters (consisting of the governor and lieutenant governor) “for the hearing and determining of appeals from the courts of law within the settlement”, and for a possible further appeal to the King-in-Council.

any ships anchored in Cape roadsteads or bays.⁶ Crimes on board East India Company or other Dutch ships, if not dealt with by way of a court martial (*scheepsraad*) on board, were often adjudicated at the Cape by members of the Council of Justice with the aid of the ship's master and high-ranking officers.⁷

One of the first matters the re-established Court of Justice was required to deal with urgently, involved the arrest of the American vessel *Nancy*.⁸

The British initially had no choice but to make use of the local court in maritime matters,⁹ the only alternative being to send the matter to England for trial to the great inconvenience of all concerned.¹⁰ That was clearly not satisfactory. The problem the British naval and maritime community at the Cape had with the Court of Justice was that it was staffed by untrained – even if now full-time and salaried – lawyers (only the secretary and the fiscal had legal qualifications), conducting proceedings in Dutch. Moreover, they applied not the legal system usually applicable in Britain to Admiralty and maritime claims, but Roman-Dutch law, including, where relevant, Roman-Dutch maritime law and procedures.¹¹

- 6 See art 60 of the *Provisioneele Instructie voor den Raad van Justisie*, as paraphrased by Botha 1962e: 126. The Cape Archives (CA) in the Council of Justice (CJ) series contains multiple relevant holdings: see, eg, CJ 3184 (reports of ships' enquiries, 1731-1768) and CJ 3158 (various documents concerning proceedings before the Council relating to ships, 1674-1800). See, also, n 41 *infra* for such proceedings during the First British Occupation.
- 7 Capital offences (murder, manslaughter, mutiny and sodomy) had to be punished in the Netherlands or Batavia, unless there was an imminent danger in postponing proceedings: see Böeseken 1986: vii-viii; Heese 1994: 56-71 (crimes and punishment of soldiers and seamen in the eighteenth century).
- 8 See Theal 1897-1905 vol 1: 203-206 (letter by members of the Court to Gen Craig, 16 Oct 1795, indicating that they were required to be "assembled extraordinarily" – they ordinarily sat only once a fortnight – for this purpose; their assembly gave them an opportunity to raise several issues with Craig concerning the administration of justice, including their salaries and what was to happen to appeals to the Court of Justice in Batavia that were pending at the time of the British occupation).
- 9 Thus, Adm Elphinstone delivered up the American ship *Argonaut*, which he had detained and which later stranded in False Bay, to the Court of Justice to take the necessary legal steps "tot conservatie van den Eijgendom van hetselve Schip en dies lading". The Court obtained permission from Gen Craig to sell her perishable cargo at a local public auction: see De Villiers 1967: 174; CA, BO 30: 107-114, 118 (letter by the Court of Justice to Gen Craig, 27 Oct 1796).
- 10 See CA, NCD 1/45/124 and 125 (1796 notarial protocol containing a protest by the master of the Danish ship *Amalienburgh* to Adm Elphinstone for sending his ship as a prize to Europe on his account).
- 11 To which must be added a rather extensive body of local enactments (*placcaeten*) dealing with matters such as shipwreck, their salvage and preservation, and the prevention and punishment, by death, of the looting of shipwrecked goods (*strandrooverijen*), as well as with life salvage. The *Kaapse Plakkaatboek* contains numerous examples; see, also, Roos 1897: 13-14. Interestingly, a *placaet* of 21 Nov 1792 (see *Kaapse Plakkaatboek* vol 4: 141-155), dealing with "die partikuliere vaart", contained detailed measures on the permission granted by the Dutch East India Co to local inhabitants to engage freely in trade to and from the Cape with surrounding territories as well as with India, and the conditions (eg, no trade in monopoly goods, and only on Dutch ships)

The Royal Navy, in particular, found this state of affairs detrimental. Prevailing conditions of war and the not infrequent capture of enemy men-of-war at or near the Cape, or of neutral ships (or ships disguised as such by flying false flags) carrying (smuggling) contraband, necessitated such ships, captured by British naval or commissioned vessels, being sent to London for adjudication, condemnation and sale as prizes of war. This unnecessarily delayed the eventual division and payment of prize proceeds to the naval officers and seamen attached to the Cape squadron who had effected the captures and whom it was sought to encourage in their endeavours by awarding such proceeds speedily. This in turn had a detrimental effect on safeguarding British merchantmen on the sea route to India against enemy attack and capture. In addition, there was still the unsettled disagreement between the Navy and the Army as to which of them was entitled as captors to the benefit of the prizes captured on the occupation of the Cape.¹²

However, local shipping interests, too, were irked by the situation. A plaintiff who had a maritime claim he wished to be adjudicated in a British court applying English law, had no option but to go to the High Court of Admiralty in London. This was not only most inconvenient but costly as well.¹³

subject to which such trade was permitted (“te vergunnen eenen particulieren vaart en handel op de hieromstreeks geleegene baayen en eilanden, mitsgaders op Indien”); s 39 provided for the subsidiary law to govern any disputes arising from this concession, namely the maritime laws and customs of Amsterdam (“In alle voorvallen en quaestien, welke ter zaake van deeze particuliere vaart en handel zoude mogen ontstaan, en waarin niet specialyk zal zijn of by vervolg worden voorzien, zullen worden gevolgd *de rechten en costume der zee in de stad Amsterdam in gebruik* voor zooverre de locale gesteldheid van dit land derzelve applicatie zal toelaten” (my italicisation)).

- 12 See, eg, Theal 1897-1905 vol 1: 224-22 (letter by Gen Clark to Secretary of State Henry Dundas, Nov 1795, on this contentious issue). It was a matter about which the Army felt so strongly that Gen Craig directed a memorial to the King, dated 27 Dec 1795, to stake the Army’s claim to a share of the prize proceeds: see Theal 1897-1905 vol 1: 293-295. A proclamation providing for the distribution as booty of war of the prizes taken from Dutch subjects at the Cape after 15 Sep 1795 was subsequently issued. It allowed those considering themselves entitled to share in it as captors, “to take such measures and to institute such proceedings in the competent Courts as may be requisite for obtaining condemnation thereof for their benefit”: see Theal 1897-1905 vol 1: 311-313 (letter from the War Office to Gen Clarke of the invading army, 16 Jan 1796), Theal 1897-1905 vol 1: 313-315 (letter from the War Office to Adm Elphinstone, 16 Jan 1796) and Theal 1897-1905 vol 1: 315-318 (letter from the War Office to Gen Craig of the remaining army, 16 Jan 1796). The problem, of course, was that the local Court may indeed not have been “competent” in all senses of the word and, not surprisingly, the matter was ultimately resolved in England: see, further, Van Niekerk 2005.
- 13 In *Boehm v Bell* (1799) 8 TR 154, 101 ER 1318, in Jan 1797, the captured American ship – the George – had to be sent to London for adjudication as prize “as there was no Court of Admiralty there [ie, at the Cape] they [the captors] were under necessity of sending her to England for trial” (at 155, 1319). The British captors – including HMS *L’Oiseau* (Capt Brisbane) – had, through their broker in London, insured the ship for her unavoidable voyage from the Cape to England.

Further, there was a need for a suitable court – which, as will be explained shortly, was not the same as the Vice-Admiralty Court – to be established locally to try crimes committed on board British ships on the high seas. Such crimes included the smuggling of contraband goods in neutral or purportedly neutral ships.

Shortly after the occupation of the Cape, in October 1795, Admiral Sir George Keith Elphinstone complained to the Secretary of War, Henry Dundas, about the activities of neutral ships around the Cape.¹⁴ A while later, in June 1796, Elphinstone¹⁵ wrote to Dundas that “[w]e are greatly at a loss for a Court of Admiralty” necessary to determine the entitlement to prizes speedily and inexpensively and so to encourage the Navy in seizing enemy vessels.¹⁶ “[H]ad there been a Court of Admiralty here, prepared to proceed on causes appropriate to its Jurisdiction”, Elphinstone continued, a great deal of the Indian trade currently being carried on illegally in contraband of war “in ships under false Foreign Colours, often commanded by Britons”, would have been eliminated.

A little more than two months later, Elphinstone “really lamented exceedingly that no steps have been adopted for so material a circumstance” as the establishment

When the prize vessel arrived safely, and was subsequently restored to her American owners as not being a lawful prize, the broker claimed a return of the premium from the underwriters, unsuccessfully so, as the underwriters had been on risk given that, as possessors, the captors did in fact have an interest, albeit a (partially) defeasible one, in the captured ship and her cargo.

- 14 See Theal vol 1: 185 (letter of 10 Oct 1795, stating that he had been compelled to prohibit neutral ships trading at the Cape except for goods in short supply there, because they would ship grain and wine and would then “uniformly pretend to be forced into the French Islands by bad weather or cruizers, and there load English Prize Goods, or take Commissions to capture British Vessels”).
- 15 Who, it is said, had already on 9 Oct 1795 recommended to Dundas that “Mr Pieter Johan de Wit should be appointed registrar of the proposed new Court of Admiralty” as he spoke English perfectly and had suffered much from his attachment to the British: see Spilhaus 1966: 194, who does not refer to any authority for this statement. De Wit was probably Petrus Johannes de Wit (1760-1798), son of his namesake father (1716-1778, who was a prominent farmer and Company official: see JH Mienie “De Wit, Petrus Johannes” in *Dictionary of South African Biography* vol 3: 231-232), by the latter’s second marriage in 1756 to Aletta Jacoba Blankenberg (1738-1805): see <https://www.geni.com/people/> (accessed 28 Mar 2017). De Wit junior may have been vendumaster just before his death: see CA, NCD 1/24/247 (1797 notarial protocol recording an obligation between (his brother?) Willem Adriaan de Wit and vendumaster Petrus Johannes de Wit). Barnard 1999a: 344 n 10 has it that Aletta Jacoba de Wit was the widow of a prominent Cape merchant and member of the burgher council, and that she ran a boarding house in Strand St which was popular with British visitors.
- 16 Theal 1897-1905 vol 1: 393-396 at 395 (letter 25 Jun 1797); see, also, Theal 1897-1905 vol 2: 112 at 118 (letter Gov Macartney to Henry Dundas, 10 Jul 1797, concerning frequent visits by foreign neutral vessels from Batavia, mainly Danish, although many of them were Dutch (or possibly English) “at bottom ... though so artfully covered that the fraud is not to be detected”; some of these attempted to carry on a contraband trade to the Cape and have paid penalties with so little complaint that forfeitures were probably inconsiderable compared to goods that escaped seizure). As to early requests for the establishment of a local Admiralty Court, see generally, De Villiers 1969: 70-71, 167.

of a local Vice-Admiralty Court. He repeated his request to Dundas, perceiving “such serious inconvenience from the want of a competent Court being established here for the necessary proceedings in cases of property being captured or detained, that I must again request permission to address you on that subject”.¹⁷

After the occupying force under Admiral Elphinstone handed over command of the British naval ships at the Cape to Admiral Thomas Pringle, one of the latter’s first actions was to advise the Admiralty in London of the capture of an American merchantman, the *George*.¹⁸ Pringle further warned that other captures that had already taken place or was anticipated soon, together with the illegal trade in contraband both at Mauritius and Batavia, “evidence the very great necessity of a Court of Admiralty being immediately appointed here”.¹⁹

Even after the establishment of a Vice-Admiralty Court had been approved, Governor Macartney reflected on the urgent need for it to commence its activities in a private letter to Henry Dundas, dated 24 July 1797.²⁰ He stated that “[w]e wait with some impatience for the outward-bound fleet, which we flatter ourselves will bring reinforcement to the garrison, the judge of the Vice-Admiralty and the different articles of supply wanted at this place”.

