THE FIRST BRITISH OCCUPATION OF THE CAPE OF GOOD HOPE AND TWO PRIZE CASES ON JOINT CAPTURE IN THE HIGH COURT OF ADMIRALTY

JP van Niekerk (University of South Africa)

1 Introduction

The First British Occupation of the Cape of Good Hope in 1795, and in particular the battles of Muizenberg, in August and September 1795, and Saldanha Bay, in September 1796, have been well documented by historians, including naval and military historians.[1] Less well known, it seems, is that both naval battles gave rise to several legal battles in the High Court of Admiralty in London. Two of them concerned the issue of joint capture.[2] By way of introduction, though, some legal background for historians and some historical background for lawyers may be required.

The Admiralty Court in England[3] exercised its jurisdiction in three distinct areas, criminal (mainly concerning crimes committed on the high seas), instance (concerning civil disputes of a maritime character) and prize. In the first two areas, its jurisdiction was constantly challenged and by way of writs of prohibition gradually eroded by the common law courts. In matters of prize, it exercised an exclusive and, hence, largely unchallenged jurisdiction. This jurisdiction was exercised only in time of war and then, as also in the period under consideration here, became its most extensive and active jurisdiction.

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1 The literature is extensive. The following is but a small selection of – mainly local – works: Percival *An Account of the Cape of Good Hope* ... (1804) 22-40; James *The Naval History of Great Britain* vol 1 (1847) 300-302 and 372-374; Allardyce *Memoir of the Honourable George Keith Elphinstone* (1882) 83-103 and 104-132; Wagner *The First British Occupation of the Cape of Good Hope: 1795-1803: A Bibliography* (1946); De Villiers *Die Britse Vloot aan die Kaap 1795-1803* (1969) [published in no 32 vol I *Archives Year Book for South African History*] 1-12; Nel *Die Britse Verowering van die Kaap in 1795* (1972) [published in no 35 vol II *Archives Year Book for South African History*] 167 f; Boucher & Penn (eds) *Britain at the Cape 1795 to 1803* (1992) *passim;* Giliomee *Die Kaap tydens die Eerste Britse Bewind 1795-1803* (1975) 43-47 and 57-60; Potgieter *The First British Occupation of the Cape* (1995) *passim*. For a recent and highly readable account of the two confrontations, see Couzens *Battles of South Africa* (2004) 25-31 and 32-36 respectively.

2 Only De Villiers (n 1) 12 and 43 mentions the litigation and judgments involving the alleged joint captures, but does so with reference to secondary and non-legal sources and not always with great clarity or comprehension of the legal issues involved. Other reported judicial decisions arising from the British occupation of the Cape, too, have attracted little, if any, attention from local historians. They – or at least some of them, for I cannot claim to have traced them all – will be mentioned, if not then discussed in any detail, in the footnotes that follow (see, eg, notes 56 and 61).

3 See, generally, Roscoe *Studies in the History of the Admiralty and Prize Courts* (1932,

Prize jurisdiction concerned the validity of the seizure of enemy property at sea in time of war and, of importance for present purposes, the rights of captors to a portion of the proceeds. All rights of prize originally belonged to the Crown and others could acquire an interest only by way of a grant from the Crown. Such grants were first made to ships of war as an encouragement of sea service, so that if a capture was made by naval vessel at sea, the Crown and the Admiralty each received a share of prize. Later, by royal grant, the Admiralty alone enjoyed the benefit of all captures made by naval ships at sea during hostilities. Initially and well into the sixteenth century, the main function of the Admiralty Court was to ensure that the Crown and, through it, the Admiralty received their proper share of prizes rather than to adjudicate on the legality of the captures themselves.

At first prizes were not in fact formally condemned and the adjudication of prizes by the Admiralty Court did not occur as a rule.[4] Captors became compelled to bring prizes in for adjudication only by the end of the sixteenth century. The procedure for prize causes was fixed by an Order-in-Council in 1665 and subsequently repeated in various Prize Acts.[5] It was not until the eighteenth century that all cases of prize came before the Admiralty Court sitting as a prize tribunal.[6] By that time the Crown had come to grant rights to prize also to private captors to whom authority in the form of letters of marque had been issued – so-called privateers – and whose captures had been declared lawful prize by the Admiralty Court.[7]

During the course of the American War of Independence (1775-1783), the French Revolutionary Wars (1792-1802) and the Napoleonic War (1800-1815), the Admiralty Court exercised its prize jurisdiction almost continuously. Although the validity and legality of captures,[8] with the elements of international law (of war) and politics that entailed,[9] became the central focus of the prize law applied by the High Court of Admiralty, questions concerning the entitlement to and the division of the proceeds of captures continued to arise. A captured ship or cargo, brought into a British port and condemned as lawful

reprint 1987) *passim*.

4 See Bourguignon *Sir William Scott, Lord Stowell. Judge of the High Court of Admiralty, 1798-1828* (1987) 9.

5 Bourguignon (n 4) 11 and 27.

6 See Roscoe *Lord Stowell. His Life and the Development of English Prize Law* (1916) 19.

7 Roscoe (n 6) 30.

8 Involving legal issues such as visit and search, blockades and embargoes, and the doctrine of continuous voyage.

9 In particular, eg, questions of the nationality, belligerency and neutrality not only of ships and shipowners (merchants), but also of the goods (contraband) carried in them and of

prize by an Admiralty Court, constituted a cash fund to be divided amongst the officers and crew of naval vessels and the owners of privateering vessels involved in the capture. Disputes concerning entitlement and division arose not only between the officers and men of an individual capturing ship, but also in cases of joint capture by, for instance, naval and terrestrial forces, or by the Navy and privateers, or even by various naval vessels.[10] As will become apparent, this was an area of some complexity and confusion. For present purposes it may merely be observed that while the validity of the capture itself was governed by international law, the entitlement to a prize and the division of prize money between several captors, or between the individual elements making up a single captor, were governed by – English – municipal law.[11]

2 The two decisions on joint capture in the High Court of Admiralty

2 1 Their common features

The two cases of joint capture under consideration here were reported as *The Cape of Good Hope and Its Dependencies*[12] and as *The Dordrecht*.[13] They had several features in common which will be alluded to shortly. First, though, some chronological clarification. While the former decision concerned events (the Battle of Muizenberg in August 1795) occurring before those relevant to the latter (the Battle of Saldanha Bay in August 1797), the former was in fact heard and decided (on 10 December 1799) after the latter (on 9 July 1799). As this note is concerned with an analysis of the decisions in their historical context, and as precisely the same principle did not arise for decision in them so that there was no reference in the later decision to the earlier one, I will consider the cases in the sequence in which their underlying facts had occurred rather than in the order in which they were decided and reported.

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the trade carried on with them.

10 See Roscoe (n 6) 31-32.

11 More specifically Admiralty law applied in the case of a naval capture, or common law in the event of a capture on land. For the former, legislation, in the form of *Prize Acts*, continued to be passed with almost monotonous regularity. However, they were of prescribed application and had to be read in conjunction with royal Orders-in-Council issued at the commencement of a war, as well as with the subsidiary common law and naval usage and practice. Given its well-known civilian ancestry, English Admiralty law of course had much more in common with international law than did English common law.

12 (1799) 2 C Rob 274, 165 ER 314.

13 (1799) 2 C Rob 55, 165 ER 237.

Apart from the fact that both involved the Cape of Good Hope and the first British occupation of the settlement at the end of the eighteenth century, and that both concerned aspects of prize law and joint capture, the two cases also had other notable features in common.

First, they were both decided by the same judge, Sir William Scott, Lord Stowell (1745-1836).[14] Acknowledged as one of the greatest English civilian lawyers,[15] he achieved a reputation equal to that of Lord Mansfield. He contributed enormously in laying the foundations not only of the modern English law of Admiralty and prize law, but also, through his influence on and correspondence with Joseph Story, of the equivalent branches of American law, as well as, more generally, of the international law of war. The older brother of John Scott, later Lord Eldon, Lord Chief Justice of Common Pleas and Lord Chancellor of England, Scott obtained a doctorate in civil law at Oxford in 1779. In the same year he was admitted as a member in Doctors' Commons, the professional organisation in which were joined together advocates, the civilian equivalent of common-law barristers, who practiced in ecclesiastical courts, the Admiralty Court and other courts which administered civil law.[16] After seeing through the traditional "year of silence" during which time advocates had to attend but were not entitled to plead in court, he commenced practice as a civilian lawyer in the Admiralty and ecclesiastical courts. He soon became a leading advocate in Admiralty Court where, in the exercise of its prize jurisdiction, many cases arose as a result of the American War. Scott was soon appointed Advocate-General to the Admiralty in 1782 and then King's Advocate in 1788, a position which he held for ten years and which allowed him to share in prize money, a not inconsiderable annual amount given the prevalence of prize cases at the time. He was also knighted in 1788. The following year he was elevated to the bench of an ecclesiastical (matrimonial) court – the consistory court of the diocese of London, from which he resigned in 1820 – while continuing to practice in the Admiralty Court. Sir William Scott became a judge of the High Court of Admiralty in 1798, after 18 years of practice. Created Baron Stowell in 1821, he remained on that bench for 30

14 On Scott, see, in addition to Bourguignon (n 4) and Roscoe (n 6), also Melikan "Scott, William, Baron Stowell (1745-1836)" *Oxford Dictionary of National Biography* (2004) [http://www.oxforddnb.com/view/article/24935, accessed 1 July 2005]; Sankey "Lord Stowell" 1936 *Law Quarterly Review* 327; and Holdsworth *A History of English Law* vol 13 (1952, reprint 1966) 668-689.

