

SOME CONSIDERATIONS ON THE EXPRESSION “*LOCO FILIAE*” IN GAIUS’ *INSTITUTES*

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1 Introduction

The expression “*loco filiae*” that Gaius uses to describe the position of the wife *in manu* has led a significant number of scholars to the firm belief that *manus* and *patria*

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potestas were equivalent powers.¹ Although the personal powers that a *paterfamilias* could exert over his descendants did not seem to match those that he could apply to his wife *in manu*, Gaius consistently uses the expression *loco filiae* to describe her position. The personal powers which a *paterfamilias* usually held in relation to his descendants, namely the *vitae necisque potestas* (the power to kill or let live), *ius noxa dandi* (the right to surrender the perpetrator of some pre-defined offences), and the *ius vendendi* (the right to sell them *in mancipio*), seem to have adjusted poorly to the position of a wife under *manus*. Although the possibility has been put forward that the husband had some kind of *ius vitae necisque* over his wife *in manu*,² this notion remains controversial.³ Further, the possibility of selling one's own wife or surrendering her after a noxal action is not supported by any ancient sources. Therefore, if the wife under *manus* was not subject to the entire power that *patria potestas* grants, one may wonder what Gaius means by the expression “*loco filiae*” when he describes her position. In this article we will systematically analyse the texts where Gaius mentions the position of a wife *in manu* and compare it with the position of other persons *alieno iuri subiectae* – the son, the slave and the son *in mancipio* – who were subject to the other personal powers that the *pater* held (*potestas* over his sons and slaves and *mancipium* over the sons of other *patres* whom he acquired through *mancipatio*).

- 1 The matter has been under discussion for over a century. The discussion began when Gans, after a difficult philological examination, stated that all the *paterfamilias*' powers, *potestas*, *manus* and *mancipio*, were originally a unified power in a very ancient stage of Roman legal history (see Gans 1821: 138ff). This view was adopted by Bonfante in order to build up his political theory of the Roman family, where *manus*, *potestas* and *mancipium* would originally have been expressions of the same singular power, which held a sovereign nature and would originally be called *manus* (see Bonfante 1963: 14ff). This theory became dominant during the twentieth century and with very important supporters (see, for instance, Corbett 1930=1979: 109ff; Düll 1944: 211ff; Mitteis 1908: 75; Wieacker 1940: 11; Söllner 1969: 12ff; Voci 1980: 420ff), although its predominance is long gone. Already Karlowa and Coli doubted the equivalence of *manus* and *patria potestas* (Karlowa 1865: 152ff; Coli 1951: 127ff). Gaudemet, undertaking a subsequent philological examination, established that the sources use *manus* mostly in relation to women, and never as an all-encompassing power in the way the political theory would predict (see Gaudemet 1979: 330ff). From this point, Volterra saw a differentiation among the powers of the *paterfamilias*, with the expression *potestas manus mancipium* as its main feature. The extension of the powers would be different, depending on whether it is *potestas* (the strongest), *manus* or *mancipium*.
- 2 See Esmein 1886: 89ff; Düll 1944: 211ff; Voci 1980: 420ff; Wolff 1934: 317ff; Castello 1972: 97ff; Cremades & Paricio 1983: 39ff).
- 3 We have discussed the matter at length elsewhere (see Amunátegui Perelló 2007: 61-153), therefore in this instance we will briefly state some of our conclusions on the matter. The texts that seem to give the power to a husband to kill his wife (Dionysius of Halicarnassus *Ant Rom* 2 25 2 1; and Aulus Gellius 10 23 4) do not relate this power to *manus*. In fact, they both state that a man may kill his wife if he finds her committing adultery, which is exactly the opposite of the *vitae necisque potestas*. The *vitae necisque potestas* was not limited by pre-established cases or situations. It might have been limited by social standards, by tradition or by the *nota censoriae*, but not by specifically pre-determined cases.

Our knowledge of *manus* is largely dependent on Gaius, from whom most of our information on the institution comes directly. This includes the expression “*loco filiae*”, which is used only in his legal works.⁴ We will divide this work according to the subject treated when he mentions *manus* and *mancipium* in his *Institutes*. In this way, we will be able to appreciate the context properly and compare it with the powers that the *pater* holds over other persons *alieni iuri*.

2 The division of people

Gaius’ book on persons opens with his well renowned division of free persons, on the one hand, and slaves, on the other.⁵ After dealing with slaves and freedmen, he incorporates yet another division of persons in his book, and this is the point at which his exposition regarding *manus* begins:

G 1 48: “Sequitur de iure personarum alia diuisio. nam quaedam personae sui iuris sunt, quaedam alieno iuri sunt subiectae.” 1 49: “Sed rursus earum personarum, quae alieno iuri subiectae sunt, aliae in potestate, aliae in manu, aliae in Mancipio sunt.”

The exposition seems quite simple. There are two kinds of persons: independent persons (*sui iuris*); and those who are subject to the right of someone else (*alieno iuri subiectae*) and who may be subject to *potestas*, *manus* or *mancipium*. Following this division, he begins with those who are under *potestas*, namely the *filiifamiliae* and slaves:

G 1 51: “Ac prius dispiciamus de iis, qui in aliena potestate sunt.” 1 52: “In potestate itaque sunt serui dominorum. quae quidem potestas iuris gentium est.” 1 55: “Item in potestate nostra sunt liberi nostri, quos iustis nuptiis procreauimus. quod ius proprium ciuium Romanorum est.”

The symmetry in Gaius’ descriptions is noteworthy. First, he describes who the persons are who may become subject to such power (*serui* in 1 51 and *liberi* in 1 55), and then he considers whether the power derives from the *ius gentium* (*dominica potestas*) or *ius civile* (*patria potestas*).

4 G 1 111 4, 1 114 5, 1 115b2, 1 118 5, 1 118 7, 1 136 10, 2 139 3, 2 159 2, 3 32. Also in the *Epitome* 1 5 2 1. However, all references to *manus* were systematically removed from the *Corpus*, and therefore the expression might have been of wider use. From non-legal texts Seneca the Elder uses the expression, albeit in a text that does not seem to relate in any way to *manus* or the position of a wife (Seneca *Controv* 9 5 15 9). Further use of it is by the late commentator Servius, who might have taken it from the same *Institutes* of Gaius: Servius *In Georg* 1 31 6: “coemptione vero atque in manum conventionione, cum illa in filiae locum, maritus in patris veniebat, ut siquis prior fuisset defunctus, locum hereditatis iustum alteri faceret.”

5 G 1 1 9.

As will become evident in the course of our analysis, Gaius never deviates from this division,⁶ reserving the word *potestas* only for slaves and *liberi*, and dealing separately with those who are under *manus* or *mancipio*, in juxtaposition to those under *potestas*. The use of the word *potestas* to describe the power exercised over slaves is quite common in Roman legal language.⁷ This assimilation is likely to have occurred long before the time of Gaius, or the Late Republic, when *patria potestas* was at its zenith. During the time of the Antonines, *patria potestas* was not an absolute power, for it had undergone a process of constant erosion over a period of several centuries. Probably during an earlier period the similarities were more evident. Two institutions may receive the same name when they look alike, but the similarity between *patria potestas* and slavery was not all that evident in either the Early Empire or the Late Republic. A common conceptualisation of slaves and descendants is likely when they both play a socio-economic role that is similar in a number of respects. This might have been the situation of slaves and sons during the Early Republic when they were the most important source of labour available to a *pater* for work required to be performed on the family land. Until the third century BC, slavery was not an important phenomenon in Roman society⁸ and the weight of production in its smallholder economy lay in the nuclear family, sometimes aided by the external provision of work, either in the form of slave labour or through *nexum* or *mancipium*, which also brought “un-free” labour into the production unit. It was only during the Punic Wars that a massive movement of slave labour transformed the Italian economy, with the side effect of liberating the sons of the well-to-do from manual labour. As a collateral effect, during the second century BC the *vitae necisque potestas* became the exception, rather than the rule,⁹ although the power to kill one’s descendants theoretically survived until the Antonines.

6 See Meylan 1970: 504.

7 See D 1 62pr; 12 4 5 3; 14 1 1 22, among many others. We even have a direct quotation of the Edict in D 9 4 21 2 regarding noxal actions: “Praetor ait: ‘Si is in cuius potestate esse dicetur negabit se in sua potestate seruum habere: utrum actor uolet, uel deierare iubebo in potestate sua non esse neque se dolo malo fecisse, quo minus esset, uel iudicium dabo sine noxae deditione’.” This is an important aspect for Cornil’s theory on the Etruscan origin of *potestas* as a distinct power from the “Latin” institutions of *manus* and *mancipium*. See Cornil 1939: 405ff.

8 Slavery seems to have appeared in Roman society under the later kings during the seventh century BC. See Franciosi 1959: 375; Franciosi 1992: 206; De Martino 1997a: 82-83; De Martino 1997b: 27-57. It seems to have become a major phenomenon only during the third century BC. On this subject, see Joshel 2010: 54f.

9 During the whole of the second century BC one can only find a handful of cases where this competency might be involved. These are the cases of D Junius Silano (Cicero *De finibus* 1 24; Livius *Ab urbe condita* 54; Valerius Maximus 5 8 3); Pontius Aufidianus (Valerius Maximus 6 1 3); Q Fabius Maximus (Valerius Maximus 6 15; Quintilianus *Dec Mai* 3 17; Orosius *Adv* Pag 5 16); the unnamed daughter of Atilius Philiscus (Val Max 6 1 6) and the son of M Scaurus (Lucius Ampelius *Mem* 19 10; Sex Iulus Frontinus *Str* 4 1 13; Val Max 5 8 4). Even in these cases, if the reason seemed unjustified, the *pater* might be punished, as happened to Fabius Maximus, who had to face exile.

The same familiar structure is used to begin Gaius’ commentary on *manus*:

G 1 108: “<Nunc de his personis uideamus, quae in manu nostra sunt. quod> et ipsum ius proprium ciuium Romanorum est.” 1 109: “Sed in potestate quidem et masculi et feminae esse solent; in manum autem feminae tantum conueniunt.”

Gaius states that *manus* is an institution that belongs to the *ius civile*. He compares it with *potestas*, saying that only women are subject to *manus*, while both men and women might be subject to *potestas*. Although this is not the only difference between these powers, the structure of Gaius’ exposition is interesting.