At this stage it may be necessary to clear up a persistent and general misconception. What the local British administrators were requesting and referring to, albeit not always clearly so, and what were subsequently established at the Cape, were in fact two separate and distinguishable institutions.

On the one hand, there was a permanent Vice-Admiralty Court, manned by a single judge, with jurisdiction to determine both instance (maritime) and prize causes. This court was also called a Prize Court – incorrectly so, for that was not its only business.

17 Theal 1897-1905 vol 1: 458-459 (letter from Adm Elphinstone to Henry Dundas, 8 Sep 1796, pointing out that property of “considerable value” had already been taken, but that “for want of a Court”, no further steps could be taken in respect of it locally and that “extreme delay” would be the result. Additionally, “[m]urmurs and discontent” were certain to arise in this regard in naval circles;) Theal 1897-1905 vol 2: 148-151 (letter Gov Macartney to Henry Dundas, 14 Aug 1797, reporting the arrival at the Cape of a Dutch prize, the *Haasje*, which had been flying the American flag and was loaded with arms and goods from Batavia intended for the rebellious population in Graaff Reinet; he informed Dundas that all the relevant information (including a declaration by the captor, a privateering English whaler, the *Hope*: see *idem* at 149-151) relating to the *Haasje* that had been received from the prize master, had been transmitted to London).

18 See, again, n 13 *supra*.

19 Theal 1897-1905 vol 2: 46-47 (letter from Adm Pringle to Evan Nepean, 18 Jan 1797). This letter followed on an earlier one on the same topic (Theal 1897-1905 vol 1: 471-472, letter of 21 Oct 1796, Pringle reporting that in consequence of instructions from Elphinstone, he was sending the Danish prize *Amalienburgh* (see n 10 *supra*) to England under a naval escort for “further Proceedings”). It was in turn followed by others (eg, Theal 1897-1905 vol 2: 47-48, letter of 24 Jan 1797) giving an account of more prizes.

20 It is reproduced in Boucher & Penn 1992: 183-185.

On the other hand, there was a so-called Piracy Court – incorrectly, for not only piracy, but also other serious crimes at sea came within purview of its jurisdiction – also known as a Commission Court or Admiralty Sessions or, confusingly, as an Admiralty Court. This was an *ad hoc* body, constituted as and when necessary, consisting of seven judges, members or commissioners, of which the Vice-Admiralty judge was but one, with criminal jurisdiction to adjudicate crimes committed on board British ships or by British subjects on the high seas.²¹

Most legal and other historians confuse and conflate these two institutions and their respective jurisdictions²² and only a few pertinently and correctly draw the distinction.²³

Then there is another common misconception, namely that the Vice-Admiralty Court was a naval court. That it definitely was not, even if naval men, as the captors of enemy prizes, were some of the most frequent claimants appearing before it. It had nothing to do with naval discipline, which was maintained by courts martial.²⁴

2 The establishment and operation of the Cape Vice-Admiralty Court

2.1 General

Before the end of 1796 matters got moving. In December, George Earl Macartney was appointed governor of the settlement at the Cape.²⁵

His instructions, dated 30 December 1796,²⁶ included the administration of justice generally (instruction no 4); acting as Vice-Admiral²⁷ of the settlement in accordance with the relevant commission he would receive from the Lords Commissioners of the Admiralty (instruction no 30); issuing commissions of marque or reprisal to private ships of war, against enemy states only (instruction no 31); and proceeding according to the applicable Acts of Parliament in trying persons for piracy, a commission for

21 For the Cape Piracy Court, see, further, par 3.1 *infra*.

22 See, eg, Van Zyl 1983: 444-446; De Vos 1992: 238; and Visagie 1969: 94. Van der Merwe 1984: 44-46, 48 initially correctly distinguishes between the Vice-Admiralty Court and the court for the trial of pirates, but then promptly confuses them by incorrectly stating that the Vice-Admiralty Court consisted of seven members, and that it dealt with piracy. There are multiple further instances of such confusion.

23 See, eg, Giliomee 1975: 96-97 referring to two “Admiraliteitshowe” at the Cape; De Villiers 1967: 169 correctly explaining that “hier [is] eintlik van twee heeltemal afsonderlike liggamme sprake”.

24 For naval courts martial at the Cape during the First British Occupation, see, further, par 3.2 *infra*.

25 For the Royal Commission of 5 Jan 1797 appointing him as “Governor and Commander in Chief in and over the Settlement of the Cape of Good Hope in South Africa, now in Our Possession”, see Theal 1897-1905 vol 2: 22-26.

26 See Eybers 1918: 5-11; Theal 1897-1905 vol 2: 3-19.

27 For his commission as Vice-Admiral – and not, it should be stressed, as judge of the Vice-Admiralty (Court), as some would have it – dated 6 Jan 1797, see Theal 1897-1905 vol 2: 27-28.

this to be prepared empowering the governor and others mentioned in it to proceed in the settlement in all matters relating to pirates (instruction no 32).²⁸

In authorising the appointment of Macartney as Vice-Admiral, the Lords Commissioners of the Admiralty further observed that as it had been pointed out that it would be to the advantage of the settlement, its inhabitants and trade “to have a Court of Vice Admiralty settled there”, they also authorised and empowered the appointment of “a Vice Admiralty Judge and other proper Officers for a Court of Vice Admiralty” at the Cape in the same way as had been done elsewhere.

On 6 January 1797,²⁹ the Vice-Admiralty Court of the Cape of Good Hope was established “to hear and determine ... all manner of Causes as to Ships and Goods seized and taken as Prize”.³⁰ To head the Court, a judge would be sent out from England.

The Court would, like Vice-Admiralty courts elsewhere, exercise a dual jurisdiction. On the one hand, there was its ordinary maritime or instance³¹ jurisdiction, to hear cases involving maritime law. This inherent jurisdiction was in England initially often contested by the common-law courts, but was also later, in the nineteenth century, expanded by statutory enactment. On the other hand, there was its extra-ordinary³² prize jurisdiction over disputes involving prize vessels – enemy vessels or neutral vessel carrying (smuggling) contraband – and goods captured *iure belli* by the Royal Navy or by privateers.³³

Vice-Admiralty courts, like the one established at the Cape, displayed several features and for the sake of clarity these may be mentioned briefly.³⁴

First, the Cape Vice-Admiralty Court was a British court, resorting under, and constituted and supervised by, the High Court of Admiralty in London;³⁵ it was not a

28 This last instruction is a reference to the Piracy Court, of which the governor was the president: see, further, par 3 1 *infra*.

29 The very day on which the Court for the Suppression of Piracy was established (see Theal 1897-1905 vol 2: 28-34 and further at n 98 *infra*), which no doubt contributed to the confusion between the two bodies.

30 See CA, BO 35: 167. See, further, eg, De Villiers 1969: 73-77; Van der Merwe 1984: 44-46.

31 And not a “first instance” jurisdiction, as Du Plessis & Olivier 2014: 12 state it; they further incorrectly explain that the instance and prize jurisdictions signified that the court had two separate “afdelings” (departments).

32 In the sense that it was only authorised and exercised in time of war, which was the case during the whole of the First British Occupation of the Cape.

33 Privateers were private merchant vessels authorised by or on behalf of the Crown by means of letters of marque to arm themselves and to capture enemy ships and goods as prizes.

34 On Vice-Admiralty courts generally, see Stokes 1783: ch XIII (Of the Court of Vice-Admiralty); Hall 1809; Dunlap 1836.

35 Smith 1927: 549: “The Vice-Admiralty Courts scattered throughout the world were regarded as mere local agencies of the High Court of Admiralty in England”; furthermore, they were obviously not local, colonial branches of the royal common-law courts in England.

local court and therefore quite independent of the colonial government.³⁶ Secondly, as a British court, the Vice-Admiralty Court was manned, at least initially, by British lawyers qualified or experienced in Admiralty and maritime law,³⁷ who were appointed, salaried by and sent out to the Cape from Britain. Thirdly, it administered and applied not the local law, Roman-Dutch law, but English law. However, the part of the latter system it was mainly concerned with was not English common law, but English maritime or Admiralty law, which displayed pertinent elements of continental civil law. Likewise, the Admiralty procedures it followed were based on civilian rules and forms relevant to maritime matters, including, for instance, the right to bring actions not only *in personam* against a defendant, but also *in rem* against maritime objects such as ships.³⁸ Moreover, it made its own additional rules when they were required.³⁹ And, as a British court, it was constituted, empowered and regulated not by local regulations, but by imperial legislation.⁴⁰ Fourthly, appeals from its decisions were, in cases of civil and maritime causes, to the High Court of Admiralty in London, and in prize causes, to the Lords Commissioners of Appeal in Prize Cases.

Given their – if not identical then certainly overlapping – jurisdictions in maritime matters, it is not surprising that the British Vice-Admiralty Court at the Cape came into conflict with the local Court of Justice. Even after the establishment of the Vice-Admiralty Court, the Court of Justice dealt incidentally – or maybe not so incidentally – with several vessels, including some prize vessels which were

36 Walker 1957: 132, 147, referring to the establishment of a Vice-Admiralty Court that was “independent of the Colonial Government” as also of the local administration of justice and court structures.

37 Later (after 1828) it was staffed by local lawyers, but remained a (British) court quite apart from the local court structure.

38 See, eg *MT “Argun” v Master and Crew of the MT “Argun”* 2004 (1) SA 1 (SCA) at 11 where, having referred to the fact that the civilian practitioners of Doctors’ Commons had the monopoly of Admiralty practice in the High Court of Admiralty in London (until 1859), the Court concluded that a procedural rule of civil law would (before that date) have applied in Admiralty courts (including in Vice-Admiralty courts) in the absence of any legislative provision indicating the contrary.

39 See, eg, the “Orders” issued by the Cape Vice-Admiralty Court on 26 Mar 1800 (see National Archives, Kew (NA), HCA 49/33/11e) concerning the appraisal and sale of goods by order or decree of the Court. Thus, the marshal was instructed in the execution of the Court’s orders and decrees “to expose to public view the usual Ensign of his Office” to avoid his authority being questioned in the discharge of that duty. The marshal and commissioners appointed to appraise prize goods were further prohibited from buying, alone or in partnership with others, any of the goods sold on the court’s orders at public auctions.

40 As a British court, the Cape Vice-Admiralty Court was regulated and the scope of its jurisdiction determined by English law, both the common law and statutory law (of which none was passed in the period under consideration). As to the empire-wide application of British laws dealing with Admiralty courts and jurisdiction, see Smith 1927, pointing out that questions of maritime law and jurisdiction were exclusively matters of imperial concern and accordingly beyond the competency of local, colonial legislatures.

either also, or which more properly belonged, before the Vice-Admiralty Court.⁴¹ This conflict was exacerbated by the fact that the two institutions applied different laws and followed different procedures. However, it came to a head only after the Second British Occupation⁴² and was never considered a problem serious enough to require specific attention during the period under consideration.

The Cape Vice-Admiralty Court was manned by a single judge, seated in Cape Town; there were not, as in some other jurisdictions, more judges sitting elsewhere in the colony. Designated the “Judge and Commissary” of the Court, and sitting without the intervention of a jury in both instance and prize cases, John Holland was the first appointee. The other two main officials appointed to the Court from England were John Harrison as its registrar and George Rex as the marshal.