15 See Holdsworth *Some Makers of English Law. The Tagore Lectures 1937-38* (1938) 227.

16 As to Doctors' Commons, see further Levack *The Civil Lawyers in England 1603-1641: A Political Study* (1973); Squibb *Doctors' Commons. A History of the College of Advocates and Doctors of Law* (1977); Coquillette *The Civilian Writers of Doctors' Commons,*

years until 1828 when he resigned for reasons of failing health.

A second common feature is that both decisions were reported by Christopher Robinson (1766-1833).[17] A distinguished and successful civilian practitioner, specialising in maritime law, and a member of Doctors' Commons to which he was admitted in 1796, Robinson was King's Advocate from 1809 until 1828 when he succeeded Scott and became a judge of the High Court of Admiralty. There he presided until very shortly before his death in 1833. During his period of office, no Prize Court existed and the workload in the Instance Court was much reduced. Robinson compiled the first regular series of reports of cases decided in the Court of Admiralty, covering the period 1799 to 1808. The two cases under discussion here were originally published in that series.[18]

The decisions further have in common that in both, the claimants – the Admiralty on behalf of East India Company ships in *The Cape of Good Hope*, and the Army in *The Dordrecht* – failed in the High Court of Admiralty in their attempts to qualify as joint captors and so to share with the Navy in prizes.[19]

2 2 *The Cape of Good Hope*

2 2 1 The factual background[20]

In February 1793 war broke out between France on the one side and Britain and Holland on the other side. France invaded Holland in 1794 and the Dutch surrendered early in 1795, under the influence of the republican and anti-royalist Patriots and with the Prince of Orange seeking and finding refuge in England.

London (1988).

17 On Robinson, see Courtney 'Robinson, Sir Christopher (1766-1833)' *Oxford Dictionary of National Biography* (2004) [http://www.oxforddnb.com/view/article/23833, accessed 1 July 2005]; Holdsworth (n 14) 432 and 689-691; Squibb (n 16) 196.

18 The series was entitled *Reports of Cases Argued and Determined in the High Court of Admiralty, 1799 to 1808*, 6 vols (1799-1808), 2nd ed 6 vols (1801-1808), and was reprinted in vol 165 of the *English Reports*. Robinson's (second) son, William Robinson, who was admitted to Doctors' Commons in 1830 (see Squibb (n 16) 200), also reported Admiralty cases in 3 vols (1844, 1848, 1852). These reports covered the period 1838-1850 and were reprinted in vol 166 of the *English Reports*.

19 They differ, though, in that in the first case the claim of joint captorship was by ships (it involved a dispute as to the division of prize money between merchant and naval ships), while in the second the claim was by land forces to share with naval forces (as opposed to a claim of different land forces to share in the booty captured by one of them).

20 The facts as they may be garnered from the arguments and the judgment in the case, while clearly relevant and while possibly revealing new angles to historians, do not provide the necessary background for those unfamiliar with circumstances at time. I have

On 3 April 1795, Vice-Admiral Elphinstone, Lord Keith,[21] sailed with a small squadron of six ships to the south Atlantic to prevent the increasingly strategic Dutch settlement – nominally it was a possession of the declining Dutch East India Company – at the Cape of Good Hope from falling into French hands.

Elphinstone arrived off the Cape on 10 June. There he was joined the next day by an advanced squadron of four ships which had left Portsmouth on 27 February under Commodore John Blankett. On board the squadron was a detachment of troops under Major-General Sir Henry James Craig. A third force of fourteen East India Company vessels with the main army of 2500 troops under Major-General Sir Alured Clarke was still en route via South America.

On 11 June, the fleet sailed round to safer anchorage and the more sparsely de-fended False Bay where Elphinstone, armed with a letter from the Prince of Orange, attempted to negotiate with the Dutch Governor Abraham Josias Sluys-ken. The latter was not immediately amenable and a stalemate ensued. After Dutch troops had withdrawn from Simon's Town to Muizenberg on 29 June, British troops were landed there. On 10 July, Elphinstone had seized as prizes in False Bay three Dutch East India Company ships (the *Willemstadt en Boetzelaar*, the *De Jonge Bonifacius*, and the *Gertruyda*) which had until then been prevented from departing, while two further ships (*Het Vertouwen* and the *Louisa Antonia*) were taken on 18 August.[22]

On 7 August, Elphinstone's ships bombarded the Dutch camp at Muizenberg and a landing force of 1000 marines and seamen under Craig advancing from Simon's Town persuaded the Dutch to abandon their camp and to fall back to Wynberg. However, the Dutch again refused British demands for their surrender. Further action was suspended until the arrival of the anticipated reinforcements as Elphinstone feared that any attack with the available force would be withstood and repelled by the Dutch.

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therefore supplemented them selectively from the authorities referred to earlier (n 1).

21 On the distinguished naval career of Elphinstone, see generally Owen "Elphinstone, George Keith, Viscount Keith (1746-1823)" *Oxford Dictionary of National Biography* (2004) [http://www.oxforddnb.com/view/article/8742, accessed 1 July 2005]; Allardyce (n 1).

22 See De Villiers (n 1) 5. Potgieter (n 1) 78 lists all five Dutch vessels as having been captured on the latter date. On the *Gertruyda*, see further n 56 below. For correspondence concerning the insurance of *Het Vertouwen* and the *Louisa Antonia* for her voyage from the Cape to England, and the division of the proceeds of these captured ships after their condemnation by the High Court of Admiralty as enemy property to the

On 3 September the troop reinforcements under Clarke arrived in False Bay. They had been transported by a convoy of non-commissioned East India Company ships under the command of Captain Rees. Bad weather delayed their landing for several days, but after the British force of more than 4000 man began advancing on Cape Town from Muizenberg on 14 September and camped at Newlands that evening, the occupation was all but accomplished. A number of ships under Blankett had been sent around to approach Cape Town from Table Bay and there, on 18 September, a further two Dutch East India Company ships (the *Castor* and the *Star*) were seized.[23]

On 16 September the Dutch forces surrendered to the British, all Dutch East India Company property being transferred to and the Cape of Good Hope being acquired for the British Crown, and not for the Prince of Orange and the Netherlands as was originally held out. The British occupation was aided, in no small measure, by the ill-prepared defences of the settlement,[24] the lack of sufficient and timeous intelligence from Europe about shifting alliances there, as well as the divided and uncertain loyalties of the local Dutch administration, military establishment and population.[25]

For those who had served in the British naval forces, there was the prospect of a share in what was expected to be prizes of some considerable value,[26] a benefit in which, it appeared, others too wished to share.

Crown, see PC 1/3477 (1800), in the National Archives, Kew, England.

23 As late as 20 October, the Dutch packet the *Maria Louisa* was still enticed into Table Bay with the usual (Dutch) signals from Lion's head and taken prize.

24 See Potgieter "Maritime defence of the Cape of Good Hope, 1779-1803" 2003 *Historia* 282.

25 See, in addition to the sources referred to earlier (n 1), also Potgieter "Verdediging van die Kaap in 1795: Vir Kroon of Patria?" 2001 *Historia* 189; Marnitz & Campagne *The Dutch Surrender of the Cape of Good Hope, 1795* (2002). Only the Pandour regiment seems to have offered any real resistance on the Dutch side, a historical fact largely overlooked by British and Dutch versions of the occupation: see further Henry C Jatti Bredekamp "The Battle of Muizenberg (1795): The Moravian missionaries and the telling of *Corps Pandouren* history" 1995 *Kronos* 36.

26 This is supported too by a letter written from Cape Town on 20 September 1795 by Captain John William Spranger (1768-1822) to his family in England – his father, John, was Master of the Court of Chancery in London, and a younger brother, Jeffrey, later became Master of the Court of Exchequer. In the letter Spranger expressed the hope that "our Prize Money will be something handsome as based on the value and importance of our Conquest ... [and as we] have detained several sail [of the Dutch] here ... some from Batavia are said to be very valuable". In a further letter, written the next day, he continued: "As to Prize Money, I can't say anything with certainty, but we shall get a Thousand Pds. I think at least ... several Dutch ships are in our hands and the stores, which by the capitulation are given to us, are of very considerable value": see "Letters from False Bay 1795-1798" 1982 *Bulletin of the Simon's Town Historical Society*

2 2 2 The claim and the legal arguments

The Admiralty, on behalf of certain East India Company ships, claimed an interest in the captures at the Cape of Good Hope. It did so by virtue of the fact that several non-commissioned ships belonging to the Company had allegedly assisted in that enterprise by carrying troops to the Cape and had in that way contributed to the capture in that their appearance had caused intimidation to the enemy.