Finally, he presents the power over sons *in mancipio*:

G 1 116: “Superest, ut exponamus, quae personae in mancipio sint.” 1 117: “Omnes igitur liberorum personae, siue masculini siue feminini sexus, quae in potestate parentis sunt, mancipari ab hoc eodem modo possunt, quo etiam serui mancipari possunt.” 118: “Idem iuris est in earum personis, quae in manu sunt: <nam feminae a> coemptionatoribus eodem modo possunt <mancipari, quo liberi a parente possunt>, adeo qu<i>dem, <ut quamuis ea sola> apud coemptionatorem filiae loco sit. <quae ei> nupta sit, <tamen> nihilo minus etiam quae ei nup<t>a non sit nec ob id filiae loco sit, ab eo mancipari possit.” 1 118a: “<Sed> plerumque solum et a parentibus et a coemptionatoribus mancipantur, cum uelint parentes coemptionatoresque <ex> suo iure eas personas dimittere, sicut inferius euidentius apparebit.” 1 119: “Est autem mancipatio, ut supra quoque diximus, imaginaria quaedam uenditio: quod et ipsum ius proprium ciuium Romanorum est.”

It is noteworthy that Gaius retains the same structure to describe the situation of *fili* *in mancipio*. He begins his commentary by saying that those who are under *patria potestas* may be the object of a *mancipatio*. He goes on to state that also those under *manus* can be the object of a *mancipatio*, but only to liberate them from *manus*. He concludes by identifying this institution as belonging to the *ius civile*.

We can say that Gaius follows a certain method in his division of persons. First, he indicates which power he is going to describe: *potestas*, *manus* or *mancipium*. Then he compares each with the one upon which he has previously commented: if it is *manus*, he compares it with *potestas*; if it is *mancipio*, he compares it with both *manus* and *potestas*, respectively, stating whether each belongs to the *ius civile* or *ius gentium*. Gaius seems to have three fixed categories in which he classifies persons without confusing them in any respect. To him, there are sharp distinctions between *potestas*, *manus* and *mancipio*.

3 *Ius vitae necisque* according to Gaius

The *ius vitae necisque* is a much-debated subject, about which we have written in general terms elsewhere.¹⁰ Therefore, in this instance, we will focus only on its treatment by Gaius in his *Institutes*.

G 1 52: “nam apud omnes peraeque gentes animaduertere possumus dominis in seruos uitae necisque potestatem esse ...”

Having defined *potestas* over slaves, Gaius states that the *vitae necisque potestas* was one of the central features of the power that masters held over their slaves. Although Gaius does not mention it, we know that descendants under the *patria potestas* were in the same position.¹¹ However, his reluctance to mention the *vitae necisque potestas* in relation to descendants may be understood in light of the fact that, during Gaius’ lifetime, the position of descendants under the *patria potestas* was the subject of debate and we know that Hadrian decided against a father who killed his son for no justified reason.¹²

Comparing the situation of descendants under *patria potestas* with that of persons under *mancipio* yields a sharp contrast:

G 1 141: “In summa admonendi sumus aduersus eos, quos in mancipio habemus, nihil nobis contumeliose facere licere; alioquin iniuriarum tenebimur.”

We have studied elsewhere the origin of this disposition.¹³ It states that the son given *in mancipio* cannot be mistreated and, *a fortiori*, there is no *vitae necisque potestas* over him. The position of the wife *in manu* might have been similar, for there is no historical evidence of the *vitae necisque potestas* regarding her, at least from the perspective of her husband.¹⁴

10 See Amunátegui Perelló 2006: 37-143.

11 In fact, *patria potestas* could be defined as the power of life and death. In the formula of the *adrogatio* reported by Aulus Gellius, the question put to the *comitia* is whether they accept that a citizen enters under the *vitae necisque potestas* of another. See Aulus Gellius 5 19 9: “Eius rogationis verba haec sunt: Velitis, iubeatis, uti L. Valerius L. Titio tam iure legeque filius siet, quam si ex eo patre matreque familias eius natus esset, utique ei vitae necisque in eum potestas siet, uti patri endo filio est. Haec ita, uti dixi, ita vos, Quirites, rogo.”

12 D 48 9 5: “Divus Hadrianus fertur, cum in venatione filium suum quidam necaverat, qui novercam adulterabat, in insulam eum deportasse, quod latronis magis quam patris iure eum interfecit: nam patria potestas in pietate debet, non atrocitate consistere.”

13 See Amunátegui Perelló 2006: 37-143.

14 As we have already stated, the only two texts that authorise the husband to kill his wife (Dio Halicarnassus *Ant Rom* 2 25 2 and Aulus Gellius 10 23 4) restrict this to certain predefined cases (mainly adultery) and in no way connect these situations with *manus*. See Corbett 1930=1979: 127ff; Gaudemet 1979: 344; and Piro 1996: 152.

To sum up, there seems to have been an important difference between those who were *in potestate* – whether they were slaves or descendants – and those who were *in manu* or *in mancipio*. The former were subject to the *vitae necisque potestas*, while the latter apparently were not.

4 Emancipation according to Gaius

It seems that it is always open to a *paterfamilias* to sever the bond of dependence. There are ample procedures available for the liberation of slaves, which we will not consider in depth. The same procedures may be used to liberate sons *in mancipio*:

G 1 138: “Ii, qui in causa mancipii sunt, quia servorum loco habentur, uindicta, censu, testamento manumissi sui iuris fiunt.”

The reason that Gaius provides for the same procedures being available to liberate slaves as well as those under *mancipio* is especially interesting: they would be *servorum loco*. This expression is analogous to that used to describe the position of the wife *in manu*, namely in *loco filiae*, and one may well draw parallels between them. In the same way that *mancipatio* can create fictional bondage that leaves the main features of citizenry unbroken, the position of a woman *in manu* was apparently fictional filiation of the same nature. It seems that each kind of *potestas* has a weaker, somewhat nebulous, parallel, which can create effects similar to it: *mancipatio* for the *domenica potestas* and *manus* for *patria potestas*.

As one might expect, the procedure to liberate a wife *in manu* is analogous to the one established to liberate a descendant:

G 1 137: “In manu autem esse mulieres desiunt isdem modis, quibus filiae familias potestate patris liberantur; sicut igitur filiae familias una mancipatione de postestate patris exeunt, ita eae quae in manu sunt una mancipatione desiunt in manu esse.”

The passage above provides insights into the content of the expression “*loco filiae*”. It highlights parallels between the way of exiting *manus*, on the one hand, and *patria potestas*, on the other. Just as those who were *in mancipio* could be liberated in the same way as slaves on the basis that they were *servorum loco*, the procedure to be followed in respect of a wife *in manu* had to be the same as that in respect of a *filiafamiliae*, for the former is *loco filiae*.

The information provided by Gaius does not cover the situation of persons who have entered *manus* through *confarreatio*, although we know that they had their own ceremony to exit *manus* (*diffarreatio*). However, this might have been due to the fact

that *confarreatio* had only religious effects during the time of Gaius¹⁵ and therefore did not create the legal dependence that Gaius is addressing. Suffice it to say that, during Gaius' time, *confarreatio* was not really a possible way to enter *manus*. The effect is that stronger parallels may be drawn between the position of the daughter and the wife *in manu*.

An important difference between those who are subject to *potestas* and those who are in *manus* or *mancipium* is that the former cannot force the *paterfamilias* to liberate them, while the latter can:

G 1 137a: "nihil<o> magis potest <c>ogere, quam et patrem. sed filia quidem nullo modo patrem potest cogere, etiam si adoptiva sit filia: haec autem <uirum> repudio misso proinde compellere potest, atque si ei numquam nupta fuisset."

G 1 140: "Quin etiam inuito quoque eo, cuius in mancipio sunt, censu libertatem consequi possunt, excepto eo, quem pater ea lege mancipio dedit, ut sibi remanipetur; nam quodam modo tunc pater potestatem propriam reservare sibi videtur eo ipso, quod mancipio recipit. ac ne is quidem dicitur inuito eo, cuius in mancipio est, censu libertatem consequi, quem pater ex noxali causa mancipio dedit, veluti quod furti eius nomine damnatus est et eum mancipio actori dedit: nam hunc actor pro pecunia habet."

Both the son *in mancipio* and the wife *in manu* could, under certain circumstances, demand their own liberation. The wife could force her husband to emancipate her when they had divorced, as if they had never been married, that is to say, as if they had performed a *coemptio fiducia causa*. On the other hand, the son *in mancipio* could force his acquirer to liberate him through the *census*. However, there were exceptions to this principle. First, if the *pater*, who sold the descendant, had established in a *lege mancipio*, perhaps through a *nuncupatio*, that his descendant should be re-mancipated to him, then this procedure should follow. Secondly, if the son had been surrendered as a consequence of a noxal action, then he could not force his own liberation.

- 15 In an endeavour to promote the use of *confarreatio*, any civil effects were removed during the Early Empire. See Tacitus *Ann* 4 16: "Sub idem tempus de flamine Diali in locum Servi Maluginensis defuncti legendo, simul roganda nova lege disseruit Caesar. nam patricios confarreatis parentibus genitos tres simul nominari, ex quis unus legeretur, vetusto more; neque adesse, ut olim, eam copiam, omitta confarreati aduetudine aut inter paucos retenta (pluresque eius rei causas adferebat, potissimam penes incuriam virorum feminarumque; accedere ipsius caerimoniae difficultates quae consulto vitarentur) et quoniam exiret e iure patrio qui id flamonium apisceretur quaeque in manum flaminis conveniret. ita medendum senatus decreto aut lege, sicut Augustus quaedam ex horrida illa antiquitate ad praesentem usum flexisset. igitur tractatis religionibus placitum instituto flaminum nihil demutari: sed lata lex qua flaminica Dialis sacrorum causa in potestate viri, cetera promiscuo feminarum iure ageret."

5 Appointment of a guardian

After studying persons *alieni iuris*, in his first book of the *Institutes*, Gaius deals with guardianship:

G 1 142: “Transeamus nunc ad aliam diuisionem. nam ex his personis, quae neque in potestate neque in manu neque in mancipio sunt, quaedam uel in tutela sunt uel in curatione, quaedam neutro iure tenentur. uideamus igitur, quae in tutela, quae in curatione sint: ita enim intellegemus ceteras personas, quae neutro iure tenentur.”