The Court sat in the Castle.⁴³ By the end of 1800, the office space allocated to the Court and, more particularly, to its registry had become insufficient⁴⁴ and the Governor was approached for accommodation “suitable to the real requirements of the VA Department”.⁴⁵ However, nothing came of these requests and the Court remained where it was.⁴⁶

What, then, of the Vice-Admiralty Court’s activities during the First British Occupation?

41 See, eg, CA, CJ 3185: no 8, 222-236 (inventory of goods in the *Drie Gebroeders* and to be sold by public auction); no 10, 281-295 (report to Gov Dundas of the inspection of the ship *Eleonora Ann*(?) and her cargo, 19 Apr 1799); no 11, 296-580 (papers concerning the privateer, the *Collector*, 1800).

42 For a well-known instance of such jurisdictional head butting, in May 1808, see Edwards 1972.

43 A few days after Holland’s arrival, Gov Macartney instructed that “the place called the Chamber of Commerce”, in the Castle, be readied as a courtroom: see CA, BO 151: 24, and BO 160: 221 (letter, 7 Feb 1798); De Villiers 1967: 175. A contemporary visitor, Percival 1804: 108, wrote that “[a]ll the public offices of government are [there]; all the papers of consequence are lodged, and all important business transacted in the castle”.

44 See CA, BO 35: 249-251 (letter Wittenoom to Holland, 27 Sept 1800, listing the increase in the Court’s business, the crowded offices, and the continual interruptions and lack of secrecy resulting from the inspection of the Court papers as daily inconveniences; eg, there was one small room for the whole of the Court’s registry in which four writing clerks had to be accommodated, and another claustrophobic room for the sessions of the Court itself, into which the registry was spilling over; there was no room for either the Court’s examiner or its translator, both of which worked from home at the time, requiring the relevant papers to be taken out of the registry which was obviously not ideal).

45 CA, BO 35: 247-248 (letter Holland to Macartney, 1 Oct 1800, pointing out the need for “a convenient & secure apartment, for the Holding of courts” and the preservation of important documents, and complaining that the present cramped conditions were irksome and injurious to health).

46 Andrew Barnard, the Colonial Secretary, wrote to Gov Macartney on 11 Jan 1800 (see Fairbridge 1924: 154) of a plan to move all public offices out of the Castle and to give it over to the military. However, it was uncertain where they could be moved and in Barnard’s view these offices, more particularly those of the Receiver General, the Lombard Bank, the Orphan Chamber and the Vice-Admiralty Court, ought not to be relocated as they often had large sums of money in them.

2 2 Prize causes

As far as the exercise of its prize jurisdiction was concerned, British captors, whether naval (mainly part of the Cape Squadron) or commissioned privateers (private ships of war commissioned and authorised in London or locally),⁴⁷ had to hand over captured and arrested enemy ships and their cargoes to the nearest Vice-Admiralty court. Such a court then had to adjudicate whether or not the ships and cargoes were lawful prizes and subject to condemnation, forfeiture to the Crown, and sale. If so, a part of the proceeds of such sales went to the captors as encouragement for similar actions against the enemy in the future. Because of the success of the local naval squadron, the Cape Vice-Admiralty Court was soon rather busy.

From the extensive records of the registry of the Cape Vice-Admiralty Court kept in the National Archives in London, and covering the period from 1795 to 1805,⁴⁸ it appears that the Court heard in excess of 110 prize causes.⁴⁹ The enemy ships and cargoes captured were mainly French (almost fifty) and Spanish (around thirty). In addition to enemy ships and cargoes, neutral ships smuggling contraband, or – enemy or even British – ships merely disguised as neutral ships for such purposes, frequently came before the Vice-Admiralty Court. Neutral ships were mainly Danish (some ten of them) and American (five) and they traded clandestinely not only in contraband of war (mainly to the French Indian Ocean islands), but also in Indian goods coming within the scope of the East India Company's monopoly.⁵⁰

47 In addition to being admiralty judge, Holland also had to issue, on the instruction of the governor (whose instructions authorised him to do so: see at n 26 *supra*) so-called Letters of Marque and Reprisals, authorisations for the capture of enemy ships. See CA, BO 160-161, 369, 475 for several examples. According to CA, BO 92: 355-404, miscellaneous documents (2), the government received twelve applications for such letters from Cape ship owners alone during the period 30 Jan 1799 to 11 Nov 1801. Controversial merchant Michael Hogan was a frequent applicant: see, further, n 55 *infra*. In his petition for an authorisation for his vessel, the *Collector*, he applied for "Letters of Marque and Reprisal for the said Brig to seize and take Ships and Goods belonging to France, Spain, and the United Provinces, or their Subjects, or others inhabiting within their Countries, Territories, or Dominions". CA, BO 230, miscellaneous documents (5), contains instructions given to governors concerning ships having letters of marque for the period from Jan 1797 to Apr 1799.

48 NA, HCA 49/1-49/40.

49 No less than ten prizes were captured by the Cape Squadron from Apr to Sep 1800: see Theal 1897-1905 vol 3: 317; the 1802 *African Court Calendar* lists sixteen prizes sent into Cape ports by naval vessels and seven by privateering vessels between 1 Jan and 31 Dec 1801. By contrast, De Villiers 1967: 291 (and see, too, Arkin 1960: 201) has it that only fifty-six captured ships arrived in Cape ports during the First British Occupation while an unknown number were destroyed; this number appears far too low.

50 See further, eg, Arkin 1960: 193, 199-200, pointing out that it was a notorious fact that most neutral vessels and cargoes arriving at the Cape were actually owned by British subjects living at home or in India and that as a consequence the trade revenue of the Company was greatly reduced; Giliomee 1975: 154-157. See, also, Theal 1897-1905 vol 2: 347-348 and Boucher & Penn 1992: 226-229 (letter by Holland to Henry Dundas, 29 Jan 1799, containing observations concerning

Then there was also the occasional Dutch, Portuguese, Prussian (from Hamburg or Stettin), Tuscan or Swedish vessel, as well as a few captured ships that were either not identifiable or whose nationality was in doubt as they were flying false colours.⁵¹ There was even, on one occasion, a British ship before the Court.⁵²

By far the majority of prize ships, with or without prize goods,⁵³ were captured by naval vessels belonging to the Cape Squadron,⁵⁴ but in excess of fifteen cases involved captures by privateers, including some local or locally operating vessels to whom letters of marque had been granted by the governor.⁵⁵

Those ships and cargoes that were condemned as lawful prizes by the Cape Vice-Admiralty Court were, under its decrees, sold at public auctions held in Cape Town. Advertisements – sometimes several advertisements for the sale(s) of the ship and of various portions of her cargo – were placed in the local press by the court's marshal George Rex; they indicated the time and place of the auction and a description of the

the "Injury the Trade of the Hon'ble East India Company appears to me to be suffering at the present period". Holland noted that "[a]s the law stands at present (unless any act or regulation has taken place since I left England)", if a ship, coloured as neutral is captured and brought into the settlement on suspicion of carrying enemy property, but appearing upon investigation to be the property of persons residing in England or India, and although perhaps commanded by an English subject and actually proved to be trading to or from India in direct and open violation of the applicable legislation (from which he then quotes), "yet the Vice-Admiralty Court here would be bound to release such ship and cargo, having no power under the above act to confiscate any property or to take any cognizance whatever of offences committed against it". He continued: "[I]t appears to me that it would be of important benefit to the East India Company either that the Vice-Admiralty Court here should be invested by the legislature with a power of taking cognizance and punishing offences against the said act and of confiscating ships trading contrary thereto, or that some other court should be erected at this settlement with a similar power."

- 51 See, eg, NA, HCA 49/11/8 (name of the captured ship not known, but she was condemned as French property, 1798); NA, HCA 49/14/2 (cause of the Dutch ship, the *Haasje*, flying Moorish colours, 1797); NA, HCA 49/21/2 (papers of the Prussian ship, the *Ladoiska*, which was condemned as French property, 1800); and NA, HCA 49/31/4 (papers of an unknown French vessel, 1800).
- 52 See NA, HCA 49/15/5 (prize papers of the British ship, the *Union*, Thomas Bowker master, captured by a Spanish privateer, but then recaptured by HMS *Diomedé*, 1800).
- 53 There appears to have been only one instance of goods alone being seized: see NA, HCA 49/11/7, concerning goods captured off Madagascar by HMS *Braave*.
- 54 For a list of the fourteen naval vessels in the Cape Squadron, with the names of their commanders, to which Dutch ships surrendered in Saldanha Bay in Aug 1796, see Theal 1897-1905 vol 1: 439; for a list of the seventeen naval vessels (including some Dutch prizes) and the names of their commanders remaining at the Cape under Adm Pringle when Adm Elphinstone left in Jul 1797, see Theal 1897-1905 vol 1: 470-471 and vol 2: 131-132.
- 55 For details of these local letters of marque, see NA, HCA 49/23, listing the authorised vessels with their commanders. Included were two (the *Chesterfield*, as to which see, further, at n 113 *infra*, and the *Lady Yonge*, as to which see, further, n 112 *infra*) belonging to the local firm of Walker & Robertson, and several vessels (eg, the *Harbinger*, *Regulus*, *Chance*, *Harriett* and *Collector*) owned or co-owned by the controversial local merchant Michael Hogan (as to whom see n 77 *infra*).

specific vessel or goods – often the goods first, as they were still on board, and then the ship herself – involved.⁵⁶

On the completion of such sales, the relevant accounts could be inspected at the court's registry in accordance with applicable legislation.⁵⁷ Sometimes advertisements placed by their agents concerned the distribution of the prize proceeds amongst the officers and crews of the capturing vessels.⁵⁸ Only occasionally did prize proceedings in the Vice-Admiralty Court attract enough attention to merit a report in the local press.⁵⁹ However, two notorious prize matters involving the Cape Vice-Admiralty Court warrant a brief discussion.