Arguing the case for the claimants were two advocates,[27] the Advocate of the Admiralty[28] and Laurence.[29] Opposing them, on the side of the Crown, were the King's Advocate,[30] who at the time was Sir John Nicholl,[31] and Arnold.[32]

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27 Advocates were the civilian equivalent of common-law barristers. They practiced in ecclesiastical courts, the Admiralty Court, and in other courts which administered civil law. They occupied a high precedence in the hierarchy of the legal profession in the eighteenth century, above that of barristers. A possible reason was because they were required to be doctors of civil law of Oxford or Cambridge. Also practising in the Admiralty Court, were proctors, a lower branch of the civilian legal profession. They performed in civilian courts duties analogous to those performed in the common-law courts by attorneys and solicitors. These civilian practitioners came to be merged with their equivalent common-law counterparts in 1857 (in the case of the ecclesiastical courts) and 1859 (in the case of the Admiralty Court: see the *High Court of Admiralty Amendment Act*, entitled "[a]n Act to enable Serjeants, Barristers-at-Law, Attorneys, and Solicitors to practise in the High Court of Admiralty" (22 & 23 Vict c 6)). See further generally Holdsworth *A History of English Law* vol 12 (1938, reprint 1966) 4-14.

28 Many government departments had own legal sections with standing counsel. In the Admiralty, the Lord High Admiral too had his advocate. The Advocate-General to the Admiralty appeared for it in suits in which it was a party. See Holdsworth (n 27) 11.

29 French Laurence (1757-1809) was admitted as a member to Doctors' Commons in 1788. He was a leading civilian practitioner and a recognised authority on international law, as well as an active politician and an author of some literary repute. He was appointed a judge of the Court of Admiralty of the Cinque Ports in 1791 and regius professor of civil law at Oxford in 1796. In 1805, he served as a member of the committee to frame articles of impeachment against Henry Dundas, first Viscount Melville, Secretary of State for War and the Colonies 1794-1801, whose nephew, Francis Dundas, served in the military and later as Governor at the Cape during the first British occupation. On Laurence, see Lambert "Laurence, French (1757-1809)" *Oxford Dictionary of National Biography* (2004) [http://www.oxforddnb.com/view/article/16126, accessed 1 July 2005]; Holdsworth (n 14) 697; Squibb (n 16) 195.

30 The King's Advocate-General was the senior Crown law officer and the government's chief adviser on matters of civil, canon and maritime law. He appeared for the Crown in ecclesiastical and Admiralty matters, but was also consulted by the Foreign Office or, through it, by the Colonial Office on matters of international law (Holdsworth (n 27) 9-10). His office took high precedence in the hierarchy of the legal profession in the eighteenth century, above that of the common-law equivalent King's Attorney-General and his Solicitor-General (*idem* 6). There was also a King's Proctor (*idem* 12). After the merger of the civilian with the common-law practitioners in the Admiralty Court in 1859, and although for some time longer a King's Advocate and a King's Proctor continued to be appointed, the post of King's Advocate was not filled after the resignation of Sir Travers Twiss in 1872 (*idem* 6 n 5), while that of King's Proctor came to be combined with the post of Treasury Solicitor (*idem* 13). In a few cases, such as in *The Cape of Good Hope*, the Admiralty's Advocate and the King's Advocate represented opposing interests. See also, eg, *The Rebeckah* (1799) 1 C Rob 227, 165 ER 158, a case decided also by Sir William Scott just a few months prior to our two cases. In it he held that a capture made of an enemy ship in an open strait off the island of St Marcou (Îles St Marcouf), on the French coast, by crews of the King's naval ships, could not be condemned as a droit of Admiralty but as a prize to the actual captors. The reason was that the captured vessel

The main evidence in support of the claim by the Company's ships was:

- a letter of thanks written by Admiral Elphinstone "which acknowledges in the fullest terms the services of these ships, and the great assistance they afforded towards the reduction of the colony";[33]
- a letter from General Craig concerning the immediate effect of their assistance, namely that "the appearance of fourteen sail of large vessels"[34] had caused a planned Dutch attack on the British camp at Muizenberg to be abandoned;
- the fact that the effect of the arrival of troop reinforcements on the Company's ships was not accidental: the troops had been called for and their arrival from South America hastened by General Craig and he did not attack the settlement at the Cape until those reinforcements had arrived; and
- the fact that at the Cape the East India Company ships were under the orders of Admiral Elphinstone[35] and the whole mode of operations at the time showed that "they were considered in the nature of a combined force".[36]

These proofs, it was argued, established not only a constructive service but actual assistance, which was required to entitle non-commissioned ships to share in a prize. Further, it was pointed out that previous decisions of the

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had not (yet) arrived in a recognised roadstead or in a port (or places of safety) so as to bring her within the scope of the rights granted to the Admiralty in respect of captures.

31 John Nicholl (1759-1838) was admitted as an advocate in Doctors' Commons in 1785 (his son, also John, was admitted there in 1826) and he was its president from 1809 to 1834. Having been turned down for the post of Admiralty Advocate in 1791, he succeeded William Scott, his mentor and lifelong friend, as King's Advocate in 1798 and was in turn succeeded in the post in 1809 by Christopher Robinson. A parliamentarian for many years (1802-1832), he was one of the founders of King's College, London, in 1824. In 1833 Nicholl succeeded Robinson as judge in the Admiralty Court where, despite increasing deafness, he sat until his death. He was also the author of unpublished notes on arguments and decisions in the High Court of Admiralty covering the periods 1781-1792 and 1793-1797 and in Prize Appeals covering the period 1794-1817. On Nicholl, see Escott "Nicholl, Sir John (1759-1838)" *Oxford Dictionary of National Biography* (2004) [http://www.oxforddnb.com/view/article/20105, accessed 1 July 2005]; Holdsworth (n 14) 691-696; Squibb (n 16) 117 195; Bourguignon (n 4) 41-42 130 141-142 293.

32 James Henry Arnold was admitted to Doctors' Commons in 1787. Like his senior in the *Cape of Good Hope* matter, Nicholl, he compiled unpublished notes of arguments and decisions in cases decided in the High Court of Admiralty and also of Prize Appeals before the Lords Commissioners, covering the period 1787-1797. On Arnold, see Squibb (n 16) 195; Bourguignon (n 4) 41-42 145.

33 *The Cape of Good Hope* (n 12) 274-275, 314.

34 *The Cape of Good Hope* (n 12) 276, 314.

35 They were, for instance, particularly directed to wear pennants – that, it was suggested, was "an acknowledged mark of an adoption into the military character" (277, 315) – and Elphinstone ordered Captain Rees to supply the men necessary for an operation involving one of the Company's vessels and designed to divert enemy attention to Table Bay.

36 *Idem*.

Admiralty Court[37] had allowed non-commissioned ships to share in a prize in cases of actual assistance in the form of joint chasing where there was nothing more than proven intimidation of the enemy. These decisions showed that the legal principle was that "[a]ssociated actual services are of a competent nature without a personal interposition in the act of capture". In the present case the acts of assistance were undeniably sufficient to entitle the Company's ships to be regarded as an associated force and to justify the application of the relevant legal principle: "All the intimidation that can in any case be derived from an associated force, was produced in this instance; it was the cause that induced the enemy to relinquish their hopes of defence; it was materially instrumental to the surrender that took place."[38]

On behalf of the Crown it was contended that the Admiralty had not established that there had been any association of a military character on the part of the East India Company vessels which had produced the alleged intimidation. The ships in question, so it was argued, were merely transports and not ships of war.[39] It had been established in an earlier decision "that ships in the character of transports *cannot* share".[40]

As to the evidence presented in favour of the claim, the Crown argued that the evidence in actual fact showed that in postponing further action, General Craig had waited not for the arrival of the Company's ships, there being at the time already sufficient men-of-war in False Bay under the command of Admiral Elphinstone, but for the troops conveyed in them. The ships themselves were therefore neither of a military character nor did they produce any intimidation. The fact that they hoisted pennants did not change their character and legally they remained transports. Likewise, the orders directed to Captain Rees by Admiral Elphinstone were not like – nor in the same form as – the orders issued to men-of-war and they were complied with voluntarily. Finally, Admiral Elphinstone's letter was no more than "a general expression of thanks in the hour of triumph" and could not grant an interest in the prize beyond that permitted in law on the facts.

37 In *The Twee Gesusters* (1780) 2 C Rob 284n, 165 ER 317n and *The Le Franc* (1793) 2 C Rob 285n, 165 ER 318n.
38 *The Cape of Good Hope* (n 12) 278, 315.
39 That is, they were neither naval vessels nor private ships of war actually commissioned against the Dutch.
40 *The Cape of Good Hope* (n 12) 278, 315.

In summary, the Crown suggested, in the case of non-commissioned vessels, a claim for mere contractual assistance could not succeed. And in the present case there was insufficient evidence of any active co-operation or any actual assistance in the capture to sustain a claim on that basis. Therefore, it concluded, the Court should reject the Admiralty's claim for a lack of proof.