Again, Gaius draws a distinction between those who are under *potestas*, *manus* and *mancipio*, respectively. If *manus* and *potestas* were the same power, he would probably use the term *potestas mancipioque* or simply *potestas* to describe all three situations. He commences his exposition by explaining the method by which one may appoint a testamentary guardian for those who are subject to one’s *potestas*:

G 1 144: “Permissum est itaque parentibus liberis, quos in potestate sua habent, testamen<to tu>tores dare: masculini quidem sexus inpueribus, <feminini uero inpueribus puberibus>que, <uel> cum nuptae sint. ueteres enim uoluerunt feminas, etiamsi perfectae aetatis sint, propter animi leuitatem in tutela esse.”

The text serves as a clear indication that there is a difference between male and female descendants, because guardianship of women was established for life, even if they were married. A grandfather could appoint a guardian for his granddaughter when her natural father was no longer subject to the power of the *paterfamilias*, whether as a result of death or emancipation.

The position of a wife *in manu* is analogous to that of a daughter:

G 1 148: “<Vxori>, quae in manu est, proinde ac filiae, item nurui, quae in filii manu est, proinde ac nepti tutor dari potest.”

As in the case of a granddaughter, the *pater* of the married *filiusfamilias* could appoint a testamentary guardian. This involves a commonly overlooked problem: if the *paterfamilias* passed away and the wife was *in manu* of the *filius* (as the text says), how could she be given a guardian, if *manus* and guardianship were incompatible? For the moment, we will simply point out the problem, which we will address below.

With respect to guardianship, there was an important difference between the situation of a wife *in manu* and a *filiafamilias*. The *uxor in manu* could be granted the right to choose a guardian (*tutoris optio*):

G 1 150: “In persona tamen uxoris, quae in manu est, recepta est etiam tutoris optio, id est ut liceat ei permittere, quem uelit ipsa, tutorem sibi optare.”

It is not known when this emerged as a possibility in Roman legal history, but evidently it was possible at least during the second century BC since the freed

woman Hispania Fecenia was given the right to choose a guardian as a reward for her participation in the criminal investigation regarding the bacchanalia:

Livius *Ab urbe condita* 39 19 5: “utique Faeceniae Hispalae datio, deminutio, gentis enuptio, tutoris optio item esset, quasi ei uir testamento dedisset.”

Apparently Livius is quoting the very text of the *senatus-consultum*,¹⁶ which seems evident from the technical language that he uses. However, the main elements of the institution, as described by Gaius some four hundred years later, are clear – the *tutoris optio* is granted as if it was established by his husband in a will (*quasi ei vir testamento dedisset*).

In the same way as the position of a wife *in manu* is assimilated to the position of a daughter, the position of a son *in mancipio* is equated to the position of a slave:

G 1 166: “Exemplo patronorum recepta est <et alia tutela, quae et ipsa legitima uocatur. nam si quis filium nepotemue aut pronepotem inpuberes, uel filiam neptemue aut proneptem tam puberes quam inpuberes alteri ea lege mancipio dederit, ut sibi remanciparentur, remancipatosque manumiserit, legitimus eorum tutor erit.>”

As we can see, those who are *loco filiae* and *loco servorum* are equated to the real daughter and the real slave as far as the appointment of a guardian was concerned. Both the wife *in manu* and the son *in mancipio* could be given a special kind of guardianship, the *tutela fiduciaria*:

G 1 166a: “Sunt et aliae tutelae, quae fiduciariae uocantur, id est quae ideo nobis competunt, quia liberum caput mancipatum nobis uel a parente uel a coemptionatore manumiserimus.”

It is noteworthy that Gaius always makes a distinction in their position between those who are under *potestas* and those who are only *in loco*, thus avoiding any confusion between *potestas*, *manus* and *mancipium*.

6 Acquisition of property

Having concluded his first book on persons, Gaius' second commentary refers to *res*, subjects of law, where he observes the same division of the powers of the *paterfamilias* into *potestas*, *manus* and *mancipio*. Gaius states that the *paterfamilias* may acquire property through persons *alieni iuris*:

G 2 86: “Adquiritur autem nobis non solum per nosmet ipsos, sed etiam per eos, quos in potestate manu mancipioque habemus; item per eos seruos, in quibus usu<mfructum> habemus; item per homines liberos et seruos alienos, quos bona fide possidemus: de quibus singulis diligenter dispiciamus.”

16 Volterra 1995a: 265ff.

In his third commentary he adds:

G 3 163: “admonendi sumus adquiri nobis non solum per nosmet ipsos, sed etiam per eas personas, quae in nostra potestate, manu mancipioe sunt.”

According to Gaius we can acquire property through those who are subject to our *potestas*, *manus* and *mancipio*. In relation to *potestas* he includes only the slaves whom the *pater* owns. Those who are under *usufructus* he places in a separate category, although he says that we could acquire property through them in the same way as we acquire property through those under *potestas*. They seem to be equated to those whom we possess in good faith, but who are really free or who belong to someone else.

In the following section he focuses on those subject to the *potestas* of another, that is, descendants and slaves:

G 2 87: “Igitur <quod> liberi nostri, quos in potestate habemus, item quod serui nostri mancipio accipiunt uel ex traditione nanciscuntur siue quid stipulentur uel ex aliquolibet causa adquirunt, id nobis acquiritur: ipse enim, qui in potestate nostra est, nihil suum habere potest; et ideo si heres institutus sit, nisi nostro iussu hereditatem adire non potest; et si iubentibus nobis adierit, hereditas nobis acquiritur, proinde atque si nos ipsi heredes instituti essemus; et conuenienter scilicet legatum per eos nobis acquiritur.”

Gaius tells us that we acquire, through persons subject to our *potestas*, not only property, but also possession:

G 2 89: “Non solum autem proprietas per eos, quos in potestate habemus, acquiritur nobis, sed etiam possessio; cuius enim rei possessionem adepti fuerint, id nos possidere uidemur; unde etiam per eos usucapio procedit.”

Gaius deals next with the acquisition of property through persons who are subject to one of the powers that imitate *potestas*. Examples of such persons would be the wife *in manu* and sons *in mancipio*:

G 2 90: “Per eas uero personas, quas in manu mancipioe habemus, proprietas quidem acquiritur nobis ex omnibus causis sicut per eos, qui in potestate nostra sunt; an autem possessio adquiratur, quaeri solet, quia ipsa<s> non possidemus.”

According to Gaius, we acquire property through such persons in the same way as we do through those subject to our *potestas* (slaves and descendants). However, there is an important difference: the possibility of acquiring possession is debatable because we do not possess such persons. This somewhat odd supposition has given scholars much food for thought.¹⁷ Gaius’ reasoning is to some extent puzzling, especially

17 See Gaudemet 1979: 323ff; Volterra 1995a: 251ff; Zannini 1999: 3; Piro (1996): 47; or the rather controversial ideas of Cornil about possession and *manus* in Cornil 1939: 407ff, among many others.

because one of the main differences between *potestas*, *manus* and *mancipio* appears to be this very feature. Although a measure of frustration may be felt on account of the paucity of information provided to us by Gaius, it may also be said that this is precisely what makes Roman law as interesting as it is for us. The same difference is apparent with regard to slaves under property and *usufructus*:

G 2 94: “De illo quaeritur: an per eum seruum, in quo usumfructum habemus, possidere aliqu<am> rem et usucapere possumus, quia ipsum non possidemus? per eum uero, quem bona fide possidemus, sine dubio et possidere et usucapere possumus. loquimur autem in utriusque person<a> secundum definitionem, quam proxime exposuimus; id est, si quid ex re nostra uel ex operis suis adquirant, id nobis adquiritur.”

The reasoning is similar, and fortunately we know more about the position of a slave who is the subject of *usufructus* than we do about a wife *in manu* or a son *in mancipio*. Gaius, on this matter, adds:

G 2 91: “De his autem seruis, in quibus tantum usumfructum habemus, ita placuit, ut quidquid ex re nostra uel ex operis suis adquirunt, id nobis adquiratur; quod uero extra eas causas, id ad dominum proprietatis pertineat: itaque si iste seruus heres institutus sit legatumue quid ei aut donatum fuerit, non mihi, sed domino proprietatis adquiritur.” 2 92: “Idem placet de eo, qui a nobis bona fide possidetur, siue liber sit siue alienus seruus: quod enim placuit de usufructuario, idem probatur etiam de bonae fidei possessore: itaque quod extra duas istas causas adquiritur, id uel ad ipsum pertinet, si liber est, uel ad dominum, si seruus est.” 2 93: “Sed bonae fidei possessor cum usucepit seruum, quia eo modo dominus fit, ex omni causa per eum sibi adquirere potest. usufructuarius uero usucapere non potest; primum quia non possidet, sed habet ius utendi fruendi; deinde quia scit alienum seruum esse.”

Regarding *usufructus*, the difference apparently lies in the fact that there are two persons who have rights over the slave, the *nudus dominus* and the *usufructuarius*, and therefore any property that the slave may acquire could go to either of them, depending on whether or not the property accrues by reason of his work. It may be argued that this situation is similar to that in which a *pater* has someone else’s son *in mancipio*, in that there would also be two persons who hold a right over the son – his natural father, who does not lose *potestas* until the third time that he sells him, and the acquirer of the son *in mancipio*. On the other hand, in the case of the wife *in manu*, we do not have a parallel situation. What we do know is that marrying in *manus* breaks the agnatic family ties of the wife to her original *paterfamilias*.¹⁸ According to known population figures applicable to Roman society,¹⁹ this might be a rather rare case, for usually the low life expectancy in the Roman empire would prevent it. Another identifiable similarity between the position of the slave under *usufructus*

18 However, Voci and Russo Rugieri have put forward the possibility that even the wife *in manu* may still have links to her original family, at least for the repression of immoral acts. See Voci 1980: 421; and Russo Rugieri (1989-1990): 115.

19 See Saller 1994: 12ff.

and the wife *in manu* is that the *usufructuarius* does not have the *vitae necisque potestas* over the slave, because by killing him he would destroy the property of the *nudus dominus* to whom he would therefore become liable. Would this then mean that the husband does not possess his wife *in manu* because he does not hold the *vitae necisque potestas* over her as he does over his descendants and slaves? Perhaps. However, this brings us to yet another problem. A wife *in manu* could not hold property because she had no patrimony. Therefore, if anything that she acquired did not belong to her husband, then who owned it? There are no clear-cut answers to these questions.

Finally, Gaius concludes his analysis by pointing out that no person under *potestas*, *manus* or *mancipium* can perform an *in iure cessio*:

G 2 96: “In summa sciendum est his, qui in potestate manu mancipioque sunt, nihil in iure cedi posse; cum enim istarum personarum nihil suum esse possit, conueniens est scilicet, ut nihil suum esse in iure vindicare possint.”