- 56 See, eg, 4, 11 and 18 Oct 1800 *Cape Town Gazette* (sales of cargo from the British ship, the *Union*; the Spanish brig, the *Numero Sete*; slaves from the French ship, the *La Glaneur*; cargo from the Spanish ship, the *Numero Sete*; cargo from the Prussian ship, the *Ladoiska*; and cargo from the *Santissima Trinidad*); 1, 8, 15, 22 and 29 Nov 1800 *Cape Town Gazette* (sales of goods from an unknown ship captured by HMS *Euphrosyne*; the ship, the *Frederick*; the remainder of the cargo from the Stettin (Prussian) ship, the *Drie Bruder*; the remainder of the cargo from the *Union* recaptured from the Spaniards; the French ship, the *L'Esperance*; the cargo from the French *La Paquebot*; the hulls and materials of *Le Glaneur* and the *Numero Sete*; and the French ship, the *L'Edouard*); 6, 13, 20 and 27 Dec 1800 *Cape Town Gazette* (sales of cargo from the Prussian ship, the *Frederick*; cargo from the ship, the *Drie Bruder*; cargo, including slaves, from the Hamburg ship, the *Sea Nymph*; and the remainder of the cargo from *L'Edouard*). The advertised cargo from the *Sea Nymph* included, tantalizingly, "a chest of French books, containing upward of Sixteen hundred volumes"!; see 7 Feb 1801 *Cape Town Gazette*.
- 57 See, eg, 6 Dec 1800 *Cape Town Gazette* (account of sales of the hull and materials of the prize, the *La Bonne Intention*, to be exhibited in accordance with statute); 1 Mar 1801 *Cape Town Gazette* (account of sales of the *L'Eleonore* and of the cargo of the *Ladoiska*); 30 Jan 1802 *Cape Town Gazette* (account of sales of several prizes, including the *L'Anna*, *La Diane*, *La Charlotte*, the *Courier de Seychelles*, and *Les Deux Cousines*).
- 58 See, eg, 14 and 21 Feb 1801 *Cape Town Gazette*; and 30 Jan 1802 *Cape Town Gazette*. Among the local prize agents who placed such advertisements were William Proctor Smith, the naval storekeeper (see Philip 1981: 392), and William Parry Wallis, secretary to Adm Curtis (Philip 1981: 444). Hercules Ross, secretary to Gen Craig, was the prize agent on behalf of the Army concerning the Dutch ships captured as prizes at Saldanha Bay in Aug 1796 (see Philip 1981: 359-360; CA, NCD 1/45/107 (1796 notarial insinuation of Ross as prize agent). Prize agents also often sought permission on behalf of the captors to sell certain prohibited goods locally by way of exception to the East India Co monopoly: see, eg, CA, BO 116/10 and CA, BO 118/56 (Smith as agent of the captors of the Spanish ship, the *Nostra Senhora de Carmen*, requesting permission to sell pepper and cinnamon locally, 1800); CA, BO 116/19 (Smith and Isaac Strombom, agents of the captors of the Danish vessel, the *Forsøget*, requesting permission to sell her cargo locally, 1800); CA, BO 119/78 (Smith and Wallis requesting permission to sell thirty-four male slaves and cargo locally, 1800).
- 59 See, eg, 16 Aug 1800 *Cape Town Gazette* (announcement of the condemnation of the *Nostra Senhora del Rosario* and of the *Nostra Senhora del Carmen*); 11 Oct 1800 *Cape Town Gazette* (proceedings briefly reported concerning the *Drie Bruder*, the *Union of Whitby*, and the *La Paquebot*); 8 Nov 1800 *Cape Town Gazette* (fuller report of the proceedings in connection with the Spanish prize, the *Santissima Trinidad*); 26 Sep 1801 *Cape Town Gazette* (condemnation of the *Chesterfield* and restoration of part of her cargo to the owners Walker, Robertson & Pringle).

2.3 The *Angelique* and *Collector* affairs

The first involved a neutral vessel, captured for carrying contraband or monopoly goods. It became the subject of disputes between the local colonial government and the Vice-Admiralty Court, giving rise to prolonged litigation.

The Danish vessel, the *Angelique*, was captured in 1798 on a voyage from Madras to (Spanish) Manilla by HMS *L'Oiseau*, of the Cape Squadron, and brought to the Cape to be condemned as a prize.⁶⁰

The Cape Vice-Admiralty Court anticipated protracted litigation preceding any judgment condemning her a lawful prize or not. In February 1799 it accordingly granted an application by the captors to have her goods, the property of Armenian merchants who had chartered the vessel, in the meantime landed, kept in a private warehouse and – to a maximum of £500 worth of cargo, to cover the cost of discharge – sold locally as she was leaking and in danger of sinking in Table Bay. However, the goods in question were so-called India goods – goods produced or manufactured eastward of the Cape and falling within the scope of the East India Company monopoly – and on hearing of the Court's decree of “unlivery” (discharge) without any further permission, the Company's local agent, John Pringle, rushed to complain to the authorities. Acting Governor Francis Dundas ordered the immediate reshipment of the goods.

The naval captor, Captain Losack of the *L'Oiseau*, in turn pointed out that there would be unnecessary expense, detrimental to whoever would eventually be adjudged by the Court to be entitled to the proceeds of the sale of the ship and her cargo, but Dundas threatened to confiscate the whole cargo if it were not immediately re-shipped. The contested issue was whether the sale (as opposed to the mere landing) at the Cape of prize India goods was at all permissible if that would contravene the

60 For an account of the *Angelique* affair, see De Villiers 1967: 176-180; De Villiers 1969: 74-76; Arkin 1960: 200, 202; and Giliomee 1975: 155-156. The prize papers are to be found in NA, HCA 49/27. The matter also generated a considerable number of notarial documents, mainly in the form of protests or authorisations by the captors, the owner of the *Angelique*, or the owners of the cargo on board: see, eg, CA, NCD 1/47/343 (notarial protest, 23 Oct 1798, by Capt Linzee of the *L'Oiseau*, regarding Registrar Wittenoom of the Vice-Admiralty Court); CA, NCD 1/12/804 (1798 notarial protocol, power of attorney by owners of the *Angelique* to Alexander Tennant concerning representation required in the Vice-Admiralty Court); CA, NCD 1/14/1239 (1800 notarial protocol, deed of assumption: Alexander Tennant as empowered by the owners of the *Angelique* concerning the case to be heard in London); CA, NCD 1/50/642 (notarial protest, 25 Jan 1802, by the agent for the captors of the *Angelique*, against the decision of the Court refusing to release the cargo); CA, NCD 1/50/649 (notarial protest, 19 Mar 1802, by the agent of the captors of the *Angelique*, protesting the Court's decision not directing the ship and her cargo to be delivered over as prayed, contending rejection of the prayer as illegal and detrimental to the captors, and also protesting against the marshal of the court for declining to hand over the goods as decreed); CA, NCD 1/50/642/1 and CA, NCD 1/50/649/1 (notarial protest by the agent of the captors of the *Angelique*, against the decision of John Holland and George Rex of the Vice-Admiralty Court, refusing to deliver the vessel's cargo).

East India Company monopoly,⁶¹ by which it was prohibited to import such goods into the Cape without permission.

Underlying the matter was a difference of opinion and interpretation between the colonial government and the Vice-Admiralty Court. Dundas had no doubt that Holland's order of landing and sale was unlawful and in contravention of the relevant measure; Holland, again, was of the view that the prohibition in question – on India goods – was not applicable to prize goods, nor to goods landed for their preservation, but only to such goods imported commercially. A heated exchange of letters followed between the protagonists – Holland and Collector of Customs John Hooke Green on the one side, and Governor Dundas, supported by the Company's agent, Pringle, on other side⁶² – and between the Cape and London. Ultimately the matter was referred to England.⁶³

In August 1799, the Crown law officers delivered their opinion, against the Navy and in favour of the East India Company: the India prize goods from the *Angelique* could not be sold at the Cape for local consumption.⁶⁴

Not surprisingly, the Navy complained bitterly. Here, and in similar cases, the prize goods would have to be sent elsewhere for sale, where there might not be a market for them, at an additional cost that would reduce the size of the prize and with a delay that would be to the detriment of the captors. A more liberal interpretation of the relevant monopoly, it was argued, could hardly damage the mighty East India Company, in whose interest it was in any event to encourage naval captures and the prevention of smuggling by such an interpretation.⁶⁵

61 For the relevant governing order-in-council of 28 Dec 1796, see Theal 1897-1905 vol 2: 1-3; *Kaapse Plakkaatboek* vol 5: 78-80, 117-118, 132-135. On restrictions on trade during the First British Occupation, see, eg, De Kock 1924: 85-86.

62 Giliomee 1975: 106 n 11 observes that Dundas's tactlessness lead to many clashes with different officials in cases where there was uncertainty and a difference of opinion about their respective jurisdictions. The best-known example was his conflict with John Holland, during which Dundas apparently challenged him to a duel!

63 See, eg, Theal 1897-1905 vol 2: 408-409 (letter Holland to Gov Dundas, 5 Apr 1799); Theal 1897-1905 vol 2: 414-419 (letter Gov Francis Dundas to Secretary of State Henry Dundas, 6 Apr 1799, requesting further instructions "in order to ascertain how far the Powers and Privileges of the Court of Vice-Admiralty supersede the Order in Council with respect to the importation of India Goods which the Court conceive themselves to be entitled to order the landing and disposal of at pleasure").

64 See Theal 1897-1905 vol 2: 477 (letter War Office to Gov Dundas, 27 Aug 1799, containing the opinion that "no Prize Goods the produce of any Country Eastward of the Cape of Good Hope should be sold at that Settlement for the consumption thereof, except such as are strictly of a perishable nature", and if they were landed at all, they had to be kept in the custody of revenue officers until re-exported or sold for consumption in the colony (if so perishable of nature as not to admit of re-exportation)).

65 See Theal 1897-1905 vol 3: 9-12 (letter Adm Roger Curtis to Gov Yonge, 1 Jan 1800, expressing "sorrow and dismay" at the legal opinion, the more so as in the West Indies, apparently, prize goods did not attract the protection of any Company monopoly and were imported solely for the benefit of the captors. The Navy's position, he continued, was "truly discouraging and deplorable"); Theal 1897-1905 vol 3: 17 (letter Adm Curtis to Evan Nepean at the Admiralty, 6 Jan 1800, asking, as far as prize goods are concerned, to be put on the same footing of advantage as that enjoyed by naval brethren elsewhere).

In the absence of instructions from London, the new governor, George Yonge, seemingly swayed by naval concerns and the legal opinion from London, devised a compromise. He determined by way of a proclamation issued on 3 February 1800⁶⁶ that, for the time being,⁶⁷ India goods, such as those from the *Angelique*, could be sold locally by way of public auction, but merely for exportation elsewhere and not for local consumption. Only if they were found, and certified, to be already deteriorating, or susceptible to serious damage by such further shipment, would a sale for local consumption be permissible. As to the other minor issue in the dispute, the governor conceded his opposition to the Vice-Admiralty Court by providing in his proclamation that captured prize goods, even if they were India goods, could be landed for safe keeping in anticipation of a decision by the court.⁶⁸

Although the Navy was still unhappy – many articles were not suitable for exportation and would therefore obtain a lower price than they would if sold at the Cape for local consumption⁶⁹ – Yonge's proclamation brought an end to the dispute

66 For the Proclamation on the Disposal of Cargoes of Ships Detained as Prize, see Theal 1897-1905 vol 3: 34-37; *Kaapse Plakkaatboek* vol 5: 195-198. The proclamation dealt with the issue in some detail. It concerned all captured or detained ships and goods brought into the Cape as prizes for adjudication by the local Vice-Admiralty Court. Such goods could be freely landed and deposited in customs warehouses “pending the proceedings to be held thereon by the Court of Vice Admiralty”. If not India goods, they could on condemnation as lawful prize be sold and disposed of in the same manner as if the goods had been imported into the settlement by a friendly ship, subject to the colonial duty of 5 per cent on the selling price. If such goods were sold for re-export or direct sending to Britain, no duties were levied. However, if India goods were condemned or adjudged to be sold by the Court, they could be sold and disposed of free of all import duties whatsoever. Nevertheless, the goods had to be sold by public auction on the express condition (buyers had to provide security bonds to customs to the effect) that they would be exported to Britain within a certain time, and on payment of an export duty of 5 per cent on the selling price. If India goods so condemned and sold should be in a “perishing state”, or liable to be destroyed or to suffer damage by being further exported (this had to be certified by customs officials), then it would be lawful to sell them by public auction for home consumption. Such goods would then be subject to an import duty of 10 per cent. If the captured India goods were not condemned, but released by the Court's judgment to the claimants, then it would be lawful for the goods to be exported to their original destination, free of all duties. However, if the claimants should wish to sell them locally because of the particular nature or necessity of the case, they could be sold subject to all duties as if they had been condemned and sold as lawful prizes.

67 See Theal 1897-1905 vol 3: 421-422 for the order-in-council of 11 Feb 1801, by which that of 28 Dec 1797 was revoked.

68 See Theal 1897-1905 vol 3: 24-27 (letter Gov Yonge to Henry Dundas, 12 Jan 1800, explaining that after a perusal of the relevant measures, “I intend to order the whole to be sold for exportation, to remain for the Judgment of the Courts, and for the Benefit of the Captors or the Claimants as the case may be, so far as relates to India goods, – the remainder there can be no difficulty in selling for consumption here or elsewhere”).