2 2 3 The decision

Sir William Scott agreed with the arguments presented by the Crown and rejected the Admiralty's claim on behalf of the East India Company's ships to share in the prize; the allegation of a joint capture was therefore not allowed. He commenced his judgment by observing that there was no doubt "that the East India Company have performed services in respect to this expedition, which may entitle them to the thanks of their country; yet the question of legal merit, whether they will be entitled to share in the proceeds of this prize, will depend on very different considerations".[41]

Firstly, the Court considered the character of the East India Company vessels. There was no direct evidence showing that they had been contracted to act in a military capacity, that is, that they had been commissioned. If there were, Scott thought, "that might nearly decide the question".[42] Their general character showed that they were merchant ships which had no commission against the enemy in question; they were merely transport vessels and were not invested with any military character as far as the present expedition to the Cape was concerned. Likewise, no such character was subsequently impressed on them by virtue of the nature and course of their employment during the expedition. Their mere association with the King's fleet was insufficient. What was required was an association in a directly military capacity. As the mere transport of stores or troops, they were no doubt associated with the Fleet and the Army and their naval and military activities, but that was not enough: "[T]hey do not rise above their proper mercantile character in consequence of such an employment; the employment must be that of an immediate application to the purposes of direct military operations, in which they are to take part."[43]

Secondly, the Court considered the argument – not pleaded and therefore not responded to by the Crown but coming out in evidence – that the Company

41 *The Cape of Good Hope* (n 12) 280-281, 316.
42 *The Cape of Good Hope* (n 12) 281, 316.

ships were actually employed in military service in that their boats carried on shore not only troops but also provisions and military stores. That, the Court thought, was insufficient and "not a service beyond the common extent of transport duty";[44] it was no more than what they were bound to do with the stores and provisions they carried. The Court likewise rejected the argument that the ships had received military orders and that that was material in showing that they had assumed a military character. Apart from the vessel sent to create a diversion in Table Bay,[45] there was no evidence in this case of orders having been given by Admiral Elphinstone in his communication with Captain Rees in any manner other than they would have been given had the vessels in question been mere transport vessels. There was, in short, no evidence that any military order had been given to and received by the East India Company ships. There was, at most, an invitation to Captain Rees to supply volunteers "rather than ... an exercise of authority and command".[46] Then, as to the argument concerning the fact that the vessels had carried pennants, the Court held that "the mere circumstance ... that these ships, which were large ships ... were desired to hoist [pennants]" was not "sufficient proof that they were by that act taken and adopted into the military character".[47]

The next, and main, ground on which the Court rejected the Admiralty's claim, concerned the argument that it had been established that the vessels in question had been actually proven to have intimidated the enemy and, that being the case, that "the assistance arising from intimidation is not to be considered as constructive merely, but an actual and effective co-operation"[48] and, hence (it may be added), that is was sufficient to enable non-commissioned vessels to share in the prize.

The Court rejected this deduction as unsound. Actual intimidation, it suggested, did not invariably arise in instances of co-operation or active assistance. It might equally well arise in cases where there was nothing more than an inactive presence. And in those cases, Scott continued, "there would not be that co-operation, nor that active assistance which the law requires, to entitle

43 *The Cape of Good Hope* (n 12) 282, 317.
44 *The Cape of Good Hope* (n 12) 289, 319.
45 Scott thought that that was sufficient to clothe her with a military character, given that she was engaged in a military employment and exposed to danger, and that he would undoubtedly allow that vessel to share in the prize: see *The Cape of Good Hope* (n 12) 280, 316 and 289, 320.
46 *The Cape of Good Hope* (n 12) 290, 320.
47 *The Cape of Good Hope* (n 12) 289, 319.
48 *The Cape of Good Hope* (n 12) 282, 317.

non-commissioned vessels to be considered as joint captors".[49]

In the present case the Company vessels in question were entirely unconscious of such intimidation as there was on the Dutch forces, and it could in any event have been produced just as effectively by a fleet of mere transports or by any number of large ships, known to be British and not known to be merchantmen: "[T]he intimidation was entirely passive, there was no *animus* nor design on their part, not even knowledge of the fact."[50] There was simply no precedent for a non-commissioned vessel being able to rely on terror excited in this fashion.[51]

Lastly, as to Admiral Elphinstone's letter, so heavily relied on by the Admiralty, the Court thought that it could not be considered conclusive evidence on the question before it, namely whether the transports contributed to the surrender. Even if it were taken to show his opinion on the matter, it might be factually an erroneous opinion and can therefore not be taken as conclusive as against the other parties involved and on the point of law at issue, namely the legal effect of the services provided by the Company ships. In any event, the Court thought that the letter may well be regarded as no more than a general expression to the ships of thanks for the services they had performed as transports.[52]

The Court therefore concluded that "however meritorious their services may have been, and however entitled they may have been to the gratitude of the country, it will not entitle [the East India Company ships] to share in this valuable capture".[53]

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49 *The Cape of Good Hope* (n 12) 283, 317.

50 *Ibid*.

51 Even the reference to the two cases of joint chasing (*The Twee Gesusters* and *The Le Franc* (n 37)) and the argument that the present case was one of assistance analogous to that of joint chasing, did not aid the Admiralty in its case. In the Court's view the analogy could not be supported. In both those cases the assistance by the non-commissioned ships (ie, the joint chasing) was rendered *animo capiendi* and contributed materially, directly and immediately to the act of capture. In the present case the East India Company vessels never had any *animus capiendi* nor any hostile purpose; they were in fact totally ignorant of the objects of the expedition. Furthermore, the Court observed, cases of joint chasing at sea – where there is an overt act of pursuing from which the actual purpose of the party involved may be ascertained – differed materially from cases of conjunct operations on land – where the mere intrusion even of a commissioned ship will not entitle her to share and where the voluntary interposition and intrusion by a non-commissioned ship or privateer can in any event on grounds of public policy and convenience not entitle her to participate in military operations and to acquire an interest in the prize given to the Fleet and the Army. This difference rendered analogous applications of the one to the other dangerous. "I think, therefore", Sir William Scott concluded, "that the cases of chasing at sea, and of conjunct operations at land, stand on different principles; and that there is little analogy, which can make them clearly applicable to each other" (288, 319).

52 See *The Cape of Good Hope* (n 12) 291, 320.

53 *Ibid*.

In summary, the Court in *The Cape of Good Hope* held

- that the Company vessels were not proven to have been either commissioned or clothed with a military character so as to entitle them to share in the prize on the basis of a constructive service only: "[I]t has not been shewn that these ships set out in an original military character; or that any military character has been subsequently impressed upon them by the nature and course of their employment";[54] and
- that those vessels had not provided associated, actual and active assistance or service, so as to entitle them as non-commissioned vessels to share in the prize as joint captors; that such intimidation as they had caused occurred without any personal action or interposition and without the required awareness, knowledge and intention on their part; and that their mere passive presence was insufficient to qualify as the co-operation or active assistance required in these cases.

On 24 May 1802, Sir William Scott's decision in *The Cape of Good Hope* was affirmed on appeal by the Lords Commissioners of Appeal in Prize Causes.[55] The decision confirming the entitlement of the Crown and, through it, of the Navy alone to the capture was, however, not the end of the legal disputes arising from the British occupation of the Cape. Apart from disputes about the validity of the capture of ships and cargoes taken by the British at the Cape both prior and subsequent to the capitulation,[56] the entitlement to the "booty of war"[57] captured on the occupation of the Cape itself (that is, Dutch public

54 *Ibid*.

55 See 6 C Rob ix 165 ER 827, where the affirmation is merely mentioned.

56 See, eg, the following four cases. In *The Danckbaar Africaan* (1798) 1 C Rob 107, 165 ER 114 it was held that goods sent from a hostile colony (Batavia) to merchants at the Cape on a Dutch ship did not change their (enemy) character in transit even though the consignees had become British subjects in consequence of the capitulation and even though the goods had been captured only after that capitulation. In *The Herstelder* (1799) 1 C Rob 113, 165 ER 116 it was decided that hostilities against the Dutch declared on 15 September 1795 (with the settlement surrendering the next day) applied retrospectively to a Dutch ship and goods captured by the British in August during the doubtful state of affairs that preceded that declaration. In *The Gertruyda* (1799) 2 C Rob 211, 165 ER 292 (and see also n 22 above) it was held that Dutch ships detained in port at the Cape before the declaration of hostilities against Holland, were validly taken as prize but belonged to the Crown and not to the Admiralty. And in *The Haase* (1799) 1 C Rob 286, 165 ER 179 it was determined that the proceeds of a Dutch ship, bound from Batavia to the Cape with gunpowder "to be distributed among the black settlements at the Cape of Good Hope, for the purpose of annoying the Cape", captured by a non-commissioned, private ship of war and condemned as lawful prize, belonged as a whole to the owners and crew of the capturing vessel.

57 The term "booty" ordinarily referred to captures on land and not at sea and by terrestrial forces exclusively: see, eg, the *Stella del Norte* (1805) 5 C Rob 349, 165 ER 801. In the decision in *Banda and Kirwee Booty* (1866) LR 1 Adm & Ecc 109 (HCA), it was held that the Court of Admiralty only acquired jurisdiction in respect of booty by statutory enactment in the form of the *High Court of Admiralty Act* 1840 (3 & 4 Vict, c 65) and that prize cases at most provided analogous assistance in booty cases. See further n 109

property) caused further legal dispute.

It appeared that the British Crown had, on the advice of the War Office, by warrant granted the property captured at the Cape of Good Hope subsequent to 15 September 1795 in trust to Admiral Elphinstone and General Clarke,[58] the two commanders-in-chief. They had to pay and distribute the proceeds to the captors in the manner specified. When a difference of opinion then arose between the two sets of attorneys appointed by the two officers to execute the object of the trust, they were obliged to seek a legal opinion from Edward Law, later Lord Ellenborough.[59] In an opinion dated 4 December 1801, he advised that the warrant in question constituted the two officers joint trustees for both services, without any distinction between the Navy and the Army; that as their authority was joint, they could not appoint separate (sets of) attorneys to execute the trust on their behalf; and that it would be expedient for the two separate sets of attorneys of the two officers to have new joint powers granted to them by the officers jointly and to receive from them a ratification and confirmation of what they had already done.[60]

For the British Navy, therefore, its involvement and exertion in the occupation of the Cape of Good Hope was not without its reward. For his efforts, and despite his personal involvement in yet further legal proceedings concerning the Cape prizes,[61] Admiral Elphinstone, for example, received by way of prize money no less than the quite princely sum of £64 000.[62]

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below.