The reason for this is easy to understand. None of the abovementioned persons has patrimony and therefore they cannot vindicate anything. As a welcome change, there does not appear to be any doubt in relation to this aspect.

7 Acquisition of universalities

Having dealt with singular acquisitions, Gaius analyses universal acquisitions. He equates *manus* with the adoption of a person *sui iuris*:

G 2 98: “Si cui heredes facti sumus siue cuius bonorum possessionem petierimus siue cuius bona emerimus siue quem adoptauerimus siue quam in manum ut uxorem receperimus, eius res ad nos transeunt.”

The reasoning is simple. Through the *capitis deminutio* that *manus* implies, the property of the wife became the patrimony of the husband (as dowry²⁰) or his *pater* (if he himself is *alieno iuris*). A detailed explanation is given in the third commentary of Gaius:

G 3 83: “Etenim cum pater familias se in adoptionem de<dit> mulierue in manum conuenit, omnes eius res incorporales et corporales, quaeque ei debita sunt, patri adoptiuo coemptionatoriue adquiruntur exceptis his, quae per capitis deminutionem pereunt, quales sunt ususfructus, operarum obligatio <libertorum>, quae per iusiurandum contracta est, et <lites contestatae> legitimo iudici<o>.” 3 84: “Ex diuerso quod is debu<it, qui se in> adoptionem dedit quaeue in manum conue<nit, non> transit ad coemptionatorem aut ad patrem adoptiuum, nisi si hereditarium aes alienum f<uerit> de eo> enim, quia ipse pater adoptiuus aut coemptionator heres fit, directo tenetur iure, i<s uero, qui> se adoptandum dedit, quaeue in manum conuenit, desinit esse heres; de eo uero, quod proprio nomine eae

20 Cicero *Top* 23 3: “Ab effectis rebus hoc modo: Cum mulier viro in manum convenit, omnia quae mulieris fuerunt viri fiunt dotis nomine.”

personae debuerint, licet neque pater adoptius teneatur neque coemptio- nator <et ne> ipse quidem, qui se in adoptionem ded<it, uel ipsa>, quae in manum conuenit, maneat obligatus obligata<ue>, quia scilicet per capitis diminutionem liberetur, tamen in eum eamue utilis actio datur rescissa capitis deminutione, et, si aduersus hanc actionem non defendantur, quae bona eorum futura fuissent, si se alieno iuri non subiecissent, uniuersa uendere creditoribus praetor permittit.”

Of the categories of persons who could eventually have entered into the dependence of the *paterfamilias*, these were the only two that could have held patrimony and, therefore, they are studied together. This is unusual because, as we have already seen, Gaius normally analyses *manus* and *mancipium* together.

8 Succession *mortis causa*

Persons who were subject to the *potestas* of the *paterfamilias* could become successors to the *pater*’s inheritance. The slaves – who became *heredes necessarii* – had to be liberated as designated by the will, and they could not reject the inheritance. It was the praetor who granted these *heredes* the *ius abstinendi* in order that they could avoid loss that the succession could possibly entail. Gaius proceeds to explain that the descendants who became *sui iuris* upon the death of the *pater* – who were called *heredes sui et necessarii* – were also not permitted to reject the inheritance. Gaius, following his traditional order of treatment, commences his exposition with the heirs who were subject to the *potestas* of the deceased *paterfamilias*:

G 2 152: “Heredes autem aut necessarii dicuntur aut sui et necessarii aut extranei.” 2 153: “Necessarius heres est seruus cum libertate heres institutus, ideo sic appellatus, quia siue uelit siue nolit, omni modo post mortem testatoris protinus liber et heres est.” 2 156: “Sui autem et necessarii heredes sunt uelut filius filiaue, nepos neptisue ex filio <et> deinceps ce<te>ri, qui modo in potestate morientis fuerunt: sed uti nepos neptisue su<u>s heres sit, non sufficit eum in potestate aui mortis tempore fuisse, sed opus est, ut pater quoque eius uiuo patre suo desierit suus heres esse aut morte interceptus aut qualibet ratione liberatus potestate; tum enim nepos neptisue in locum sui patris succedunt.”

Persons who were subject to the *potestas* of another were governed by the particular rules that were applicable. Therefore, the wife *in manu viri* will become a *heres sui et necessaria*, while those under *mancipio* will be *heredes necessarii*. Following his usual method, Gaius begins with persons under *manus* and thereafter he analyses the position of persons under *mancipio*:

G 2 159: “Idem iuris (that of the daughters under potestas) est et <in> uxoris persona, quae in manu est, quia filiae loco est, et in nuru, quae in manu filii est, quia neptis loco est.” 2 160: “Quin etiam similiter abstinendi potestatem facit praetor etiam ei, qui in causa [id est mancipato] mancipi<i> est, <si> cum libertate heres institutus sit, cum necessarius, non etiam suus heres sit, tamquam seruus.”

In relation to heritage, Gaius once again draws a parallel between persons who are under *potestas* and persons who occupy the place of a person under *potestas*. The situation of the wife *in manu* is equated to that of a daughter and those who are under *mancipio* are in a position analogous to that of actual slaves, at least for hereditary matters. The rules concerning the situation of the *heredes sui et necessarii* are set out in some detail thereafter, in the third commentary:

G 3 1: “<Intestatorum hereditates ex lege xii tabularum primum ad suos heredes pertinent>.”
 3 2: “<Sui autem heredes existimantur liberi, qui in potestate morientis fuerunt, ueluti filius filiae, nepos neptis ex filio, pronepos proneptis ex nepote filio nato prognatus prognatae. nec interest, utrum naturales sint liberi an adoptiui. ita demum tamen nepos neptis et pronepos proneptis suorum heredum numero sunt, si praecedens persona desierit in potestate parentis esse, siue morte id acciderit siue alia ratione, ueluti emancipatione; nam si per id tempus, quo quis moriatur, filius in potestate eius sit, nepos ex eo suus heres esse non potest. idem et in ceteris deinceps liberorum personis dictum intellegemus>.” 3 3: “<Vxor quoque, quae in manu eius, qui moritur, est, ei sua heres est, quia filiae loco est. item nurus, quae in filii manu est, nam et haec neptis loco est. sed ita demum erit sua heres, si filius, cuius in manu fuerit, cum pater moritur, in potestate eius non sit. idemque dicemus et de ea, quae in nepotis manu matrimonii causa sit, quia proneptis loco est>.”

Gaius once again follows his usual method of separate treatment of the rules pertaining to persons under *potestas* and persons who are only in that position (*in loco*), in this case, those under *manus*. The passage highlights an important difference. Regarding grandchildren under *potestas*, Gaius states that they could become *heredes sui et necessarii*, given that after the grandfather died their natural father (the *filiusfamilias* of the *pater*) was no longer under the *potestas* of the *paterfamilias*. Later, while analysing the position of the daughter-in-law *in manu* – who would be in the position of a granddaughter – Gaius tells us that the same rules applied to her situation, given that her husband was no longer in the *potestas* of the *pater*.

The son could exit the *potestas* of the *pater* by reason of either his own death or his emancipation. Where the natural son died, the position seemed to be straightforward, but where the son was emancipated, some questions could be raised. If the son was emancipated, did the wife *in manu* remain under the power of his *paterfamilias*? Or did her status change in line with that of her husband? The case is also explained in the *Collatio*:

Collatio 16 2 3: “Uxor quoque, quae in manu est [ei cuius in manu est] sua heres est, quia filiae loco est: item nurus quae in filii manu est, nam et haec neptis loco est. Sed ita demum erit sua heres [si] filius, cuius in manu sit cum pater moritur, in potestate eius non sit. Idemque dicimus et de ea, quae [in] nepotis manu matrimonii causa sit, quia proneptis loco est.”

In principle, after the emancipation of the natural father, his descendants remained in the power of the grandfather, who was still his *paterfamilias*, and they became *sui iuris* after the latter’s death. Therefore, the position in relation to a daughter-in-law *in manu* could be the same. As we have seen, in G 1 148, Gaius informs us that the

father-in-law was entitled to appoint a guardian for his daughter-in-law. Because *manus* and guardianship were incompatible – on the basis that guardianship implied a patrimonial capacity that *manus* excluded – we should conclude that the emancipation of the son terminated his *manus* relationship with his wife, who remained under the dependence of her father-in-law, in the same way as the grandchildren did.²¹

Regarding disinheritance, Gaius equates the position of adopted sons with that of the wife *in manu* on the basis that they both invalidate the will in a similar way to that in which the *postumi* do:²²

G 2 138: “Si quis post factum testamentum adoptauerit sibi filium aut per populum eum, qui sui iuris est, aut per praetorem eum, qui in potestate parentis fuerit, omni modo testamentum eius rumpitur quasi agnatione sui heredis.” 2 139: “Idem iuris est, si cui post factum testamentum uxor in manu<m> conueniat, uel quae in manu fuit, nubat: nam eo modo filiae loco esse incipit et quasi sua.”

Equating the two situations seems justified because through adoption the *pater* legally acquired an heir (who was a *postumus* with respect to the will) in the same way as, through *manus*, he acquired a person who occupied the same hereditary position as his own daughter. Volterra used this fragment to propose that the wife *in manu* would enter into her husband’s *potestas* through the *conventio in manu*.²³ However, an examination of the passage in its context shows clearly that this is not what Gaius maintains. He uses different wording in his exposition of the situation with respect to an adopted son and the wife *in manu*, respectively. When dealing with the former, Gaius specifically mentions the word *potestas*, while he seems to treat the latter’s position as if she was *loco filiae*. Gaius does not state that the wife *in manu* is *in potestate*, and it would be only by forcing the text that one could arrive at such a conclusion, which would seem to contradict Gaius’ entire exposition. Once Gaius has divided the powers of the *paterfamilias* into *potestas*, *manus* and *mancipio*, he never merges them again, but he treats them separately in each situation in which he must explain a matter pertinent to them. *Manus* seems merely to imitate *potestas*, as the son *in mancipio* was in a position in which parallels could be drawn with a situation of slavery, although only in some respects. In this respect, Volterra’s conclusion is untenable.

However, there is a third text in which the situation of the wife *in manu* and the adoptive son are equated. It occurs in the treatment of the rights of inheritance that the ex-master (*patronus*) could hold in the succession to the rights of his freedmen. According to the information given by Gaius, the inheritance of the *patronus* varied

21 Piro (at 1996: 93ff) proposes the contrary. The main problem with her hypothesis is that she does not seem to take into account the fact that guardianship and *manus* are incompatible with each other.