69 See Theal 1897-1905 vol 3: 316-317 (letter Adm Curtis to Evan Nepean at the Admiralty, 20 Oct 1800, pointing to “the peculiar hardships the Officers and Ships Companies of the Squadron on this Station labour under from their being prohibited to sell here except for Exportation any Prize Goods the Produce of the Countries Eastward of the Cape of Good Hope”. The hardship was exacerbated by the fact that the goods they captured were in the main India Goods “so that the captors would receive no great benefit from their exertions to distress enemy commerce”).

and was accepted not only locally, but more generally⁷⁰ and even by the local agent of the East India Company.⁷¹

As the *Angelique* and her cargo were declared lawful prizes by the Cape Vice-Admiralty Court, the Armenian owners of the cargo on board her were naturally less than impressed by what had transpired. Not only had their goods been detained for a really long time, but, so they contended, the goods in question had in fact been traded with the permission of the East India Company.⁷² That was also the basis of their appeal against the decision to the Lords Commissioners of Appeal in Prize Cases, in one of few prize causes going on appeal from the Cape Vice-Admiralty Court to London. However, in the case of *The "Angelique"*⁷³ their Lordships affirmed the decision below.⁷⁴

70 See Theal 1897-1905 vol 3: 199-206 (letter War Office to Gov Yonge, 28 Jul 1800, stating that his proclamation concerning the disposal of prize goods from the *Angelique* brought into the Cape met entirely with royal approval).

71 See Theal 1897-1905 vol 3: 83-86 (letter John Pringle to William Ramsay, East India House in London, 27 Mar 1800, considering the proclamation as "fair enough", except for the fact that the Company's agent had no part in surveying and determining whether landed goods qualified to be sold for home consumption, and except for the possibility of endless disputes arising from applications for exceptions to be granted to enable local sales for local consumption); see, also, Arkin 1960: 202.

72 See Theal 1897-1905 vol 3: 124-125 (letter Gen Francis Dundas to Henry Dundas, 6 May 1800, including a letter from the Armenians as well as the permission given them by the governor of Madras).

73 (1801) 3 C Rob (App) 7, 165 ER 497. The owners claimed that the trade engaged in by them as Armenian merchants resident in Madras, had occurred with the knowledge and prior permission of the East Indian government and the governor, Lord Clive, in Madras and that the trade was therefore legal. On appeal, the Lords Commissioners held that only the Crown could grant such permission and license individuals to trade with a public enemy, not the East India Company (that was not a power within its charter), nor the governor-in-council in India by tacit or acknowledged permission. It was within the power of the Crown alone to declare war and it alone could dispense with its operation. Further, and importantly for present purposes, the claimants also represented "the extreme hardship of the case to the Vice-Admiralty Court of the Cape of Good Hope", but their Lordships did not address this point. Thus, they affirmed sentence of the Cape Vice-Admiralty Court and condemned the ship and her cargo as the property of foreign subjects taken in trade with the enemy. Given the good faith of the claimants, and the general misapprehension apparently prevailing in India, even on the part of the government there, the costs of the suit were directed to be paid out of the proceeds.

74 Another appeal from the Cape Vice-Admiralty Court, *The "Hope"* (Lords, 23 April 1803), referred to in *The "Atalanta"* (1808) 6 C Rob 440, 165 ER 991 at 456-457, 997-998, concerned the conduct of a neutral American ship, the *Hope*, captured by HMS *Trusty* in 1799 and carrying dispatches to and from her mother-country, America, to the Dutch colony of Batavia. The Vice-Admiralty Court had condemned her as a lawful prize. It was argued on appeal that a particular packet might not have been on board (so that there was no ground for her condemnation as a prize) and that it might, notwithstanding the receipt given for it, have been forwarded by some other American ship, of which there were several at Batavia at the time. On appeal, the Lords Commissioners assumed that the Court below had made the necessary enquiries and had been satisfied on that point and that the relevant packet was indeed on board. However, the appeal proceeded on other grounds (the vessel ultimately being restored to the owners) and the argument was not fully considered by their lordships. Ultimately, though, the appeal succeeded and the vessel was restored to her owners. See, further, on the *Hope*, NA, HCA 49/6 for the relevant prize papers.

Even though nominally the victors in the legal dispute, the captors – the officers and crew of the *L'Oiseau* – received their share in the prize only much later. News that the local Court's decision had been confirmed on appeal and that the vessel and her cargo remained condemned as prizes, was received at the Cape only early in 1802.⁷⁵ Only then could the cargo be shipped to England to be sold there for the benefit of the captors.

If the Vice-Admiralty Court escaped relatively unscathed from its confrontation with the colonial government in the *Angelique* matter, its conduct in the second of the notorious prize matters, the *Collector* affair,⁷⁶ did its reputation infinitely more harm and exposed it to severe criticism. It was a matter in which the Court displayed an amazing naivety (if not, worse, a reckless complicity) in failing to recognise an obviously dubious if not illegal scheme for the importation of slaves into the Cape.

At the time, the trade in slaves in British ships was not prohibited (that would only occur in 1807), but the colonial government had decided to control the importation of slaves into the settlement at the Cape. Several schemes were hatched to evade this prohibition. One such scheme involved the importation of slaves under the guise of their having been captured from enemy vessels and, as such, liable to condemnation and sale as prize cargoes at the Cape. Its mastermind was Michael Hogan, a shrewd Scottish merchant – he operated at the Cape from 1798 until 1803 – of doubtful morality, a partner of Alexander Tennant in slave-trading enterprises, and later also implicated with Governor George Yonge in various nefarious activities.⁷⁷

One of Hogan's ships, the *Collector*, for which he had obtained a letter of marque in January 1799, departed in March under the command of David Smart⁷⁸ for the Indian Ocean, ostensibly to cruise as a privateer in the hope of capturing enemy

75 See CA, BO 126, doc 19 of 19 Feb 1802; also 23 Jan 1802 *Cape Town Gazette*.

76 See, generally, De Villiers 1967: 182; De Villiers 1969: 76-77; and Giliomee 1975: 125-126; for a popular account, see Laidler 1939: 181-185.

77 For example, in Mar 1800 the ship *Joachim* arrived in Table Bay with a cargo of slaves from Mozambique, indicating that she was *en route* to Rio de Janeiro. However, the suspicion was that Hogan had chartered her to bring slaves from Mozambique to the Cape despite the fact that all trade with Mozambique, including in slaves, was strictly prohibited. Governor Yonge nevertheless took it upon himself to give Hogan permission to land a few slaves, bypassing the established procedure of obtaining permission via the office of the Colonial Secretary Andrew Barnard. See, further, Giliomee 1975: 125-126; and Fairbridge 1924: 201-202 (letter Barnard to Earl Macartney, 14 May 1800). One of the circumstances leading to Yonge being recalled, in 1801, was his allegedly receiving £5 000 from Hogan for his own use in exchange for permission to import 800 slaves into the Cape: see Theal 1897-1905 vol 3: 484-488 at 487; Theal 1897-1905 vol 4: 221-274 esp 256-273 (report of the commissioners appointed to investigate the charges against Yonge concerning Hogan). Lady Anne Barnard was rather ambivalent about him: see, eg, Barnard 1999b: 60 ("Mr Hogan has always appeared to me a man of mild & benevolent manners, but Mr B[arnard] as well as others tells me that he is of a wonderful sharp invention for making money, letting no occasion slip ..."); *idem*: 125 ("I cant help liking the man tho I am not fond of his 'ways'"). For more on Hogan, see Styles 2003.

78 As to whom, see Philip 1981: 386.

prizes. She apparently had some success, for in November and again in December of that year two vessels, the *La Rose* and the *La Africano*, arrived at the Cape, with respectively fifty-six and twenty-five Mozambican slaves on board. The vessels had, so it was said, been captured by the *Collector* from the French and sent to the Cape for adjudication. The two ships and their cargoes were shortly thereafter condemned as lawful prizes by the Vice-Admiralty Court. Then, in February 1800, the *Collector* herself arrived, with about 160 more slaves on board (all that had survived of the 250 originally taken on board): these had allegedly been taken from an enemy French vessel shortly before the latter was driven onto the Madagascan shore. Again, the Vice-Admiralty Court condemned the cargo as lawful prize – this happened on 15 April – and, as before, decreed the slaves to be landed and sold for the account of the captor.

In the meantime, a Danish vessel, the *Holger Danske*,⁷⁹ had arrived in Table Bay from Mozambique with information that the *Collector* was well known in the slave trade and that the slaves in question had not been captured from the enemy but had been bought by Smart. He had then sent a first consignment home in the two vessels he had bought, and transported a later consignment there in the *Collector*. Given that there was then a shortage of labour at the Cape, the introduction of slaves in this fashion meant that they would obtain keen prices.

A special commission of inquiry by the Court of Justice was reluctantly appointed by Governor Yonge to investigate the matter. After sitting from 16 to 21 April, it found, on evidence presented by Fiscal WS van Ryneveld, that the Vice-Admiralty Court had been deceived by false documentation and untruthful witnesses and that the *Collector's* transactions were unlawful.

Although the last consignment of slaves, from the *Collector*, was confiscated by the Court of Justice and Hogan had to repay the money he had received from the sales of the earlier ones, nothing more happened to him. Even though he had sought to convince the authorities that he was not privy to the dealings of Smart and had genuinely thought that the slaves were lawful prize goods, there was little doubt about his involvement, but still he was not prosecuted. His captain, Smart, fled from the Cape when the inquiry was launched and before he could be prosecuted, and was declared an outlaw and banished from the colony.

However, the credibility and reputation of the Vice-Admiralty Court had already been damaged. There was initial surprise that the Court, and Judge Holland in particular, could have been duped in what was commonly known to be an irregular

79 Herself the subject of Admiralty proceedings after the privateer, the *Henrietta*, captured her later in 1800. For the prize proceedings between 1800 and 1802, see NA, HCA 49/17, 49/22/3-4, 49/24/3, 49/28/2-3, and 49/31/3; see, also, CA, NCD 1/15/1410 (1801 notarial protocol, special power of attorney given by her master Hans Laurens Smit, on behalf of Duntzfeld & Co and De Coning & Co of Copenhagen, to Arnold Jan van der Tuuk, concerning the case to be heard in the Vice-Admiralty Court).

transaction.⁸⁰ In fact, it later transpired that Holland had been more than alerted to the possibility of earlier underhand slave dealings involving Hogan and Yonge.⁸¹ Moreover, a later commission of inquiry into the misconduct of Governor Yonge, considering the *Collector* affair, concluded that it was

a matter of public notoriety that the Court of Vice Admiralty had been grossly imposed upon, and made a cloak to cover a most iniquitous transaction, and the public conversation was not less engaged at that time than a general degree of surprise excited, that no steps appeared to be taken by the Vice-Admiralty Court to bring the delinquents to punishment, who by preconcerted perjury had so completely imposed upon the said Court.⁸²

2.4 Instance causes

As for its instance jurisdiction in ordinary maritime matters, which included claims relating to the ownership and possession of ships, ships' mortgages, carriage claims, claims for seamen's wages, claims resulting from damage caused to and by ships, and bottomry,⁸³ the Cape Vice-Admiralty Court was much less busy. Archival records reveal only five such cases in the period 1797 to 1803:

- *James Thompson* [captain of the ship, the *Mary*] *v Joseph Bray* [Cape merchant], 1798, for freight;⁸⁴

80 See Theal 1897-1905 vol 3: 125-127 (letter Capt Campbell to Henry Dundas, 8 May 1800, explaining the affair. Port Captain Donald Campbell stated that “[h]ow the Court of Admiralty could have been so grossly imposed upon in all this transaction is surprising; [the inquiry] being so public in the Town that I never thought it could possibly [have] escaped the knowledge of the Court until I found the Slaves in the Collector were absolutely condemned as lawful Prize, and landed, when I determined that so glaring and pernicious a Traffic should not pass unnoticed”).