58 And, according to De Villiers (n 1) 12, also to General Craig.

59 On Ellenborough (1750-1818), who was a King's Counsel at the time and who became Chief Justice of the King's Bench in 1802, see Lobban "Law, Edward, first Baron Ellenborough (1750-1818)" *Oxford Dictionary of National Biography* (2004) [http://www.oxforddnb.com/view/article/16142, accessed 8 July 2005].

60 For this opinion, see 2 Dods 492n, 165 ER 1557n. See also *Tarragona* (1821) 2 Dods 487, 165 ER 1555, confirming that in the case of a joint naval and military entitlement to booty (or prize), there ought to be a joint and concurrent appointment of trustees or their deputies and a joint and concurrent distribution by them.

61 See, eg, *Dutch Commissioners v Lord Keith*, referred to in *The Narcissus* (1801) 4 C Rob 17, 165 ER 520 in note (b), where the prohibition requested by the Commissioners against Elphinstone, proceeding in the Admiralty Court on ships seized at the Cape of Good Hope prior to the commencement of hostilities but brought to England afterwards, was refused. It was held that the Commissioners were under the wrong impression that their authority extended to the care of all Dutch property brought into England after the war. In *Collett & Another v Lord Keith* (1802) 2 East 260, 102 ER 368, which involved an action of trespass *vi et armis* for the seizure and taking of a ship and goods belonging to the plaintiffs at the Cape of Good Hope, Elphinstone's plea of justification, viz that the property in question had been seized under process and within the jurisdiction of the Cape Supreme Court of Judicature, was rejected as too general. And in *Lord Keith v Pringle* (1803) 4 East 262, 102 ER 830, Elphinstone was unsuccessful in claiming a share, and in preventing his successor as commanding officer of the station at the Cape from claiming his share as chief flag officer, in the prizes taken there after his (Elphinstone's) departure for England.

2 3 *The Dordrecht*

2 3 1 The factual background[63]

Less than a year after the occupation of the Cape, a further event occurred there which gave rise to a second claim in the High Court of Admiralty for the sharing of prizes. This time it was a claim by the Army to share in prizes captured by the Navy, a contentious issue over many years.[64]

After the surrender of the Cape, the settlement was left in the charge of General Craig, with a garrison of less than 3000 men and the few ships under Commodore Blankett that had remained behind. Admiral Elphinstone had sailed with most of his ships for India in November 1795 to seize Dutch settlements in India and on Ceylon. On the receipt of intelligence that a Dutch expedition, supported by the French, could be sent to secure the Cape, Elphinstone was recalled. He returned to the Cape in May 1796. There he joined up with the ships left behind as well as with reinforcements sent from England to form a naval force of eight gunships and six frigates and sloops to counter any offensive from a combined French-Dutch fleet.

The Dutch fleet, under the command of Rear Admiral Engelbertus Lucas, sailed too late, in February 1796, to secure the Cape and was therefore insufficiently equipped and manned to recapture it from the British.[65] Further and apart from being greatly inferior to the British naval presence at the Cape, the promised French naval support, after a delayed departure from Europe, never rendezvoused with the Dutch squadron as arranged but sailed past the Cape to Mauritius. Encountering storms, illness and dissent – on the part of Orange-supporting seamen against the Patriot officers – en route, the Dutch squadron of eight, mostly small, ships, including the flag ship the *Dordrecht* and a transport vessel with a small contingent of troops, arrived at the Cape only on 6 August. There it sought shelter, and was subsequently discovered by the British, in Saldanha Bay, north of Cape Town.[66]

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62 See De Villiers (n 1) 12.

63 See n 20 above.

64 In *La Bellone* (1818) 2 Dods 343, 165 ER 1508 at 350, 1510, for example, it was observed that "[i]t long remained a subject of some uneasiness between the two services, what was the claim of the military force acting with the navy on conjunct expeditions".

65 Quite amazingly, Admiral Lucas was never informed by the new Dutch government of the changed circumstances at the Cape before his departure.

66 On the diplomatic background as well as for information on the preparations for Lucas's voyage, its prosecution, the fleet's anchoring in Saldanha Bay, the surrender to the

General Craig immediately dispatched Captain Robert M'Nab[67] with a small advance land force of about 40 mounted men from Cape Town to Saldanha Bay. They were to station themselves there to watch the movements of the Dutch and to provide, together with the main contingent of 2500 soldiers and guns which was to follow, such support as may be required by the Fleet.

Elphinstone's naval force blocked off the entrance to Saldanha Bay. It was so overwhelming in gun power, and such was the anticipated support of the British land forces, which had arrived there from Cape Town on 16 August, combined with the nuisance caused by the advance party under Captain M'Nab which had fired some shots at one of the Dutch ships too close to shore and had hindered Dutch attempts to obtain supplies from locals ashore, that the Dutch were persuaded to surrender without firing a shot on 17 August 1796. The Dutch officers were sent back to Holland for trial before a Hoogen Zeekrijgsraad in The Hague, where they were acquitted.[68] The crews mostly agreed to be pressed into the Royal Navy or to serve on East India Company ships with only the few who refused being taken prisoner of war. The nine captured ships, including the *Dordrecht*,[69] were declared prize and taken to Table Bay, subsequently to be taken up into the British Navy.[70]

The "battle" of Saldanha Bay was, in all respects a misnomer and involved, so the Navy thought, a most fortuitous acquisition of prize money for its officers[71]

British and the subsequent court-martial, see Mile *De Geheime Onderhandelingen tusschen de Bataafsche en Fransche Republieken van 1795 tot 1797 in verband met de Expeditie van Schout bij Nacht E Lucas naar de Kaap de Goede Hoop* (1942), relying mainly on Dutch sources.

67 M'Nab was stationed at the Cape from 1795-1802 as lieutenant and from 1802-1803 as captain. In 1797 he was appointed deputy Judge Advocate and received a full-time appointment in that capacity in 1800: see Philip *British Residents at the Cape 1795-1819. Biographical Records of 4800 Pioneers* (1981) 258-259.

68 Admiral Lucas died on 21 June 1797, before the verdict.

69 The other Dutch ships taken prize, apart from the 66-gun *Dordrecht*, were the 66 gun *Revolutie*, the 54-gun *Maarten Harpertsz Tromp*, the 40-gun *Castor*, the 40-gun *Braave*, the 26-gun *Sirène*, the 24-gun *Bellona* and the 18-gun *Havik* plus an armed merchantman the *Vrouw Maria*. All were copper-sheathed and in good condition.

70 The capture of other ships during this operation also gave rise to litigation: see *Wilson v Marryat* (1798) 8 TR 31, 101 ER 1250, concerning the insurance of an American ship captured by Elphinstone in Simon's Bay on 2 August 1796 on suspicion of being an illicit trader.

71 After Admiral Elphinstone's arrival back in England, he was created Lord Keith in March 1797. In June of that year he was sent to the Nore to assist in putting down the naval mutiny that had erupted there. He was accused by the mutineers' delegates of withholding their Cape prize money, but was able to assure them that he had not yet himself received any share of it, after which the mutineers in question surrendered. Elphinstone retired from the Royal Navy only in 1815, on the termination of the Napoleonic War, having commanded all three main fleets (in the Channel, the North Sea and the Mediterranean) and having made a handsome fortune – perhaps more than any other naval officer – from prize money in his capacity as commander in chief which entitled him to a large share of the prize money awarded for ships and other enemy property captured by vessels within his command. See further Owen (n 21).

and crew. However, the Army had other ideas.

2 3 2 The claim and the legal arguments[72]

The Army under General Craig claimed to have co-operated in the capture of Admiral Lucas's fleet and thus to being entitled to share in the proceeds of the Dutch ships taken prize.

Appearing for the Army were advocates Arnold[73] and Swabey,[74] while the King's Advocate[75] represented the Crown.

In what was referred to by the Court as "an elaborate argument for the army with much attention",[76] the Army conceded a number of points[77] before stating the crux of its argument. That was "that the army contributed to the intimidation of the enemy, that the capture was occasioned partly by that intimidation, and therefore that the army are entitled, in virtue of that effective assistance, to be considered as joint captors".[78]

Proof of this was sought in the opinions of the captured Dutch themselves, the most credible of witnesses given their lack of bias towards the parties involved, if not the only witnesses who could testify as to whether the force claiming a share in their capture did in fact play any part in inducing them to surrender. Admiral Lucas and the other Dutch officers had in fact acknowledged and testified that it was largely from their apprehension of the Army that they decided, by way of a council of war held on board the Admiral's ship, to surrender to the British and not to run their ships ashore to prevent them falling

72 In the report, the Army's claim is reported after the Crown's refutation of that claim. To facilitate the present discussion, I have reversed this sequence.

73 Arnold also appeared in the *Cape of Good Hope* matter (see n 32 above). However, there he appeared with the King's Advocate and for the Crown; here he was against the King's Advocate.