22 See Düll 1944: 207ff.

23 Volterra 1995a: 251ff.

through time. During the time of the Twelve Tables, he could be passed over in the testamentary succession and was called to the inheritance only in case of intestacy, if the freedman had no *sui heredes* (descendants, adoptive sons or daughters or a wife *in manu*). This position would have changed due to the praetor granting *bonorum possession contra tabulas* to the *patronus* if the freedman did not leave to the *patronus* an inheritance equivalent to one half of his (the freedman’s) goods. In any event, in the case of intestacy, if the freedman did not leave natural descendants and only had an adoptive son or a wife *in manu*, the praetor would grant him *bonorum possessio*:

G 3 41: “si uero intestatus moriatur suo herede relicto adoptiuo filio <uel> uxore, quae in manu ipsius esset, uel nuru, quae in manu filii eius fuerit, datur aequae patrono aduersus hos suos heredes partis dimidia bonorum possessio. prosunt autem liberto ad excludendum patronum naturales liberi, non solum quos in potestate mortis tempore habet, sed etiam emancipati et in adoptionem dati, si modo aliqua ex parte heredes scripti <sint aut praeteriti con>tra tabulas testamenti bonorum possessionem ex edicto petierint ... ”

This is a disposition created to favour the position of the *patronus* by diminishing the importance of the agnatic ties, which the law creates, in contrast to blood ties. It left intact the position of the natural descendants, but impaired the position of the wife *in manu* and the adoptive son. This seems to be a disposition that went against the original spirit of Roman civil law and had an exceptional character. Regarding the *nurus in manu*, the observation made above tended also to accord with this understanding of the situation. Although her husband could have been emancipated, she still fell under the dependence of his former *paterfamilias*.

9 Obligations

In his third commentary (3 88ff), Gaius deals with obligations: how they are constituted; their validity; and how they may be extinguished. Regarding *stipulatio*, he explains that a person *alieno iuri subiecta* could not acquire an obligation towards his *paterfamilias*, something which seems evident since the qualities of debtor and creditor would be confused in the same patrimony. After explaining the problem, Gaius states that neither slaves nor persons who were *in mancipio*, nor a daughter, nor persons *in manu*, could acquire any obligation by *stipulatio*, not only to the power holder, but also to any other person:

G 3 104: “<Praeterea> inutilis est stipulatio, si ab eo stipuler, qui iuri meo subiectus est, item si is a me stipuletur. seruus quidem et qui in mancipio est et <fi>l<ia familia>s et quae in manu est, non solum ipsi, cuius iuri subiecti subiectaeque sunt, obligari non possunt, sed ne alii quidem ulli.”

To go into the possible reasons for omitting the *filiusfamilias* from this enumeration would fall outside of the parameters of this study, devoted as it is to Gaius’ exposition of *manus* and *mancipio*. However, a reason may be that the *filiusfamilias* could hold patrimony separately by virtue of his *peculium castrense*, but we leave this question

for a separate study.²⁴ What is relevant in this context is that Gaius does not use the word *manus* or *potestas* to refer to persons who are under the dependence of the *paterfamilias*. The technical expression that he uses is *iuri subiecti*. In other words, as far as concerns legal terminology, neither *potestas* nor *manus* are all-encompassing expressions that may be used, as many scholars have assumed, to describe the different, nuanced, situations of persons under the dependence of the *pater*.²⁵ Later, in the text explaining “*adstipulatio*”, Gaius points to an anomaly in the institution which he calls a singular right:

G 3 114: “in hoc autem iure quaedam singulari iure observantur. nam adstipulatoris heres non habet actionem. item seruus adstipulando nihil agit, qui ex ceteris omnibus causis stipulatione domino acquirit. idem de eo, qui in mancipio est, magis placuit; nam et is serui loco est. is autem, qui in potestate patris est, agit aliquid, sed parenti non acquirit, quamvis ex omnibus ceteris causis stipulando ei adquirat; ac ne ipsi quidem aliter ac<tio> conpetit, quam si sine kapitis diminutione exierit de potestate parentis, ueluti morte eius aut quod ipse flamen Dialis inauguratus est. eadem de filia familias et quae in manu est, dicta intellegemus.”

Again, we will not go into the full depth of the problem,²⁶ but we will limit our comments to the formal aspects of the reasoning. One can appreciate Gaius’ division between, on the one hand, slaves and persons who are under *mancipio*, and on the other, a *filiafamilias* in relation to which he draws parallels with the situation of the wife *in manu*. The observation may be made that Gaius uses the expression “*loco*” to extend a traditional solution to a specific problem to situations that were not originally envisaged by or included in it. The concept *loco* serves an interpretative function in jurisprudence, permitting the creation of new solutions for unresolved cases. Nevertheless, the conceptual separation between *potestas* and its more nuanced imitations is retained.

10 *Actio furti and iniuriae*

Once Gaius has concluded his analysis of contractual liability, he explains tort law. In this section he deals with the case of *furtum* of free people under the *potestas* of the *paterfamilias*:

G 3 199: “Interdum autem etiam liberorum hominum furtum fit, uelut si quis liberorum nostrorum, qui in potestate nostra sint, siue etiam uxor, quae in manu nostra sit, siue etiam iudicatus uel auctoratus meus subreptus fuerit.”

According to Gaius, the *paterfamilias* can bring an action of *furtum* for his son *in potestate*, his wife *in manu*, the *iudicatus* and a gladiator under a salary (*auctoratus*), the two falling outside the purview of our study.²⁷ Again, Gaius treats the situation of the wife *in manu* and the son *in mancipio* separately, a pattern that is observed

24 For a detailed study, see Scherillo 1930: 203ff.

25 See n 1.

26 On the matter see Scherillo 1930: 219ff.

27 See Watson 1971: 146; Treggiari 1969: 141.

consistently throughout his work. Although a slave could obviously be subject to *furtum*, the text does not include this situation, perhaps because it deals specifically with cases when the *actio furti* can be brought in relation to free people. This may be the reason for the omission of the son *in mancipio*, for his situation is usually equated with that of a slave.

Regarding the *iniuria*, the situation is a bit more complicated:

G 3 221: “Pati autem iniuriam uidemur non solum per nosmet ipsos, sed etiam per liberos nostros, quos in potestate habemus, item per uxores nostras, quamuis in manu nostra <non> sint; itaque si ueluti filiae meae, quae Titio nupta est, iniuriam feceris, non solum filiae nomine tecum agi iniuriarum potest, uerum etiam meo quoque et Titii nomine.”

Although reconstruction of the text is still being debated, especially regarding the matter of whether, after “*in manu nostra*”, there should be a “*non*”,²⁸ some comments may be made. In principle, the victim of an *iniuria* was the one who held the *actio iniuriarum*, but the *pater* of the victim under *potestas* and the husband, even if he had no *manus*, also held the action. For this reason, this yields a somewhat awkward outcome. One would expect that only the husband could have sued when he held *manus*, because his wife would then have been under his dependence, but that, if the marriage was without *manus*, only the *paterfamilias* could have sued because she remained a *filiafamilias*. Some editors prefer to omit the “*non*” and would have the text read that the husband could sue only when he held *manus*. While this would accord with what is known about the agnatic family system, it does not make much sense in the context of the following example that Gaius provides: A daughter was married to Titus and someone committed an *iniuria* to her. Gaius expressly states that both the father and the husband would have had an action. If the traditional system applied, then only the *pater* (if she was under *potestas*) or the husband (if she was under *manus*) would have had an action, but the text says that both of them did. In addition, the word used by Gaius to describe the marriage is “*nupta*”, which seems to be linked with *sine manu* marriage in Gaius’ vocabulary.²⁹ This may be viewed as something of an exception in that it appears to extend the protection to the victim. It may be the result of a development in the concept of *iniuria*, to permit wider protection of the victim, based on personal ties rather than power relations.³⁰

28 We follow the Seckel-Kuebler reconstruction of the text (see Seckel & Kuebler 1938). However, some editions read “*item per uxores nostras [cum in manu nostra sint]*” (*Ad ex*: Manthe 2004). Very recently, Cursi has defended this first reading in a very seductive way, relating it to the development of the praetorian *iniuria* (see Cursi 2012: 255-288).

29 He uses this very same word to describe the process of acquisition of *manus* through *usus*. In G 1 111 he expressly states that a wife should stay *nupta* for a year in order to enter the *manus* of her husband: G 1 111: “*Usu in manum conueniebat, quae anno continuo nupta perseuerabat; quia enim uelut annua possessione usu capiebatur, in familiam uiri transibat filiaeque locum optinebat. itaque lege duodecim tabularum cautum est, ut si qua nollet eo modo in manum mariti conuenire, ea quotannis trinoctio abesset atque eo modo cuiusque anni usum interromperet. sed hoc totum ius partim legibus sublatum est, partim ipsa desuetudine oblitteratum est.*”

30 Cursi 2012: 255-288.

On the other hand, regarding slaves, the *servus* is not considered to be a victim of *iniuriae*, save for the case that through offending him, an *iniuria* to the master is intended:

G 3 222: “Seruo autem ipsi quidem nulla iniuria intellegitur fieri, sed domino per eum fieri uidetur; non tamen iisdem modis, quibus etiam per liberos nostros uel uxores iniuriam pati uidemur, sed ita, cum quid atrocius commissum fuerit, quod aperte in <con>tumeliam domini ieri uidetur, ueluti si quis alienum seruum uerberauerit, et in hunc casum formula proponitur; at si qui<s> seruo conuicium fecerit uel pugno eum percusserit, non proponitur ulla formula nec temere petenti datur.”

Iniuria against a slave attracted no liability, except if by acting against the slave the author intended to offend the master. The position in relation to persons under *mancipio* was very different, because, as we saw earlier, they could use an action for *iniuria* even against the holder of the *mancipio*. Gaius does not say if the *mancipium* holder could use the *iniuria* action when the offence inflicted against the son *in mancipio* was also intended against him. It was possible, but the position is unclear.

What is interesting is that *iniuria* apparently broke the assimilation between persons who were under *potestas* and persons who were *in loco*. *Manus* did not seem relevant in this context, and even the husband of the wife *sine manu* could have used the action. A son *in mancipio* was subject to an entirely different regime to that which applies to a slave. It is when studying the subject of *iniuriae* that the difference between being under *potestas*, on the one hand, and on the other, being under one of its imitations, *in loco filiae* or *servorum*, becomes evident.