81 See Theal 1897-1905 vol 4: 221-274 (report of the commissioners appointed to investigate charges against Gov Yonge, stating, at 261-262, that Holland had deposed before the commission that having heard from common reports of the scandalous transactions going down at Government House, he had enquired from Col Cockburn, Yonge's aide-de-camp, whether there was any foundation in truth for such reports, and to his surprise Cockburn “openly avowed that he himself was concerned with Hogan in the profits arising from the Sale of prohibited slaves in the Colony”).

82 See Theal 1897-1905 vol 4: 221-274 (report of the commissioners appointed to investigate the charges against Yonge) at 265. However, the commission felt reluctant to put any questions to judge Holland “that could be supposed to convey the most distant appearance of reflecting on the proceedings of that Court” (at 268-269). However, they did ask him if, after it had become apparent that his Court had been deceived, any steps were taken to punish the perjurers. Holland answered in the negative because, first, no one appeared to prosecute for perjury, and second, the jurisdiction of the Vice-Admiralty Court appeared to be questionable, although he did suggest to the fiscal that Smart should be prosecuted.

83 Bottomry loans were occasionally notarially executed at the Cape. There are several archival examples in the CA: see NCD 1/32/215 (1798); NCD 1/32/248 (1798); NCD 1/32/334 (1798); NCD 1/32/352 (1798); NCD 1/32/354 (1798); NCD 1/32/355 (1798); NCD 1/32/356 (1798); NCD 1/32/357 (1798); and NCD 1/32/358 (1798).

84 NA, HCA 49/14/12. As to Bray, see Philip 1981: 37.

- *John Pringle* [East India Co agent at the Cape] v *Nettleman* [captain of the ship, the *Christiana*], 1799, concerning smuggling;⁸⁵
- *Johan Gotlieb Modjer v The Ship “Christianus Septimus”*, 1799;⁸⁶
- *John Peterson & Co v The Ship “Holger Danske”*, 1800, for a seaman’s wages;⁸⁷ and
- *Robert Ross* [Cape merchant] v *John Elmslie* [American consul in Cape Town and owner of the ship, the *Eliza*] 1801, for breach of contract.⁸⁸

Interestingly, and relating to an issue of some contention in modern South African law, namely whether there was Admiralty jurisdiction over marine insurance claims,⁸⁹ Judge Holland wrote in November 1799, when the recaptured property of the American ship, the *Pacific*, was claimed not by her owners but by the underwriters, that it was “not consistent with the practice of Admiralty Courts to receive claims on behalf of underwriters” who could only after the occurrence of a loss “have such an interest in the Property, as to entitle them to represent the Original Owners”.⁹⁰

Despite the establishment of a Vice-Admiralty Court at the Cape, though, the local Court of Justice retained, and on occasion did not relinquish but continued to exercise, its broad maritime jurisdiction that, in many respects, overlapped with that of the British Court. There are several examples of the Court of Justice hearing or being involved in (what appears to be) maritime claims after the establishment of the Vice-Admiralty Court in 1797.⁹¹

A conflict of jurisdiction was no mere theoretical possibility but a reality, and one exacerbated by the fact that in respect of the same subject matter the two courts

85 NA, HCA 49/7/1. As to Pringle, see Philip 1981: 332-333.

86 NA, HCA 49/13/7.

87 NA, HCA 49/18.

88 NA, HCA 39/31/10. As to Ross and Elmslie, see Philip 1981: 361 and 116-117 respectively.

89 See, in general, Van Niekerk 1994.

90 See CA, BO 35, 120-127 (letter Holland to Gen John Henry Fraser). As to Fraser, see Philip 1981: 133).

91 See, eg, CA, NCD 1/46/179 (1797, notarial protest by the captains of the naval ships, the *L’Oiseau*, the *Saldanha* and the *Vindictive*, concerning proceedings in the Court of Justice against the captain of the Dutch ship, the *West Capelle*); CA, NCD 1/21/617 (1800, notarial protocol in which a Danish shipmaster appointed locals Jacobus van den Bergh and Evert Hogh to represent him in a case brought by the merchant JJ Vos before the Court of Justice for breach of contract); CA, NCD 1/21/627 (1800, notarial declaration by the captain of the Danish ship, the *Admiral Chapman* confirming that attorney Buissine had power of attorney to deal with a charge of smuggling laid before the Court of Justice); CA, NCD 1/49/501 (1800, notarial protest by a Danish shipmaster concerning his dispute with the Court of Justice over the poor state of his ship’s anchors and chains); CA, NCD 1/49/506 (1800, notarial protest by a Danish shipmaster against the decision of the Court of Justice for the removal of Danish goods bound for Bengal from his ship’s hold and their subsequent plundering); CA, NCD 1/21/644 (1801, notarial protocol in which a Danish shipmaster appointed locals Van den Bergh and Hogh to act and appear for him before a local court; and CA, NCD 1/50/527 (1801, notarial protest by a Danish shipmaster concerning the delay in loading his ship because of a charge of smuggling that had been laid before the Court of Justice).

applied different and potentially conflicting legal systems.⁹² The potential for conflict was further heightened by competition between the marshal of the Vice-Admiralty Court and the fiscal of the Court of Justice as to who was entitled to bring a matter before his own court. Both were keen to do so as for both courts and officials there was financial advantage involved in hearing such cases.⁹³

Apart from the problems arising from an overlapping jurisdiction – a matter that only came to a head at the end of the second decade of the nineteenth century and was then one of the subjects of investigation by the Colebrooke and Bigge Commission of Eastern Inquiry in 1823 – there were several other grounds for complaint against the operation of the Vice-Admiralty Court at the Cape. Its fees, although prescribed by an order-in-council originating from London, were initially so high that in prize causes the eventual profit of captors was much eroded. Regulations followed “whereby the property of these daring asserters of Britain’s glory is in some measure protected”.⁹⁴ In another instance the Court’s marshal sent in his bill for goods – biscuits and flour delivered to the Spanish prize brig, the *La Balena* – but his charges were later found to be “very exorbitant” and reduced accordingly.⁹⁵

3 The Piracy Court and courts martial

3.1 The Piracy Court

As explained, the Vice-Admiralty Court should be distinguished from another body that operated at the Cape and exercised a criminal jurisdiction over piracy⁹⁶ and other serious crimes (felonies) committed on the high seas. This body has been referred to under several appellations, including, confusingly, the Admiralty Court. Formally, it was known as the Commission or Court for the Suppression of Piracy, hence it was called the Piracy Court – incorrectly, for it dealt with more than only piracy – or the Commission Court. Elsewhere it was known as the Court of Admiralty Sessions, a reference to the fact that it was not a permanent body but one only constituted and sitting for the trial of offences as and when necessary. Merely in order to avoid any

92 As to the conflict between the Vice-Admiralty Court and the Court of Justice during the First British Occupation, see De Villiers 1967: 175.

93 For example, the Admiralty judge received as part of his salary a share of the fines levied and fees collected in cases coming before him: see, further, at n 145 *infra*.

94 See De Villiers 1967: 76 n 167; De Villiers 1969: 181, quoting a statement by Samuel Eusebius Hudson, chief clerk of customs, Cape Town, 1798 to 1800 (see Philip 1981: 195-196), in his *Diary* at 62 (the entry for 14 Feb 1800).

95 From Theal 1897-1905 vol 4: 149 at 189 it appears (from the proceedings of a special governmental commission appointed to regulate the consumption of grain in the colony) that the marshal charged Rds16 per 100 lbs of biscuit and Rds12 for the flour, but the commissioners offered him Rds10 for the biscuit and Rds8 for the flour, these prices “according with the highest at present given in the Market for such articles of the very best quality”.

96 The Cape, of course, had a long acquaintance with (passing) pirates: see Botha 1962a: 42-52.

further confusion with the Vice-Admiralty Court, I will refer to this body as the Piracy Court.⁹⁷

A Commission under the Great Seal of the High Court of Admiralty of England, signed by its registrar Arden, establishing a Court of Admiralty for the Cape Colony, its territories and dependencies, for the prevention of piracy, and for the trial of pirates, was issued on 6 January 1797.⁹⁸

The commission is detailed and only some salient points may be mentioned very briefly. It is addressed to Governor Macartney, Lieutenant Governor General Francis Dundas, the judge of the Vice-Admiralty Court (who had, at the time, not yet been appointed), the colonial secretary, Andrew Barnard, Admiral Elphinstone (who had already left the Cape) or whoever was the commander of the naval forces at the Cape station, and all admirals, captains and commanders of naval ships actually within the Admiralty jurisdiction of the settlement at the Cape of Good Hope. After referring to the applicable legislation dealing with the suppression of piracies, felonies and robberies at sea, it appointed the addressees to be the local “Commissioners” at the Cape to try such offences, and for that purpose to “call and assemble a Court of Admiralty on Ship board or upon the Land for the hearing and final determination of any case of piracy Robbery or Felony and all accessories thereto ... and to give Sentence and Judgment of Death and to award Execution of the Offenders convicted” as and when necessary. The Piracy Court would consist of at least seven of those addressed⁹⁹ and had to proceed publicly in open court “according to the civil Law and the methods and rules of the Admiralty”.

The Cape Piracy Court’s criminal jurisdiction over the crimes at sea mentioned, was further described as “extending from the southern extremity of the continent of Africa along the western coast thereof as far as Cape Negro in the Atlantic ocean and along the eastern coast of the said continent as far as Cape Corrientes in the Indian sea, and comprising all the territory situated within those limits”.

In addition to the judge of the Vice-Admiralty Court being one of the members or commissioners sitting on the Piracy Court, that court, when assembled, was staffed by personnel from the Vice-Admiralty Court.

The Cape Piracy Court sat only twice during the First British Occupation.

97 On the Piracy Court, see, eg, Visagie 1969: 94; De Villiers 1967: 169-172; De Villiers 1969: 71-73; and Giliomee 1975: 97.

98 It is reproduced in Theal 1897-1905 vol 2: 28-34. See, also, CA, H1, and VC [Verbatim Copy] 58 (“Commission appointing a Court of Admiralty at the Cape of Good Hope) in Theal 1895: no 50.

99 If less than seven of them were available, others could be appointed to the court “[p]rovided that no persons but such as are known as Merchants, Factors or Planters or such as are Captains, Lieutenants or Warrant Officers in any of our Ships of War or Captains, Masters or Mates of some English ships shall be capable of being so called and sitting and voting in the said Court”. This power of appointment was made use of in the *Princess Charlotte* matter: see n 104 *infra*.

3 1 1 The *Princess Charlotte*

After an earlier attempt at court martialling them had failed,¹⁰⁰ the Piracy Court convened in the Castle in June and July 1798 to try four mutineers of the HCS *Princess Charlotte*. They were John Mills, Will Gutheridge, John Newberry and William Laws, and they were accused of having committed various acts of mutiny and piracy on board the ship.¹⁰¹

The commissioners present were the governor, Lord Macartney, who was also the Court's president; the Lieutenant-Governor General Francis Dundas; John Holland as judge of the Vice-Admiralty Court; Andrew Barnard, the colonial secretary; Admiral Hugh Cloberry Christian, the commander of the naval forces at the Cape;¹⁰² and four captains of naval ships then at the Cape, George Losack of the *Jupiter*, Lord Augustus Fitzroy of the *Imperieuse*, Andrew Trodd of the *Trusty*, and Thomas Alexander of the *Sphinx*. George Rex, the marshal of the Vice-Admiralty Court, was appointed as the Piracy Court's registrar.