74 Maurice Swabey (d 1826) was admitted to Doctors' Commons in 1789: see Squibb (n 16) 195; Bourguignon (n 4) 43. His son, Maurice Charles Swabey, admitted to Doctors' Commons in 1850 (see Squibb (n 16) 203), was the editor of a series of reports covering Admiralty cases for the period 1855-1859 (which have been reprinted in vol 166 of the *English Reports*), and also – with Thomas Hutchinson Tristram, another and in fact the last surviving member of Doctors' Commons, having been admitted in 1855 (Squibb (n 16) 203) – of a series of reports of probate and matrimonial causes for the period 1858-1865 (which have been reprinted in vol 164 of the *English Reports*): see Holdsworth *A History of English Law* vol 15 (1965) 262-263.

75 See n 30 above.

76 *The Dordrecht* (n 13) 63, 240.

77 Namely that it could not alone have taken possession of the Dutch squadron, that the Fleet itself was sufficient to have made the capture, and that the actual and formal surrender was made to Admiral Elphinstone without any mention of General Craig or the land forces under his command.

78 *The Dordrecht* (n 13) 58, 238.

into enemy hands.

Furthermore, additional evidence showed the part played by the Army in taking preparatory measures which contributed to the success of the capture. For instance, the Army had gathered intelligence of the arrival of the Dutch squadron, which was passed on to the Admiral so as to enable the latter to capture the ships. The Army had also dispatched a small advance detachment, followed by a larger, armed force, to Saldanha Bay. It had harassed the enemy in their operations and prevented them from obtaining water and other supplies from shore. And it had also prevented communication between the squadron and the shore by which the Dutch could be informed that an English fleet of superior force was en route, as a result of which information the Dutch may well have escaped or run their ships ashore. Also, the advance guard had cannonaded one of the Dutch ships close to shore from which she received considerable damage.

That these operations contributed very materially to the capture, the Army's argument continued, appeared from the fact that the Dutch surrendered relatively soon after the arrival of Admiral Elphinstone with his fleet. The Dutch testified that given the position of the Army on land, they had perceived it impossible to run their ships on shore[79] without exposing the crews to attack from the Army, a perception in fact strengthened by a letter sent to the Dutch by General Craig warning them that no mercy would be shown if they were to run their ships ashore. Soon after the receipt of this letter, they in fact acceded to the terms of capitulation proposed by Admiral Elphinstone.

As no engagement took place between either the Navy or the Army and the Dutch, the Army continued, the Navy's force itself "was a force of intimidation only; it was a force which was only represented and displayed; the force of the army was displayed likewise, and with effect, in this denunciation".[80] In short, so the argument ran, "the army were materially instrumental, in producing what is stated to have been a chief cause of the surrender".[81]

Interestingly enough, the only authority to which the Army could refer – although it conceded that the case was probably not on a par with the present

79 After resisting enemy attack, that being the next duty incumbent upon the Dutch, namely to diminish the benefit of the victory to the enemy as much as possible by destroying their ships.

80 *The Dordrecht* (n 13) 62, 239.

one – was to a decision by the Lords Commissioners of Appeal in Prize Cases delivered on 30 June 1786.[82] The decision was that in *The Hoogkarspel*.[83] It is of interest in that the capture there, in 1781, of Dutch ships by a British squadron, had also taken place in Saldanha Bay. And there the Army, operating by their presence on shore, was considered as a part of the capturing force and the capture was held to have been a joint capture even though the Fleet alone had taken possession of the Dutch ships.[84] That decision meant

81 *Ibid*.

82 See *The Dordrecht* (n 13) 62-63, 239.

83 Various spellings are encountered: *Hoogkarspel*, *Hoogkarspee*, and, most frequently, *Hoogskarpel*. The first is probably the correct one (and the one I will use for the sake of uniformity), being the name of a small town in the district of Drechterland in north Holland, between Enkhuizen and Hoorn on the Ijsselmeer; nearby there is a town called Bovenkarspel.

84 In December 1780, the Dutch joined the French and the Americans in their war against the British. A privateering enterprise – the ships did not sail under orders from the Admiralty but did have the backing of the Crown and sailed under the King's orders – under Commodore (Captain) George Johnstone left Portsmouth in March 1781. Comprising more than 40 (private but armed) ships, including thirteen East Indiamen sailing under convoy, with a compliment of troops under Major-General William Meadows on board some of the transports in the squadron – the enterprise being a joint sea and land operation – the contingent made for the Cape of Good Hope. It had (again) become of strategic importance as a port of call and replenishment for the India trade. Also setting off for southern waters from Europe at this time was a fleet of French ships under Commodore Pierre André de Suffren. The settlement at the Cape itself was ill protected. Governor Joachim van Plettenberg was able to do no more than protecting passing Dutch ships from capture by either sending them away from the Cape or hiding them in suitable bays around the peninsula while hoping for the arrival of French support. Although the French squadron arrived at the Cape in False Bay before the English, a home-bound convoy of five Dutch East India Company ships seeking shelter in Saldanha Bay (including the *Hoogkarspel*, master Gerrit Harmeyer who was also in command of the convoy, and with instructions to destroy their ships if they were in danger of falling into enemy hands), were surprised by the British fleet (flying French colours) there on 21 July. The Dutch set fire to their ships and swam ashore. There, later, they were pursued by a company of British troops from the fleet and driven by broadsides from the British ships to retreat to Cape Town. Four of the five Dutch ships were taken prize and their fires doused before too much harm could be done to their valuable cargoes. However, the British were unable to extinguish the fire on board the fifth vessel, the *Middelburg*, which was subsequently destroyed with everything on board, including the papers and collections of one of her passengers, the French traveller and botanist François le Vaillant. Without attacking the inferior French squadron in False Bay, Commodore Johnstone returned to England with his prizes, no doubt to have them declared valid by the High Court of Admiralty. At St Helena all but two of the vessels, the *Hoogkarspel* and the *Paarl*, were destroyed by a hurricane. On an appeal from the High Court of Admiralty, which had allowed the Army an interest in the capture, the Lords Commissioners decided (see *Home v Earl of Camden* (1795) 6 Brown 203, 2 ER 1028) that as this was a conjunct expedition and as the troops had taken part in the affair at Saldanha Bay (even though they had been landed only two hours after the Dutch ships had been taken), the prize did not come within the Prize Act then in force (which applied to naval captors only and further applied only when they had acted alone). In short, the co-operation of the Army deprived the privateering vessels of any title and the whole valuable property (it had been insured as prizes with Lloyd's for £1 700 000) was claimed by and allowed to Crown. The captains of Commodore Johnstone's squadron were deprived of their hopes of prize money and could do no more than rely on royal bounty for whatever compensation the Crown thought appropriate. For further information on the (first) battle of Saldanha Bay, see Couzens (n 1) 17-24; Rutherford "Sidelights on Commodore Johnstone's Expedition to the Cape" 1942 *Mariner's Mirror* 189-212 290-308; Potgieter (n 24) 289-290. For further litigation involving a claim by a captain of one of the ships in Johnstone's expedition to share in the prizes despite the fact that his command had been suspended and that he was under arrest for disobedience at the time although he was subsequently acquitted of all charges, see *Lumley v Sutton* (1799) 8 TR 224, 101 ER 1358.

that neither the naval nor the military force was entitled to share in the prize.[85]

Nevertheless, the Army concluded, even in absence of a precedent, on the general principles of joint capture – namely "that those who are present, and contributing to the surrender, although they do not concur in the act of seizure, are yet to be considered as joint captors"[86] – it was entitled to share in the captured Dutch ships.

In countering the Army's claim, which was considered unprecedented, the King's Advocate at the outset stressed two reasons why the Navy alone was entitled to the benefit of the capture. Firstly, it was a capture of ships at sea, in no way protected by any land forces; and secondly it was made by the Fleet at sea and was thus to be considered a pure naval prize.

The point was made that to support the principle of joint capture between the Navy and the Army, it had always been required that some direct and actual assistance be shown to have been given not merely for the purpose of preventing the destruction but for the purpose of compelling the surrender of the enemy ships. Here, the evidence clearly showed that there was no such assistance nor was it even proven that there had been any contribution (pre-concert) by the Army to prevent the destruction of the Dutch fleet.[87] In short, it appeared from the evidence "that in fact the surrender was to the British fleet alone; that the British fleet was abundantly competent to enforce the surrender; that the army did not, and could not have annoyed her fleet; that the inducement arising from intimidation from the army is a mere afterthought".[88]

Thus, the King's Advocate concluded, in view of these facts and in the light of the principles governing joint captures, the Amy was not entitled to be considered as joint captors.

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85 For an explanation of this consequence of the finding of a joint capture in *The Hoogkarspel*, see further n 120 below.

86 *The Dordrecht* (n 13) 63, 239-240.

87 Thus, such intelligence as there was from the Army, did not in any way facilitate the capture and was not only inconsequential but was in any event general knowledge or came from naval sources; the shots fired on the Dutch vessel near the shore merely caused an annoyance; evidence from the Dutch themselves indicated that had Fleet not been there, they would merely have stayed out of reach of the Army ashore; the Dutch had decided to surrender, if they had not actually surrendered, before the letter from General Craig arrived; and the Dutch themselves ascribed the main reason for their surrender to have been the superior naval strength of the British if not also the mutinous disposition of the Dutch seamen.

88 *The Dordrecht* (n 13) 59, 238.

2 3 3 The decision

Sir William rejected the Army's claim to share in the prize for having acted as joint captors of the Dutch fleet in Saldanha Bay.