11 *Actiones fictae*

Sometimes the praetor, when dealing with *alieni iuri*, granted actions as if *capitis deminutio* had never occurred. The praetor’s aim is to prevent persons from avoiding liability by becoming subject to the dependence of another. This could have been the case in relation to an *adrogatus* and also the wife *in manu*, because both might have held patrimony before the *capitis deminutio* when the adoption or the convention *in manu* was performed. The praetor gives the following *actio ficta*:

G 4 38: “Praeterea aliquando fingimus aduersarium nostrum capite deminutum non esse. nam si ex contractu nobis obligatus obligataue sit et capite deminutus deminutaue fuerit, uelut mulier per coemptionem, masculus per adrogationem, desinit iure ciuili debere nobis, nec directo intendi potest sibi dare eum eamue oportere; sed ne in potestate eius sit ius nostrum corrumpere, introducta est contra eum eamue actio utilis rescissa capitis deminutione, id est, in qua fingitur capite deminutus deminutaue non esse.”

The similarity, as Volterra points out, lies in the fact that in both cases the person who had entered the dependence of a *paterfamilias* held patrimony before the *capitis deminutio*.³¹

31 Volterra 1995a: 251ff.

12 *Actiones noxales*

Elsewhere we have treated at length the situation of the wife *in manu* and a son *in mancipio* with respect to *actiones noxales*³² and therefore we simply refer, in this instance, to the systematic method of Gaius’ analysis of the subject. First, Gaius explains the situation in relation to persons under *potestas* (the son and the slave) with respect to penal actions:

G 4 75: “Ex maleficio filiorum familias seruorumque, ueluti si furtum fecerint aut iniuriam commiserint, noxales actiones proditae sunt, uti liceret patri dominoue aut litis aestimationem sufferere aut noxae dedere. erat enim iniquum nequitiam eorum ultra ipsorum corpora parentibus dominisque damnosam esse.”

Thereafter, Gaius explains the situation regarding persons who are in their position, or “place” (*in loco*), in other words, those under *manus* and *mancipio*:

G 4 80: “Haec ita de his personis, quae in potestate sunt, siue ex contractu siue ex maleficio earum controuersia sit. quod uero ad eas personas, quae in manu mancipioe sunt, ita ius dicitur, ut cum ex contractu earum agatur, nisi ab eo, cuius iuri subiectae sint, in solidum defendantur, bona, quae earum futura forent, si eius iuri subiectae non essent, ueneant. sed cum rescissio capitis deminutione cum iis imperio continenti iudicio agitur, * * *”

Sadly, the text is lost as Gaius is about to begin with *actiones ex delicto*. Nevertheless, the jurist again follows his own division between those who are under *potestas* and those who are under *manus* and *mancipio*.

13 Conclusion

We have witnessed how, throughout Gaius’ entire work in which he discusses *alieni iuri*, he maintains a division between those who are under *potestas* – that is to say, slaves and descendants – and those who are only in their place, namely the wife *in manu* and the son *in mancipio*. We observed that the expression *potestas* is used to describe only the situation of descendants and slaves and that in not even a single text does Gaius use this word to refer to the wife *in manu* or a son *in mancipio*.

The dependence to which a slave and a *filiusfamilias* were subject was apparently similar in many respects. Both the *filiusfamilias* and the slave were subject to the *vitae necisque potestas*; could be surrendered for noxal actions; were *heredes necessarii*; provided a means by which the *pater* could acquire possession and property; and were prevented from forcing the *pater* to liberate them. Their respective positions were, however, apparently different when one considers the procedures that the *pater* might have used to free them; the effects that the *astipulatio* could produce; and by virtue of the fact that the *filiifamilias* were also *heredes sui*, while the slaves were not.

32 See Amunátegui Perelló 2008: 205-236.

Equating the descendants and the slaves seems rather odd if one considers the prevailing social realities during the Late Republic and Early Empire. During the Late Republic a steady decline in the practical intensity of *patria potestas* led to a progressive dissolution of its most brutal aspects. In fact, during the Late Republic the exercise of the *vitae necisque potestas* was somewhat problematic and, if not backed by the authority of the Senate³³ or a *consilium amicorum*, could lead to social ostracism.³⁴ During the Early Empire, the practice was suppressed for any practical purpose. All things considered, equating descendants and slaves in this context seems to fit more appropriately with the archaic social reality of Rome when the main working forces at the *pater's* disposal were relatively few slaves and his own descendants.

On the other hand, the words *manus* and *mancipium* – which seem to date from earlier times – are used to describe the powers that are to some extent shaded, or nuanced, equivalents of *potestas*. The wife *in manu* is *loco filiae*, while the son *in mancipio* is *loco servorum*. The comment may be made that the main difference between *potestas* and its imitations was the intensity of the personal powers that the *pater* could exercise. The wife *in manu* and the son *in mancipio* do not seem to have been under *vitae necisque potestas*, both of them could enjoy fiduciary guardianship and neither of them was under the possession of the *pater*. They could compel the *pater* to liberate them. Another point of significance is that the powers that may be exercised over all of the persons subject to *potestas* tend to be different to those that may be exercised in respect of persons under *manus* or *mancipium*. In this respect we could reduce Gaius' division into a dual partition, with, on one side, persons under *potestas* and, on the other, those under *manus* (or *mancipium*). *Manus* would not be equivalent to *potestas*, as the traditional theory holds,³⁵ nor would *manus* generate *potestas*, as Volterra proposed.³⁶ The difference between *potestas* and *manus* is substantial, probably originating in Early Roman law, and is embedded in social realities that are beyond the scope of this modest work.

Abstract

This article studies the meaning of the expression in “*loco filiae*” that Gaius uses to describe the position of the wife that has undergone a *conventio in manum*. Its aim is

33 As in the case of Lucius Gellius, who judged his son, with the whole Senate acting as a *consilium*, during the last century of the Republic (Valerius Maximus 5 9 1). See Kunkel 1966: 22; Volterra 1995b: 133; Bauman 1984: 1290.

34 This was the case of Quintus Fabius Maximus, who killed his son for conducting himself with dubious chastity. He was accused by the *tribunus plebis* and was thereafter exiled. See Valerius Maximus 6 1 5; Quintilian *Decl Mai* 3 17; Orosius *Adv Pag* 5 16. Scholarship has been prolific on the case, see Rabello 1979: 12; Harris 1986: 84ff; Albanese 1991: 360; Kaser 1938: 6; Volterra 1995b: 143; Thomas 1981: 663.

35 Mitteis 1908: 75; Wieacker 1940: 11; Söllner 1969: 12ff.

36 Volterra (1995a): 251ff.

to ascertain whether or not *manus*, *potestas* and *mancipium* were equivalent powers, in the time of Gaius, by identifying, in particular, institutions which reflect disparate regulation of each.

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LE GOUT DES JEUNES POUSSSES: ATTICUS, BRUTUS, OCTAVE

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Key words: *Politique; jeunesse; Rome; Brutus; Octave; Atticus* (Politics; youth; Rome; Brutus; Octavius; Atticus)

Brutus ... Octave ... Quel est le point commun? L'un est né vers 85 avant JC, l'autre est né vingt ans plus tard en 63 avant JC, appartenant ainsi à une tout autre génération. Un premier point commun pourrait être César qui favorisa la carrière de l'un comme de l'autre, qui fut tué par l'un et vengé par l'autre. Un second point commun pourrait se trouver dans la plaine de Philippes, là où les soldats de Brutus prirent le camp d'Octave, là où Brutus se suicida après la victoire d'Antoine. Mais c'est le troisième point commun que nous voudrions étudier ici, en la personne de Titus Pomponius Atticus.¹ Ce chevalier romain des plus discrets se trouva parmi les proches de Brutus, et plus tard dans l'entourage d'Octave devenu Octavien. Né en 110 avant JC, il mourut un an avant Actium. Il avait donc vingt-cinq ans de plus que Brutus et presque cinquante ans de plus qu'Octave. Ses talents étaient multiples: on le voit faire un arbre généalogique de la famille de Brutus,² à la demande de

1 Les biographies d'Atticus ne manquent pas en anglais et en allemand: voir en particulier Leslie (1950) et Perlwitz (1994). Voir également Benferhat 2005: 98-172.

2 Cf *Nep Att* 18 3. Sur les généalogies d'Atticus, préparées en 46-44, voir Marshall 1993: 308-310 sur celle de Brutus. L'auteur souligne les aspects politiques de ces ouvrages, tout en les rapprochant du *Liber annalis* d'Atticus pour ce qui est du travail d'historien.

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celui-ci qui savait le goût d'Atticus pour l'histoire. On le voit donner des conseils à Octavien pour rénover un temple ancien tombé en ruine:³ toujours cette passion pour l'histoire ...

La question que l'on pourrait se poser pour commencer serait de savoir ce qu'ils pouvaient s'apporter vraiment, ce qu'ils attendaient les uns les autres de leur relation. Rome affectionnait et favorisait des liens entre générations qui permettaient de transmettre des savoirs: pensons à la relation qui existait entre le questeur et son gouverneur de province quand les choses se passaient bien. Le questeur,⁴ jeune homme d'environ trente ans, était comme un fils adoptif pour le consulaire: l'un commençait sa carrière quand l'autre était parvenu au sommet, ne pouvant plus guère espérer que la charge de censeur s'il n'était pas encore rassasié d'honneurs. Il y avait donc comme une sorte de passage de relais entre deux générations. De même, les spécialistes de droit ou les grands orateurs attiraient auprès d'eux des jeunes gens venus se former: Cicéron eut ainsi parmi ses protégés Caelius et Trebatius, après avoir été formé par Mucius Scaevola.

Mais la relation avec Atticus n'était pas de cet ordre-là: il choisit de ne pas faire carrière et de rester dans l'ombre, donc il n'avait pas de savoir officiel – que cela soit d'ordre militaire ou politique ou intellectuel – à transmettre. En revanche, il était extrêmement riche et faisait partie de la haute société romaine avec un carnet d'adresses très solide. Il était donc représentatif d'une certaine Rome et c'est peut-être dans cette direction qu'il faudra chercher. Inversons le point de vue: que pouvait attendre Atticus de jeunes pousses comme Brutus et Octave? Quel intérêt pouvait-il trouver à les fréquenter? Ils étaient tous les deux promis à un avenir de chef de parti, mais pas forcément le parti qui plaisait le plus à Atticus. Nous verrons donc dans une première partie comment il a soutenu Brutus, puis comment il a dû se faire à Octave: chemin faisant nous reverrons la Rome des dernières années de la République et le terreau de l'ascension fulgurante du futur Auguste.