100 A court martial had been convened on board the HMS *Sceptre* in Table Bay, but was dissolved as the court martial had doubts about its own competency to try the mutineers (the mutiny had not taken place on a naval but on an East India Co vessel and the accused had not been detained as prescribed). See, further, Theal 1897-1905 vol 2: 274-277 (letter Gov Macartney to Henry Dundas, 7 Jul 1798, from which it appears that Macartney had obtained the opinion of Judge Holland of the Vice-Admiralty Court and that of Sir Thomas Strange, Recorder of Madras, who happened to be on board the *Princess Charlotte en route* to the Cape, confirming that a "Court for the trial of Pirates" would be competent to hear the matter). Thomas Andrew Lumisden Strange (1756-1841), former chief justice of Nova Scotia (an appointment he had obtained through his mother's friendship with Lord Mansfield), was first recorder of Fort St George (Madras) in British India from 1798 and, when the Recorder's Court was superseded, chief justice of the Supreme Court there from 1800-1817: see DF Chard "Strange, Sir Thomas Andrew Lumisden" in *Dictionary of Canadian Biography Online* at <http://www.biography.ca> (accessed 17 Apr 2017).

101 The proceedings of Jun-Jul 1798 are to be found in CA, BO 36, 1-96. Further information may be found in the British Library, IOR/G/9/6, 153-161 (letter by Pringle to the Secret Committee of the East India Co on the arrival of *Princess Charlotte*, the mutinous state of her crew, and the proceedings before the Commission of Piracy); Wits Historical Papers A140 (*Great Britain. Court of Admiralty (Cape of Good Hope)*) contains a copy of the complete proceedings. Further information may be found in Wits Historical Papers A88 (Macartney Papers), eg, items 360 (articles of piracy and felony), 363 (minutes of evidence taken at the Court of Piracy), 368 (sentence of the court), 369 (death warrant issued to John Claiden, provost marshal, Castle, Cape Town, instructing him to hang the mutineers between 9 and 12 o' clock on the morning of 23 Jul 1798, according to the Court of Admiralty's sentence), and 370 (order of respite of execution of Mills, Newberry and Laws, issued to John Claiden, provost marshal, by Earl Macartney). See, also, eg, L Albertson "Mutiny on the *Princess Charlotte*, 1798", available at <http://archiver.rootsweb.ancestry.com> (7 May 2002, accessed 4 Aug 2014); L Albertson "Princess Charlotte and confusion at the Cape", available at <http://archiver.rootsweb.ancestry.com> (19 Jul 2002, accessed 4 Aug 2014).

102 On Christian (1747-1798), whose involvement in the proceedings occurred shortly before his death at the Cape, see K Breen "Christian, Sir Hugh Cloberry" in *Oxford Dictionary of National Biography* (2004, online ed 2008, accessed 29 Jul 2014).

Immediately upon commencement, proceedings were delayed by a complaint from Admiral Christian that Judge Holland had been sworn in by the presiding governor, following the order set out in the Piracy Court's deed of establishment, before himself. Shortly after, the other naval officers complained that Barnard had been sworn in before any of them. The naval officers, who relied on "the Points of the Naval precedence Established by the Rules of the Admiralty Board", according to which, for instance, an admiral was entitled to precedence over an Admiralty judge, promptly left the courtroom when their complaints fell on deaf ears.¹⁰³

The remaining commissioners simply made use of their right of appointment to supplement the members of the Court to ensure the prescribed quorum of seven.¹⁰⁴ Kennard Smith, captain of the East India Company ship, the *Minerva*, and two Cape merchants, Michael Hogan and John Robertson¹⁰⁵ were promptly co-opted as replacements.

After several sessions,¹⁰⁶ judgment was delivered on 5 July 1798. Three of the accused (Mills, Newberry, and Laws) were condemned to death while the fourth (Gutheridge) was acquitted.¹⁰⁷ All three condemned men were recommended¹⁰⁸ for a royal pardon which they received in March 1799,¹⁰⁹ no doubt gratefully.¹¹⁰

103 For Macartney's later defence of the procedure and his contention that the swearing in would only be regular if the order was followed in which the members were named and appointed in the establishing commission, see Theal 1897-1905 vol 2: 274-277 (letter Macartney to Henry Dundas, 7 Jul 1798). In his comments on Macartney's report on the *Princess Charlotte* proceedings, Dundas not only supported the governor, but also expressed concern over the Navy's attitude. He nevertheless conceded that it may have been due to a (misguided) sense of duty and was therefore not in need of any censure: see Theal 1897-1905 vol 2: 309-313 (War Office to Macartney, 15 Dec 1798).

104 See n 99 *supra*.

105 Both merchants were implicated in earlier and later underhand dealings at the Cape: see, again, n 77 *supra* as to Hogan; Robertson was a partner in the firm of (Alexander) Walker & Robertson which had supposed and much talked-about commercial dealings with Gov Yonge: see Boucher & Penn 1992: 229, 239.

106 The Court sat on Tue 26, Thurs 28 and Fri 29 June, and Mon 2, Thurs 5 and Fri 6 Jul 1798.

107 In pronouncing the death sentence, Macartney erroneously read Gutheridge's name in the place of that of Newberry, so that the Court had to reconvene the following day for Newberry to be sentenced anew: see CA, BO 36, 187-189.

108 By Gov Macartney, because of the disagreement among members of the court and the fact that the accused had experienced a long period of suffering in prison, uncertain of their fate.

109 For the relevant proclamation announcing the free pardon granted to the three sailors who had been condemned to death (by the Court of Piracy), dated 27 Mar 1799, see *Kaapse Plakkaatboek* vol 5: 182.

110 See Theal 1897-1905 vol 2: 414-419 (letter Gov Francis Dundas to Henry Dundas, reporting that he had assembled the members that had constituted "the Court of Piracy" and before them read to the three men the royal pardon, which was also announced by a proclamation. The convicted persons, he reported, received this pardon "perfectly penitent and with a grateful sense of His Majesty's goodness").

3 1 2 The *Chesterfield*

The Piracy Court was next convened in the Castle almost three years later, on 19 March 1801, in a matter involving the captain Michael Franklin Brooks and the supercargo James Mortlock¹¹¹ of the *Chesterfield*.

In November 1800, the *Chesterfield*, belonging to the local firm of Walker & Robertson,¹¹² and having been commissioned as a privateer against enemy, including Spanish, marine trade,¹¹³ was captured by HMS *Diomedé* near the Rio de la Plata while trading with the enemy “in a treasonable and traitorous manner” and with compromising papers on board. She was brought back to the Cape with her original cargo with a view of sending her under escort on to England for trial, the naval captor, Captain Charles Elphinstone¹¹⁴ of the *Diomedé* “thinking at that Time there was no Tribunal competent to take cognizance of these Offences in this Colony”.¹¹⁵

However, first the Vice-Admiralty Court seized the *Chesterfield* pending its findings as to the lawfulness of her capture as a prize,¹¹⁶ and then governor Yonge informed the captor that he had the power to convene the Piracy Court – over which he would preside – to try Brooks and Mortlock, as the latter had apparently requested.¹¹⁷

111 Mortlock (1760-1806) had a long and fascinating career at sea. After joining the Royal Navy in 1779, he was part of Commodore Johnstone’s mission to the Cape in 1781 (see Van Niekerk 2015b and 2016), but was out of naval service by 1790 and probably transferred to the merchant service. In 1794, as commander on board the HCS *Young William* on her return voyage from the East Indies, he was credited with the so-called discovery of two sets of uncharted islands in the Pacific Ocean, the one now known as the Takuu (formerly the Mortlock) Islands and part of Papua New Guinea, the other further north-west still called the Mortlock (or also the Nomoi) Islands and now part of the Federated States of Micronesia (see “Log Book of the *Young William*”, available at <http://web.singnet.com.sg>, accessed 15 May 2014). He was at the Cape at least from Apr 1798, when he requested permission to remain in the colony. In Oct that year, he left Cape Town on a privateering cruise aboard the *Britannia* and off Rio in Jun the next year he captured the 100-ton Spanish merchantman, the *Nostra Senora de Carmen*, which was brought back and condemned as a prize by the Cape Vice-Admiralty Court (see NA, HCA 49/14 for the prize papers of the *Nostra Senora de Carmen*, 1798-1800). After his return to England subsequent to the *Chesterfield* trial, Mortlock went back to sea. In Jul 1806, when captaining the privateer *Antelope*, it was reported that she had been taken by an armed Spaniard in the Pacific, off the coast of Chile, and that Mortlock had subsequently been murdered in Lima. On Mortlock, see esp Griffiths 2002; also Philip 1981: 290.

112 John Robertson had been a member of the previous Piracy Court: see n 105 *supra*. The firm had earlier been implicated in irregularities involving Gov Yonge concerning the government’s charter from them of (“in the circumstances somewhat suspiciously named”: Laidler 1939: 190-191) the *Lady Yonge*, for what appeared to be the governor’s private (slave) trading ventures: see, further, Giliomee 1975: 124-125.

113 See NA, HCA 49/23/1 for the original papers concerning the granting of a letter of marque to the *Chesterfield*, 20 Jan 1800; see, again, at n 55 *supra*.

114 Charles Elphinstone Fle(e)ming (1774-1840), later a member of Parliament (1802-1812, 1832-1835) and admiral (1821), was the nephew of Adm Sir George Elphinstone: Philip 1981: 117.

115 See CA, BO 37, 198-200; De Villiers 1969: 173.

116 See, further, at n 126 *infra*.

117 Elphinstone accepted this. The accused were initially kept in the Castle as the charges against them, amounting to high treason, were serious. But when they were granted bail – put up by messrs Walker & Robertson – by Gov Yonge on 12 Mar, Elphinstone feared that they would

When the Piracy Court convened on 23 March 1801,¹¹⁸ the following members were sworn in: Governor George Yonge, Lieutenant-Governor General Francis Dundas, Judge Holland of the Vice-Admiralty Court, Colonial Secretary Andrew Barnard, Admiral Roger Curtis, and two naval captains, William Hotham of the *Adamant* and Commodore Roger Curtis¹¹⁹ of the *Rattlesnake*. This time the question of precedence caused no objections to be raised by the naval officers.¹²⁰

Although George Rex was again appointed to act as the Piracy Court's registrar, he informed it a few days later that because of his position as marshal of the Vice-Admiralty Court, "his personal attendance is daily required for the dispatch of the Business of that Court" and accordingly requested the Court to dispense with his further involvement. His request was acceded to and notary Rouviere was appointed as the registrar.¹²¹

The main charge against Brooks and Mortlock was that they had had treasonable and traitorous "correspondence" with the enemy and had carried on an illicit and nefarious trade in that they had supplied an enemy vessel with provisions and other contraband and had warned her of the approach of a British man-of-war. Voluminous and damning evidence were presented during the trial.

After several sessions,¹²² during which the governor's conduct did little to allay the suspicion of his bias in favour of the accused and their employers,¹²³ both accused were on 16 April found guilty and sentenced to death. However, there was a condition. As the Court was unsure of whether their conduct came within the provisions of any applicable statute, it added the proviso that if it did, they were not guilty. This issue was referred for an opinion to the Crown lawyers in London. In any event, the accused were recommended for royal mercy.

escape and accused the governor of conduct "both illegal and unprecedented": see Theal 1897-1905 vol 3: 458-459 (Capt Elphinstone to Henry Dundas, 23 Mar 1801), 459-460 (encl 1: Capt Elphinstone to Yonge, 15 Mar 1801, and the reply by Yonge, 21 Mar, and by Elphinstone, 22 Mar); Boucher & Penn 1992: 236 add that the governor's patent partiality towards the accused was unprecedented and probably illegal and filled everyone with astonishment and disgust.