The Court first set out the principles governing cases of joint capture. These were as follows

- The case did not come within the provisions of the applicable *Prize Act*[89] which directs that the British Army was to share, in a number of specified cases of which this was not one,[90] in conjunction with the Fleet.
- The case was not one of "concerted operations" – as *The Hoogkarspel* may have been[91] – as whatever was done here was "done separately, and without concert or communication".[92] There was clearly no pre-concert here and that angle had rightly been abandoned by the Army in arguing its case.[93]
- The burden of proof was on the Army to make out a case of joint capture "and to shew co-operation on their part, assisting to produce the surrender".[94] As the surrender here was to the Fleet which then took possession of the Dutch ships, "the presumption is on the side of the actual captor"[95] and the Army as the party claiming an interest in the joint capture had to present clear and consistent evidence to prove that there had been an actual co-operation on their part. In short, the burden of proof was on the party claiming as a joint captor against the party who was the actual captor.
- As far as the burden of proof on the Army was concerned, "much more is necessary than a mere being in sight, to entitle the army to share

89 The *Prize Act* 1793 (33 Geo III c 34 [and not c 16 as in the report at 63, 240]).

90 The Army was to share in captures in, eg, cases where there were operations against some fortress on land which was accessible both by land and by sea and where both forces were capable of concurring on an identical operation. It was therefore not to share in an entirely naval capture, as of ships at sea. As to the scope of the *Prize Acts*, see also Sir William Scott in *La Bellone* (1818) 2 Dods 343, 165 ER 1508 at 349-350, 1510.

91 The Court, too, in fact thought that that case was "materially distinguishable" from the present one as "there was pre-concert and co-operation of the most effectual kind" and as there British troops had landed from the British Fleet upon a hostile shore: see *The Dordrecht* (n 13) 76-77, 244. See also *La Bellone* (1818) 2 Dods 343, 165 ER 1508 at 350, 1510 where reference is made to the captures in *The Hoogkarspel* being "by a conjunct force under Commodore Johnstone and general Meadows".

92 *The Dordrecht* (n 13) 64, 240.

93 See *The Dordrecht* (n 13) 66, 241.

94 *The Dordrecht* (n 13) 64, 240.

95 *The Dordrecht* (n 13) 65, 240. That is, if the claimant does not make out a case satisfactorily or beyond doubt, "it is the duty of the Court to adhere to the interests of the actual captor" (66, 240).

jointly with the navy, in the capture of the enemy's fleet".[96] In cases of alleged joint capture by "different parties of naval force", a mere presence is, with a few exceptions – of which *The Cape of Good Hope* was probably one, the East India Company ships there not being a naval force – sufficient, given that there is usually such common purpose between those involved as to constitute a community of interest as joint captors. But in cases where sea and land forces act independently of each other and for different purposes, and where there is therefore no "concerted operations", no such common purpose can be assumed. In those cases, therefore, "there must be a contribution of actual assistance, and the mere presence, or being in sight, will not be sufficient".[97]

- Lastly, the Court thought that the principle was that where no pre-concert service was rendered by the party claiming to be entitled to the benefit of a joint capture, the service in fact rendered must not be slight and assistance must not merely render capture easier or more convenient. What is then required is "some very material service".[98] That is the more so where one of parties alone could have executed the capture and did not request the assistance of the other. Then "the interposing of a slight aid, insignificant perhaps, and not necessary, [will not] entitle another party to share".[99] The services would have to be ones directly or materially influencing the capture; not merely remote services, but services of such a nature "that the capture could not have been made without such assistance, or at least, *not certainly*, and without great hazard".[100]

Next, the Court turned to the evidence presented by the Army to establish whether it had made out its case. It considered the evidence in some detail and its conclusions may be summarised as follows:

- No material service, which even in the remotest degree contributed to the eventual capture of the Dutch ships, had been performed by the Army on shore prior to 16 August.[101]

96 *The Dordrecht* (n 13) 64, 240.
97 *Ibid*.
98 *The Dordrecht* 65, 240. Where there is common purpose and design or pre-concert, each party merely has to perform the service assigned to it and then there is no need for the service to be material.
99 *Ibid*.
100 *The Dordrecht* (n 13) 65, 240.
101 Captain M'Nab's party was no more than one of observation and it appears that it could not even prevent (but at most hinder) the Dutch supplying themselves from the shore with the aid of local farmers: "[T]here was nothing to interrupt their quiet anchorage in the

- On 16 August, after the arrival of the main body of men from the Cape and a few hours before that of the Fleet, the Dutch no longer came ashore but the Army itself did nothing and rendered no service of any significance.[102] In short, "the army could not take [the Dutch fleet], nor even annoy them".[103]
- On 16 August, after the arrival of the Fleet, the Dutch capture was a certainty; there was no hope of escape and, given the established mutinous state of the Dutch crews, no likelihood of any effective resistance. As to the argument that the Army's presence had prevented the Dutch ships from being destroyed, the Court thought that "[t]he principle of terror to support this claim must be, of terror operating not mediately and with remote effect, but directly and immediately influencing the capture".[104] The presence of the Army on shore may in an appropriate case entitle it to share in a capture made by the Fleet alone, such as when the Army eliminated enemy defences on shore, thus preventing a running ashore or landing and so influencing the ships to surrender to the Fleet. It was otherwise, though, when, as here, there was not an enemy shore with an adverse population – that, no doubt, was another reason for distinguishing the decision in *The Hoogkarspel*.[105] In the present case, the presence of the Army was not an effective cause of the Dutch decision not to destroy their ships.[106]
- Finally, as to General Craig's letter, it had not clearly been established by the Army that (and there was conflicting evidence as to whether) the letter had arrived in time to have influenced the Dutch decision to

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Bay, nor to cut off their communication with the country, except in one or two trifling instances" (67-68, 241). Further, the contingent of troops sent from Cape Town arrived too late to have played any part in the capture. In fact, the Court was of the view that even if the Army had actually prevented the Dutch from supplying themselves from, or from communicating with, the shore, that would not have sufficed to entitle them to qualify as joint captors (see *The Dordrecht* (n 13) 68, 241, also 65, 240) as such services would still have been too remote.

102 There were no offensive operations by the Army against the Dutch squadron, and even the cannonading of the Dutch frigate stationed nearest to shore, whatever its potential effect – which the Court thought was in all probability very limited – had ceased before any material damage had been done.

103 *The Dordrecht* (n 13) 70, 242.

104 *The Dordrecht* (n 13) 71, 242.

105 In that case the Dutch enemy Fleet was close to its own shore and the British troops were landed from the British Fleet upon a hostile shore: see *The Dordrecht* (n 13) 76, 244.

106 "[I]f the Dutch had attempted to destroy their ships and to affect a landing on shore", the Court thought, "they must in a few days have been hunted down, and have become, in the ordinary course of things, prisoners of war; the appearance of a military force therefore ... made no difference; it conveyed no additional terror, or at least no such special intimidation, as could entitle them to be considered as joint captors": *The Dordrecht* (n 13) 72, 243.

surrender.[107]

Therefore, Sir William Scott concluded, "the claim of the army is not supported on any principle, on which either this Court or the Court of Appeal has pronounced for an interest of joint capture".[108] Here the British Navy's presence, rather than any actual action, had again resulted in it alone being entitled to the Dutch prizes taken.

3 Conclusion

Arguably the decisions in *The Cape of Good Hope* and *The Dordrecht* did not establish any, but at most illustrated the application of minor, principles of the law of prize relating to joint captures. That conclusion is supported by the fact that despite issues of joint capture arising in English courts from time to time,[109] the occasion hardly ever arose to refer to them.[110]

There was one notable exception, though,[111] *The Feldmarschall,*[112] a case

107 And even if it had, that would be insufficient intimidation to have allowed a claim on the part of the Army and would at least have been no any different from a threat of an attack by the inhabitants issued against those who might attempt to destroy their ships and escape on shore.

108 *The Dordrecht* (n 13) 76, 244.

109 See, eg, *The Island of Trinidad* (1804) 5 C Rob 92, 165 ER 709 (joint capture of Trinidad by several naval ships and the right of each of them to share in property taken on land, in one Spanish vessel captured in port, and in the distribution of His Majesty's bounty on the destruction of other Spanish ships); *The Stella del Norte* (1805) 5 C Rob 349, 165 ER 801 (disallowing a claim by the Fleet, under command of Lord Keith (Elphinstone), to share in the capture of French vessels taken by British ships which had become detached from the Fleet in order to act in concert with Austrian land forces on the coast of Genoa); *The Nordstern* (1809) 1 Acton 128, 12 ER 48 (rejecting a claim of joint capture by a party – officers of a squadron of naval ships employed in the blockade of Cadiz – not the actual captor, to share in prize with the actual captor); *Genoa and Savona* (1815) 2 Dods 88, 165 ER 1424 (disallowing a claim by a ship of war, en route under Admiralty orders but barely hearing or seeing a firing on the coast which she was passing in the prosecution of her voyage, and not knowing the reason for that firing or from whom it came, to share in the property captured by the actual capturing force with which she had no communication or concert); *Naples Grant* (1818) 2 Dods 273, 165 ER 1485 (confirming the principle that to vest an interest as joint captor in a vessel engaged in a common naval service, such as a blockade or siege, it has to be shown that that vessel was present and materially assisted at some stage of the operation of capturing the prizes); and *Banda and Kirwee Booty* (1866) LR 1 Adm & Ecc 109 (HCA) (rejecting a claim by one land force to share in the booty captured by another land force in the course of military operations to suppress the Indian Mutiny of 1857-1858 as there was not such a bond of association between the joint captor and the actual captor recognised by law as entitling a joint sharing, nor any co-operation or services by the former which directly produced the capture in question).