Lorsque Brutus naquit,⁵ Atticus n'était pas à Rome, si l'on retient la date de 85 avant JC pour cette naissance. Tous les deux étaient pris dans les tourbillons de la guerre civile qui avait commencé en 88: Atticus avait choisi de partir s'installer à Athènes⁶ après le meurtre du tribun P Sulpicius Rufus, auquel il était apparenté.

3 *Idem* 20 3.

4 Voir Moreau 1989: 37-46. Sur la questure, voir Latte (1936) sur les origines de cette magistrature; voir Harris (1976) pour son histoire sous la République entre 267 (création de cette charge) et 81 (la réforme de Sylla) et Ryan (1996) sur l'âge du questeur.

5 Parmi les nombreux ouvrages consacrés à Brutus, voir en particulier Clarke (1981) et Dettenhofer 1992: 99-119 sur ses jeunes années. Martin a consacré plusieurs études à Brutus, de sa thèse sur la royauté jusqu'à maintenant: nous renvoyons à l'une des dernières qui permettra de trouver la bibliographie complète: voir Martin 2010: 33-49.

6 Sur les raisons de ce séjour (financières, politiques) voir Marshall 1999: 56-68. L'auteur insiste sur les liens financiers d'Atticus avec le monde grec en mettant en avant la figure de Lucullus auquel était lié Caecilius, l'oncle d'Atticus.

Orphelin de père, il laissait à Rome sa mère Caecilia et sa soeur Pomponia. La mère de Brutus, Servilia,⁷ avait épousé un partisan de Marius, Marcus Junius Brutus,⁸ tribun de la plèbe en 83 que l'on croise dans le *Pro Quinctio*, et qui fut assassiné en 77 par Pompée au moment du soulèvement organisé par Lépide.⁹

Non seulement Brutus perdit ainsi son père alors qu'il n'avait pas dix ans, mais il semble bien qu'il devint enfant de proscrit avec l'impossibilité de faire carrière ensuite: F Hinard considère que M Junius Brutus n'avait pas déposé les armes contre Sylla¹⁰ mais que parti en Gaule il y entretint une insurrection à la façon d'un Sertorius en Espagne, et qu'il se rallia à Lépide par la suite. C'est donc en tant que personne inscrite sur la liste des proscrits qu'il aurait été mis à mort par Pompée quand les Syllaniens parvinrent à lui mettre la main dessus. Cela expliquerait en tout cas l'adoption du jeune Brutus par le frère de sa mère, Q Servilius Caepio, dont il prit le nom: c'était un moyen de lui permettre de faire le *cursus honorum*.

C'est le nom sous lequel il est connu en 59 avant JC lorsqu'il est accusé de conspirer contre Pompée sous le consulat de César: Cicéron utilise néanmoins les deux patronymes *Caepio hic Brutus*, dans une lettre à Atticus¹¹ qui était peut-être déjà intéressé par le sort de cette jeune pousse jugée prometteuse dans le camp des *Optimates*. C'est en effet à ce titre que son nom fut cité par un dénonciateur avec celui d'autres jeunes gens du même parti: Curion, Paulus, Lentulus. On leur reprochait de prendre le parti de Bibulus contre son collègue.

Ses débuts dans le *cursus honorum* datent de la fin des années 50: auparavant il avait été dans le staff de Caton, le demi-frère de sa mère Servilia, lorsque celui-ci fut envoyé à Chypre¹² par Clodius en 58 avant JC. C'était un bon moyen de l'éloigner de Rome après cette affaire de conspiration et de l'aider à s'enrichir. Brutus avait commencé à gagner de l'argent par des prêts, y compris à Quintus Cicéron,¹³ mais surtout dans le monde grec. Il fut questeur en 53 avant JC en Cilicie, et épousa à la même époque Claudia, fille d'Ap Claudius Pulcher,¹⁴ le célèbre consul de 54, gouverneur de Cilicie en 53-52 et censeur de 51.

Il est très clairement alors compté comme la relève à venir dans le camp des *Optimates* auquel s'est rallié Pompée par son propre mariage avec Cornelia et l'union de son fils aîné avec la belle-soeur de Brutus, autre fille d'Appius. Cela transparaît en

7 RE 101. Voir Dettenhofer 1992: 777-779 sur le rôle politique de Servilia & Förtsch 1935: 88-94 et 104-10. Syme (1967) a consacré plusieurs analyses à Servilia également (voir index).

8 *Magistrates of the Roman Republic* 2 63.

9 Voir Keaveney 1982: 111-139.

10 Voir Hinard 1985: 361-362.

11 Cf Nep Att 2 24 2.

12 Cf Plut Brut 3. Voir Badian (1965) sur les détails de cette mission.

13 Cf Cic QFr 1 3.

14 RE 297. Sur ce personnage voir Constant (1921) et plus récemment David 1992: 825-826; Deniaux 1993: 396-397. On trouve dans Syme 1967: 46sq, quelques notations acidulées sur Appius. L'arbre généalogique des Claudii se trouve dans Syme 1986: VII.

particulier dans une lettre¹⁵ de Cicéron à celui-ci en 51. La mère de Brutus, Servilia, avait pourtant essayé de le mettre sous la protection de César en le fiançant à Julie,¹⁶ mais celle-ci fut finalement donnée en mariage à Pompée.

La correspondance de Cicéron lors de son proconsulat en Cilicie en 51 permet de voir qu'Atticus est alors déjà proche de Brutus: Cicéron le charge de transmettre ses plaintes au gendre d'Appius, qu'il appelle *noster Brutus*.¹⁷ Le possessif sert clairement à souligner que l'affection portée à Brutus par Atticus est partagée par Cicéron, et que le jeune homme lui est cher. En revanche, le *tuus* utilisé par Cicéron dans une lettre postérieure semble indiquer déjà une prise de distance: "*Ego tui Bruti rem sic ago ut suam ipse non ageret.*"¹⁸ Cette interprétation nous semble confirmée par une critique implicite du caractère difficile de Brutus: "*Faciam tamen satis tibi quidem, cui difficilius est quam ipsi; sed certe satis faciam utrique.*"

C'est que Brutus avait prêté de l'argent au roi Ariobarzane, placé sous la protection de Cicéron¹⁹ en tant que proconsul de Cilicie, et il comptait bien le récupérer, en se montrant sans doute assez pressant. Cette mentalité ne posait aucun problème à Atticus qui faisait la même chose.²⁰ Les deux hommes géraient leurs finances d'une manière semblable, et ce dans la même zone d'influence au sens large, à savoir le monde grec: la nuance est que l'on connaît surtout les relations d'affaires d'Atticus avec Athènes, Sicyone dans le Péloponnèse et la région de Buthrote,²¹ alors que pour Brutus il s'agissait semble-t-il de régions plus à l'Est, qu'il avait eu l'occasion de découvrir au cours de sa mission à Chypre, sous les ordres de Caton, ensuite pendant sa charge de questeur. Atticus appuya donc les demandes de son protégé quand celui-ci remit à Cicéron une liste de demandes,²² *mandatorum libellus*.

Certes Cicéron revendique sa *familiaritas* avec Brutus – qu'il appelle encore une fois *tuus* – devant Cassius,²³ qui était son beau-frère; certes il essaie de faire plaisir à Atticus en affirmant ne pas aimer le jeune homme moins que lui. Là encore le jeu sur les pronoms personnels est révélateur: "*quem non minus amo quam tu, paene dixi quam te.*"²⁴ C'est néanmoins Atticus qui est le protecteur des intérêts de Brutus. On peut imaginer sans trop grand risque d'erreur qu'il s'agissait ici pour

15 Cf Cic Fam 3 4 2: il utilise alors le nom M Brutus.

16 Cf Plut Cés 14 7. Voir Syme 1967: 36.

17 Cf Cic Att 5 17 6.

18 Cic Att 5 18 4 (20 septembre 51).

19 Voir Braund (1983) sur Cicéron et Ariobarzane III.

20 Sur les finances d'Atticus, on peut consulter Leslie 1950: 21-24 (un ensemble assez bref, où l'auteur s'intéresse surtout à la mise en pratique de l'épicurisme dans la gestion du patrimoine d'Atticus), et surtout Perlwitz 1992: 30-85.

21 Voir Horsfall 1989(b): 60-62.

22 Cic Att 6 1 3.

23 Cic Fam 15 14 6.

24 Cic Att 5 20 6.

Pomponius d'utiliser ses relations afin de soigner ses liens avec un jeune homme appelé à devenir un des grands du parti conservateur.

De fait, Lucullus²⁵ était mort en 57; les frères Metelli,²⁶ aussi bien Celer (le consul de 60) que Nepos (consul en 57) étaient décédés dans les années 50 aussi; Hortensius²⁷ n'était plus que l'ombre de lui-même avant de mourir en 50. Par l'intermédiaire de Servilia, sa mère, Brutus était lié à tous ces hommes, du passé désormais, ce qui lui assurait une légitimité certaine à leur succéder: son oncle Caepio avait épousé Hortensia, et sa tante était devenue la seconde femme de Lucullus.²⁸ Il y avait certes encore Appius Claudius Pulcher, Scipion Nasica, qui avait été adopté par Metellus Pius, et Caton le Jeune, autrement dit la génération²⁹ née entre 97 et 95. Mais Appius était couvert de scandales et bien trop imbu de sa noblesse: surtout il avait fonctionné en tandem avec son frère le tribun de la plèbe Clodius pour le plus grand bénéfice de la *gens* Claudia d'abord. Caton³⁰ était jugé trop rigide, en particulier vis-à-vis des chevaliers manieurs d'argent. On comprend le souhait de voir émerger un autre homme pour défendre la cause des *Optimates*.

Atticus, qui n'était pas aussi neutre en politique qu'on le prétend souvent,³¹ avait choisi, et il protégeait Brutus quitte à se retrouver en pleine contradiction, comme on le voit avec l'affaire de Salamine de Chypre. Cicéron, lors de son proconsulat en Cilicie, fut amené à devoir prendre la défense des habitants de cette cité contre un créancier dénommé Scaptius, qui réclamait deux cents talents et qui avait obtenu du beau-père de Brutus un titre de préfet ainsi que la cavalerie qui allait avec pour maltraiter ses débiteurs.³² Faute d'arriver à obtenir quelque chose, cet individu finit par sortir la plus belle carte de son jeu: il travaillait en fait pour le compte de Brutus,³³ qui n'avait pas jugé opportun de le dire, semble-t-il, même à Atticus.