118 For the proceedings, see CA, BO 37, 1-113; De Villiers 1967: 172-174; Giliomee 1975: 127; Boucher & Penn 1992: 236, 248 n 78. See, also, Theal 1897-1905 vol 3: 455-461 and vol 4: 8-9; for a popular account of the *Chesterfield* affair, see Laidler 1939: 184-191, referring to the proceedings in the "Court of Piracy Commission".

119 He was the son of the admiral: see Boucher & Penn 1992: 239.

120 Lady Anne Barnard wrote to Lord Macartney on 22 Mar 1801 (see Fairbridge 1924: 273-274) that "the Navy have stroak'd down their prow'd stomach, and sit quietly in their places now". However, a difference of opinion did arise between the governor and the Navy when the Court reconvened on 23 Mar. Captain Elphinstone requested that the correspondence between Yonge and himself be read, and complained when it was only read in part, demanding either that everything be read or that his further petition be included in the Court's record; the latter route was followed the next day and proceedings could commence: see CA, BO 37, 197-204.

121 See CA, BO 37, 18; Brooks 1802: 45.

122 On Thurs 19, Fri 20, Mon 23, Sat 28, Mon 30, Tue 31 Mar and Wed 1 to Thurs 16 Apr 1801.

123 See Boucher & Penn 1992: 236.

Still, Yonge's biased conduct continued.¹²⁴ Without informing the naval captors or anyone else, he acceded to Brooks and Mortlock's petition for permission to proceed to England under escort, summarily ordering that the men should be released on bail and be allowed to return to London on the first available ship, there to await the decision of the Crown lawyers and any decision on a pardon.¹²⁵ It seems that, for whatever reason, both accused eventually escaped punishment.

Incidentally, there had also been insurance on the *Chesterfield* and her cargo which became the subject of litigation in England – *Robertson & Thomson v French*¹²⁶ – with the owners claiming, unsuccessfully, from the London underwriters in a matter turning on the interpretation of the marine insurance policy in question.¹²⁷

124 In addition to Yonge's alleged involvement with Hogan and the *Collector* affair (see at n 76 *et seq supra*), he also had dealings with the firm of Walker & Robertson. They had advanced him money and acted as his agent in private speculation in cargoes. The government, eg, in May 1800 chartered their ship, the *Young Nicholas*, for a year at an excessive rate (of £1200 per month, after she had shortly before been hired for a monthly rate of £591) and in what appeared to have been a highly irregular arrangement: see, further, Giliomee 1975: 123-124; CA, BO 37: 205, 304. Shortly after the *Chesterfield* trial, Yonge was summarily dismissed from his office for various misconducts and recalled to England; see as to those of his misconducts that involved Walker & Robertson, eg, Theal 1897-1905 vol 3: 484-488 (letter Lord Hobart to Gen Dundas, 22 May 1801).

125 See Theal 1897-1905 vol 4: 8-9 (letter Andrew Barnard to William Huskisson, 10 Jun 1801, explaining the decision of the court and Yonge's subsequent conduct); see, also, CA, BO 120/16 (1801, memorial received from Brooks and Mortlock regarding their trial for treason by the Court of Piracy, and requesting permission to proceed to England under escort); CA, BO 120/24 (1801, memorial received from Mortlock and Brooks regarding permission to obtain a copy of the proceedings against them in the Piracy Court). Brooks subsequently had the Piracy Court's proceedings and his own version of events published: see Brooks 1802.

126 (1803) 4 East 130, 102 ER 779. It has subsequently been pointed out that the case was "not very clearly reported" (see *Carr & Josling v Montefiore* (1864) 5 B & S 408, 122 ER 883 at 432, 892) and that is so. Many factual statements made in the course of the judgment raise multiple questions about what precisely happened to the ship herself and her cargo. Thus, it is said that on the vessel being delivered by her captors to the Cape Vice-Admiralty Court, her insured owners abandoned her to the underwriters; that the ship was condemned by the sentence of the Vice-Admiralty Court (for her prize papers, see NA, HCA 49/25 (1801)), sold at the Cape under the court's decree, and had since arrived in England; that this sentence went on appeal to the Lords Commissioners of Appeal (see NA, HCA 32/1835 pt 1 (1801) for the Prize appeal) which, in turn, declared the property in the ship to reside in the claimant, to whom she was restored; hence, the claim against the underwriters. Mortlock himself was a witness and his testimony was in preliminary proceedings found to be acceptable because, although as supercargo he had, like Brooks, a share in the ship and in the profits of the adventure, such profits would be realised only after a sale and not from a recovery of an indemnity from the underwriters: see *Robertson v French* (1803) 4 Esp 246, 170 ER 707 (KB).

127 The insurance on the ship, cargo and freight was against the usual perils "at and from all, any or every port ... on the coast of Brazil, and after the 17th day of September [1800] to the Cape of Good Hope, ... beginning the adventure upon the goods and merchandizes ... from the loading thereof aboard the said ship [the *Chesterfield*] at all, any or every port ... on the coast of Brazil, and from the 17th day of September 1800; and upon the ship in the same manner" (my italics). The owners claimed for the loss of the *Chesterfield* by arrest and restraint, as she was condemned by the Vice-Admiralty Court at the Cape. In the insurance case, the court held (at 137-142, 782-784) that the policy only attached to a homeward-bound cargo, laden on board at the coast of Brazil, and did not cover cargo originally taken in at the Cape, which continued on board after 17 Sep while the ship

3 2 Courts martial

Naval courts martial, consisting of a body comprised of naval captains, were on many occasions convened on board naval ships (or, exceptionally, on land) at the Cape.¹²⁸

So, when incidences of mutiny occurred on board naval ships in Simon's Bay in October and November 1797, probably following the earlier naval mutinies in April in England, at Spithead and Nore,¹²⁹ court-martial proceedings followed.

Initial uprisings had quickly been suppressed and a free pardon was granted – unwisely as it turned out – by Admiral Thomas Pringle on 12 October¹³⁰ to the mutineers who were assured that their grievances would be addressed. However, the honourable discharge on 6 November by a court martial of Captain George Hopewell Stephens of HMS *Tremendous*, who had been charged with oppressive conduct that had allegedly given rise to the uprisings in the first place,¹³¹ caused further discontent; open mutiny flared up again. The first incident occurred on 7 November 1797 on board the *Tremendous*, the flagship of Admiral Pringle, commander of naval operations at the Cape, and unrest soon spread to other vessels of the Cape Squadron.

A court martial, held in the Castle on 21 November, condemned to death two of the large number of insurgents charged: Philip James of the *Tremendous* and Daniel Chapman of the *Sceptre*. They were hanged two days later. Two more mutineers were later tried and hanged in December.¹³² The others found guilty, including Francis Peacock from the *Sceptre*, were imprisoned in the Castle, where they were observed by Lady Anne Barnard¹³³ and where they scratched their names into the walls and doors for later study.¹³⁴

was on the coast of Brazil and after she had left it on her return to the Cape. The policy on the ship and her cargo never attached as the adventure in terms of the policy commenced from the loading of goods aboard the ship on the coast of Brazil (and then only after 17 Sep), an event which never happened as the goods were loaded not there, but earlier at the Cape. In short, cargo laden at the Cape before the ship's arrival on the coast of Brazil was not cargo loaded on board on the coast of Brazil; likewise, the policy also did not cover the ship herself, which was insured in the same manner as her cargo. This decision soon became a precedent (see, eg, Marshall 1808 vol 1: 261, 323) and has remained one until today (see, eg, Arnould 2013: *passim*, and especially paras 3-34 where it is described as a "leading case" and considered in some detail).

128 See, further, eg, De Villiers 1969: 129.

129 See, eg, Brenton 1837 vol 1: 361-362; Yonge 1863 vol 1: 518-519; Dugan 1965: 404-407; Wells 1983: 107; Davey 1988; Featherstone 2009: 775. For a popular account, see Rosenthal 1954.

130 See Theal 1897-1905 vol 2: 186 for the proclamation pardoning the seamen and marines who had been involved in acts of mutiny, disobedience of orders, or any breach or neglect of duty, but who, so it was stated, had since returned to good order and the regular discharge of their duties.

131 For the trial of Stephens, 6-14 Nov 1797, see NA, ADM 1/5342.

132 For the trial of Philip James, Daniel Chapman, and Francis Peacock, 17-23 Nov 1797, see NA, ADM 1/5342. See, also, Theal 1897-1905 vol 2: 161-187, 202-211 for a large volume of correspondence and documentation (in the form of enclosures) concerning the 1797 Simon's Bay mutiny and the subsequent courts martial. See, also, Ulrich 2011; Ulrich 2013.

133 She failed to improve their position by having them paroled for outside work for the rest of their term of imprisonment: see Barnard 1994: 270-271.

134 See Horwitz 1997: 57, 59-60, 94 and 98-100 (the names of the persons involved in the 1797 mutiny in Simon's Bay). Peacock was the only naval prisoner in the Castle positively identified by the remaining graffiti.

Another mutiny, on board the naval vessel HMS *Hope* off the coast of Madagascar in May 1799, resulted in the ringleaders being tried and five of them being sentenced to death. Four of them – the execution of one of them, Joseph Peters, was suspended and he was recommended for mercy – were hanged on board the naval vessel HMS *Lancaster* in Table Bay in January 1800.¹³⁵

Military discipline was maintained by (regimental) courts martial.¹³⁶ Captain Robert McNab, who served at the Cape from 1795 to 1803, was in 1797 appointed deputy judge advocate and the next year judge advocate.¹³⁷

(To be continued)

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- 135 See NA, ADM 12/24 (*Digest of Admiralty Records of Trials by Court Martial, from 1 Jan 1755 to 1 Jan 1806* vol 4 (J-N), 479, concerning the “formidable mutiny” formed by a large number of the crew of the *Hope* for purposes of seizing command and running away with her. The ringleaders were hanged and lesser criminals punished suitably, great praise being due to Capt Brine, his officers and part of the ship’s company for their spirited exertions in suppressing mutiny). See, also, Theal 1897-1905 vol 3: 18 (letter Adm Curtis to Evan Nepean at the Admiralty, 6 Jan 1800, concerning the mutiny on board the *Hope* and the trial and execution of the offenders); Theal 1897-1905 vol 3: 74- 78 (letter Curtis to Nepean, 5 Mar 1800, reporting that the condition of the *Hope* was such that she had been surveyed and as a result put out of commission on 21 Dec 1799, her hull to be sold by auction). See, further, Wilkinson 2005: 163; Anon 1963, concerning the order book of the *Hope*’s captain at the time of the mutiny, Augustus Brine; Horwitz 1997: 61-62 for graffiti in the Castle (reading “HMS HOPE 1799”), presumably by the mutineers from the *Hope* during their long incarceration awaiting trial.
- 136 See Percival 1804: 313, explaining that after the cessation of martial law following on the British Occupation of the Cape, the provost martial only exercised jurisdiction over military crimes.
- 137 See Philip 1981: 258-259. In 1800 McNab was a member of the court martial investigating complaints against the director of military hospitals, Dr Edmund Somers: see Barnard 1973: 195; and see, further, n 269 *infra* in Part 2 of this article.

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