110 And also by the fact that they are not mentioned in the list provided by Roscoe (n 6) 110-112 of Sir William Scott's principal prize decisions.

111 Less notably, *The Cape of Good Hope* was referred to in argument in *Duckworth v Tucker* (1809) 2 Taunt 7, 127 ER 976 at 22, 982 as a decision in which it had been laid down that a title to prize depends on whether or not the ships acted in a military character. *The Cape of Good Hope* was also referred to in *Banda and Kirwee Booty* (1866) LR 1 Adm & Ecc 109 (HCA) at 128 in argument. *The Dordrecht* was referred to in the *Banda and Kirwee Booty* decision at 136 in support of the notion that the claims of joint captors to share with actual captors were only exceptionally admitted, and Lord

which, quirkily enough, also had a southern African connection.

During the Great War and in the course of combined naval and military operations in German East Africa, a German steamship, the *Feldmarschall*, was captured on 4 September 1916 in Dar-es-Salaam harbour. The capture was actually effected by a naval squadron under Admiral Charlton. However, a claim was put in by the Treasury and by territorial forces under General Smuts[113] to share in the proceeds of the sale of the captured ship. The claim was brought as a test case in which to obtain a decision on the right of the Army to share in property captured as a result of joint operations by the Navy and the Army. In the present case it was contended that the Army had lent such assistance, and had so far contributed to the success of these operations as to entitle them to be considered as joint captors.

Factual and legal questions arose for decision.

After considering the efforts of the Army under General Smuts in some detail, the Tribunal by a majority held, on the question of fact, that although the circumstances of the capture constituted a joint enterprise,[114] they did not constitute a joint capture; it "was not a joint capture although the capture was the result of joint operations".[115] In fact, the capture was one by the naval forces alone and the military's claim was accordingly rejected.[116]

Stowell was quoted at 137 as to the kind of assistance required in cases where there was no pre-concert between the forces involved, the Court referring to his dictum as "the true principle applicable to all cases".

112 [1920] P 289 (Naval Prize Tribunal). Could this have been the same ship that had featured some fifteen years earlier in *Juridini v The Deutsche Ost-Afrika Linie* (1905) 19 EDC 74?

113 The armed forces were organised in three columns under General Smuts himself, General Van Deventer, and Colonel Price.

114 For instance, it had been arranged that the Fleet should co-operate with Smuts' forces. In fact, the combined operations were under the general directions of a common chief, General Smuts.

115 *The Feldmarschall* (n 112) 304. The German vessel and the town and harbour of Dar-es-Salaam, which the German forces had left on 2 September and which had been under heavy naval bombardment on 3 September, could in the majority's view have been captured many days earlier and before either the surrender of the vessel (in the course of the morning of 4 September) or the arrival of the troops (a few hours later on the afternoon of 4 September). Although the Army alleged that the advance of military forces had induced the Germans to evacuate the town, the fact remained that the naval forces (marines) could at any time have landed from the squadron and/or with the help of the squadron's guns have taken the town and the vessel in question (or at least have destroyed her, if that was all that was possible) even with Germans still there. The terrestrial forces were not even in sight at the time of the capture. The minority judgment held that the surrender of Dar-es-Salaam, and with it the capture of the German ship, was as much due to the advance of the land forces and to the fact that they were encamped immediately outside the town, than to the immediate attack by the Navy.

116 For a case where South African land forces were considered to have captured as lawful prize German lighters and harbour craft on capturing the ports of Luderitzbuch and Swakopmund in German South-West Africa, see *The Anichab* [1919] P 329 (PC). It was also held there that the lighters the land forces had captured some six months later up to

In the course of his judgment, Lord Phillimore[117] had occasion[118] to refer to the decision in *The Dordrecht* and to the "very elaborate judgment" of Sir William Scott holding that there was no joint capture there. The main reason was that there was no pre-concert. But Scott's judgment also made it clear that the burden of proof was on the party claiming as joint captor against the actual captor, that it had to prove an actual contribution, and that there had to be a contribution of actual assistance.

However, the Tribunal further unanimously, although clearly obiter, held, on the question of law and after an analysis of a number of decisions, including, in particular, the obscure[119] decision in *The Hoogkarspel*,[120] that had the military

300 miles inland (in Otavi and Omaruru) to where the craft had been transported by rail in an attempt to prevent them from falling into enemy hands, were not the subject of maritime prize as they were not taken in pursuit. See further generally Hudson "Seizures in land and naval warfare distinguished" 1922 *American J of International Law* 375.

117 Walter George Frank Phillimore (1845-1929) was a leading Admiralty practitioner and a recognised expert in international law. He was judge on the Queen's Bench 1897-1913, sat in the Court of Appeal 1913-1916, and became a Law Lord in 1916, sitting in numerous cases in the House of Lords, the Privy Council and the Naval Prize Tribunal. Lord Phillimore was from a distinguished family of Admiralty lawyers: his father, Robert Joseph Phillimore (1810-1885), who had joined Doctors' Commons in 1839, was the last judge in the High Court of Admiralty before it was taken up in the High Court in 1875, while his grandfather, Joseph Phillimore (1775-1855), who had become a member of Doctors' Commons in 1804, had succeeded Laurence (see n 29 above) as regius professor of civil law at Oxford. On Phillimore, see Sankey "Phillimore, Walter George Frank, first Baron Phillimore (1845-1929)", rev Mooney, *Oxford Dictionary of National Biography* (2004) [http:// www.oxforddnb.com/view/article/35511, accessed 12 July 2005].

118 *The Feldmarschall* (n 112) 295. There is a further reference in the minority judgment at 310.

119 Not only was the case never (fully) reported, but the reason for the decision and the principle upon which it was based were not readily apparent. The Tribunal in *The Feldmarschall* had recourse to Rothery's *Prize Droits, being a Report to HM Treasury on Droits of the Crown and of Admiralty in Time of War* (1857, rev ed by Roscoe 1915) (see at 300, 304), to identical reports in various newspapers at the time (see at 302), and also to Sir William Scott's explanation of the decision in *La Bellone* (1818) 2 Dods 343, 165 ER 1508 (see at 303-304). The latter explanation was regarded as of particular value as Scott was one of the counsel in *The Hoogkarspel*.

120 The decision in *The Hoogkarspel* was referred to and explained in some detail in *The Feldmarschall*, both in the course of argument (see 290 292) and in the judgment itself (see 295 299-303). The facts of the case, it will be recalled (see n 83 above), involved joint naval and military operations in Saldanha Bay resulting in the capture of Dutch ships in 1871. In the Prize Court, Sir James Marriott first condemned the ship and her cargo as prize, reserving the question as to who were the captors. Later he held that as it was a case of joint capture, the Army was entitled to share with the naval force. Both joint captors went on appeal to the Lords Commissioners of Prize. Their Lordships held that the ship and her cargo had been taken by conjoint operations and that it was a case of joint capture. It therefore did not fall under the applicable *Prize Act* (in terms of which, when literally interpreted as it was, the Navy was entitled to claim a prize only if it had effected the capture alone, so that joint expeditions were entirely outside of the statute as regards both services), but under an ancient practice by which such captures were excluded from any grant of prize to the captors but were specially reserved as droits of the Crown. The result – described as "very curious" in *The Feldmarschall* (n 112) 295 – was therefore that neither the land nor the sea forces had made out any title. Both could but hope that the Crown, to whom the condemned ship and cargo belonged as lawful prize, would grant them some benefit. Subsequent to the decision of the Lords Commissioners, both parties took various steps to have the decision reversed, without success. The Crown, having asserted its right, proceeded to divide the prize in the way indicated in the King's earlier instructions to the commanders in question, namely equally between both.

land forces' claim as joint captors been established, the proceeds of the sale of the captured German ship would be partly a droit of the Admiralty and partly a droit of the Crown.[121]

It seems increasingly unlikely that the decisions in old cases such as *The Cape of Good Hope* and *The Dordrecht* will be referred to and followed in future. That, it may be thought, is so not only because issues of joint capture, especially between forces of the same country, will in all probability be regulated in advance or settled internally, but especially because changed circumstances of war will render them obsolete as precedents. Some 85 years ago already, in *The Feldmarschall*, it was recognised[122] that "little assistance can be obtained from the precedents of old wars because the modern developments of transport and communication by railways, aircraft, telegraphs and wireless telegraphy render co-operation between distant forces much closer and more real than was possible in former times when these facilities were not at their disposal". But while they may have lost their value as judicial precedents, they certainly retain their historical interest.

121 The proportion allocated to the military forces would be a droit of the Admiralty (and not a droit of the Crown) and therefore payable to the Exchequer to be dealt with by the Crown as it might be advised. The portion allocated to the naval forces would be a droit of the Crown and would be directed to be payable to the Naval Prize Fund in accordance with *Naval Prize Act* 1918 and the relevant royal proclamation in terms of which droits of the Crown were granted to the Fleet. On droits of the Admiralty – prizes captured during hostilities either in port or by non-commissioned vessels or persons – and droits of the Crown – captures effected jointly by forces of the Army and the Navy, or captures made before the commencement of hostilities – see, in addition to Rothery (n 119), also Roscoe (n 6) 30-31.

122 *The Feldmarschall* (n 112) 308 per Sir Guy Fleetwood Wilson.