On voit en filigrane une jeune pousse assez imbue d'elle-même et manifestant pratiquement les mêmes défauts que son beau-père Appius: Cicéron utilise les deux adverbes *contumaciter* et *adroganter*³⁴ pour décrire la façon dont Brutus lui écrit

25 Voir la biographie de Van Ooteghem (1959) et plus récent Tröster (2008). De la même génération que Lucullus et Hortensius on doit citer Catulus, mort vers 61.

26 Voir Van Ooteghem (1967) et Skinner 2011: chapitre 5.

27 Voir Gruen 1974: 51-53 et Dyck (2008) sur Hortensius: c'est une étude biographique très complète, et une des plus récentes mises au point.

28 Cf Plut *Cat* 24 4-5. Harders (2007) considère qu'elle était la nièce de Caton et non la sœur de Servilia: *contra RE* et *Neue Pauly* IX 461.

29 Nous ne citons ici que les personnages les plus connus: voir Gruen 1974: 56-59 sur Favonius, Bibulus, Domitius.

30 Voir la biographie de Fehrle (1983) et Gruen 1974: 53-56.

31 Sur cette question très débattue, nous nous permettons de renvoyer le lecteur à notre thèse: Benferhat 2005: 124-164.

32 Cf Cic *Att* 5 21 10 en particulier.

33 Cf Cic *Att* 6 1 6. Sur cette affaire, voir Andreau 2001: 40-43. Voir également Welch 1996: 463-466.

34 *Idem* 7. On retrouve la même critique dans une autre lettre cf Cic *Att* 6 3 7.

alors. Il est clair néanmoins que celui-ci, choyé par Atticus, le choyait à son tour en comptant sur lui pour faire bouger Cicéron avec lequel il avait manifestement beaucoup moins d'affinités. Atticus alla jusqu'à demander cinquante hommes en armes à Cicéron pour aider Brutus et son homme de paille Scaptius, sans se souvenir apparemment qu'il avait lui-même recommandé à son ami proconsul de veiller à sa réputation en se montrant irréprochable: "*Ain tandem, Attice, laudator integritatis et elegantiae nostrae, ausus es hoc ex ore tuo ... inquit Ennius, ut equites Scaptio ad pecuniam cogendam darem me rogare?*"³⁵

Sautons quelques années qui virent le début de la guerre civile et la victoire de César sur Pompée à Pharsale où Brutus combattit du côté des Républicains: c'est dans les années 46-44 que les liens entre Atticus et Brutus sont à nouveau bien attestés. Cette période est particulièrement intéressante parce qu'elle voit Brutus dans une position pour le moins ambiguë:³⁶ sa carrière rebondit grâce à César qui lui confie la Gaule à gouverner (en 46-45) puis la préture urbaine en 44, mais il est également devenu le chef de file potentiel de l'opposition puisque tous les chefs du parti des *Optimates* sont morts.

On comprend assez l'intérêt que pouvait lui porter Atticus; en revanche on ne sait malheureusement pas quelle influence le vieil homme a pu avoir sur son cadet pour le pousser ou non contre César. Relevons cependant que faire l'arbre généalogique de Brutus n'était pas vraiment innocent dans le contexte d'alors. En effet, appuyer les prétentions des Junii à faire remonter les origines de la famille au premier Brutus que Rome connut,³⁷ celui qui chassa les Tarquins du pouvoir, c'était entrer dans le jeu de toute une propagande invitant Brutus à chasser lui aussi un tyran. Mais c'est Brutus qui lui demanda ce travail, *M Bruti rogatu*, selon le biographe d'Atticus. Cicéron, dans son *Brutus*, les décrit arrivant ensemble chez lui:

*Nam cum inambularem in xysto et essem otiosus domi, M. ad me Brutus, ut consueuerat, cum T. Pomponio uenerat, homines cum inter se coniuncti tum mihi ita cari itaque iucundi, ut eorum aspectu omnis quae me angebat de republica angebat cura consederit.*³⁸

Double Patte et Patachon, en somme ... De fait, Cicéron passe par Atticus pour avoir des nouvelles de Brutus alors gouverneur de Gaule.³⁹ L'épisode de la publication de l'éloge de Caton par Brutus invite cependant à nuancer quelque peu ce portrait: on

35 Cic Att 6 2 8.

36 Son divorce d'avec Claudia en 45 avant JC put donner l'impression qu'il allait manifester son ralliement complet à la cause de César, mais il se remaria avec Porcia, veuve de Domitius et fille de Caton, ce qui marquait nettement sa volonté de prendre la tête du parti des Républicains (cf Cic Att 13 9 2 de la mi-juin 45). Sa mère ne s'y trompa pas, qui eut de très mauvaises relations avec sa seconde bru (cf Cic Att 13 22 4).

37 Voir Wiseman 1987: 207.

38 Cic Brut 10. Sur ce traité de Cicéron voir le très récent ouvrage de Aubert-Baillet & Guérin 2014.

39 Cf Cic Att 12 27 3 et 12 36 2 (cf 12 37 1). De même Cic Att 13 9 2. Leslie 1951: 52 suggère que Cicéron ait pu ressentir une certaine jalousie devant les liens entre Atticus et Brutus.

voit Atticus essayant en vain d'influencer Brutus afin qu'il améliore son oeuvre avec l'aide de Cicéron. Celui-ci ne se fit pas faute de souligner l'attitude désagréable du jeune homme: "[Ad] *cetera uero tibi quem ad modum rescripsit! Tantum rogat de senatus consulto ut corrigas.*"⁴⁰

Néanmoins, Atticus continua de jouer ce rôle qui lui seyait si bien de passeur en invitant Cicéron à dédier un ouvrage à Brutus,⁴¹ en le faisant copier par ses esclaves, en poussant Brutus à accepter de bon gré le cadeau même si les choix rhétoriques de Cicéron et les siens étaient aux antipodes. C'était une façon comme une autre, assez délicate et astucieuse, de maintenir et de tisser continuellement des liens entre deux hommes⁴² qui avaient pour seul point commun d'être opposés à un retour éventuel de la monarchie.

Cette proximité de Brutus et d'Atticus est exaltée même dans la biographie de celui-ci. Cornelius Nepos vante la relation exceptionnelle, selon lui,⁴³ qui s'était établie entre les deux hommes en particulier après le meurtre de César: "*Sic M. Bruto usus est ut nullo ille adulescens aequali familiarius quam hoc sene neque solum eum principem consilii haberet, sed etiam in conuictu.*"⁴⁴ C'est le terme *adulescens* qui doit retenir notre attention: en 44 avant JC quel était l'âge de Brutus? Quarante ans et des poussières ... Autrement dit, il y a ici une exagération du biographe pour mettre en valeur le lien exceptionnel entre ces deux hommes de génération différente et surtout le charme d'Atticus qui opérait sur tous les âges:⁴⁵ Brutus n'était plus un *adulescens* – terme employé pour les jeunes hommes entre dix-sept et trente ans à Rome – il était un *iuuenis*.⁴⁶ Mais comme certains ont une éternelle tête de gendre idéal, lui semblait toujours concourir dans la catégorie des jeunes espoirs, sans doute aussi parce que les circonstances ne lui permirent jamais d'aller plus loin.

Certains jugeront donc que l'expression "jeune pousse" était bien abusive pour Brutus, puisqu'on le voit apparaître sur la scène à presque trente ans déjà. Elle s'appliquait bien mieux à Octave avec ses dix-huit ans tout frais lorsqu'il devint

40 Cic Att 12 21 1.

41 Cf Cic Att 13 21a 1.

42 Atticus poussait également à des rencontres entre les deux hommes, cf Cic Att 13 39 2, même lorsque Cicéron doutait des intentions réelles de Brutus.

43 La biographie d'Atticus composée par Cornelius Nepos a fait l'objet de plusieurs mises au point soulignant souvent l'importance des choix idéologiques de son auteur au détriment de l'exactitude historique: voir Labate & Narducci 1981: 127-182; Millar 1988: 40-55 et le commentaire de Horsfall 1989a.

44 Nep Att 8 2.

45 Nep Att 16 1.

46 Mentionnons cependant Axelson (1948) qui défend la thèse que les deux termes étaient synonymes, *adulescens* et *iuuenis*, et que le second supplanta même le premier à partir de l'époque augustéenne.

héritier officiel de César au printemps 44. C'est qu'il y a jeunesse et jeunesse⁴⁷ en politique à Rome, en fait, comme on peut le voir justement avec ces deux hommes: il y a la jeunesse convenable, celle qui a l'âge du questeur, trente ans au minimum donc, quand on commence à parler d'elle, et puis il y a la jeunesse qui déboule dans le jeu avec toute son insolence à vingt ans, parce que les circonstances sont exceptionnelles – retour de Sylla en Italie pour le jeune Pompée – ou parce qu'elle se veut exceptionnelle. Ce fut le cas de toutes ces jeunes pousses traînant en justice une célébrité: César attaquait Dolabella à vingt-trois ans, Caelius attaquait Antonius Hybrida au même âge, Asinius attaquait Caton à vingt-deux ans.

Octave appartient sans aucun doute possible à cette deuxième catégorie de "jeune pousse": en acceptant l'héritage de César dont il devenait le fils adoptif, il menaçait directement la position de Brutus en tant qu'assassin de César, mais aussi la position de Marc Antoine en tant que successeur de César. En somme on se retrouvait avec la génération de 63 qui s'en prenait à la génération de 85-83. Non seulement il était très jeune, mais en plus il n'appartenait pas au milieu des élites de Rome dont faisaient partie Brutus, Atticus et même Antoine qui était le petit-fils de l'orateur Antonius. Octave était le fils d'un *homo novus*, Octavius, et de la nièce de César Atia:⁴⁸ orphelin de père à l'âge de quatre ans, il fut élevé par sa mère et son beau-père Philippus. César, après avoir décidé d'en faire son héritier, soigna son éducation dans le domaine de la guerre en l'envoyant à Apollonie commencer à préparer une expédition chez les Parthes.

Atticus voit arriver Octave à Rome en avril 44, alors qu'il soutient Brutus⁴⁹ qui représente un espoir de paix à ses yeux quand les Césariens sont vus comme une menace dans la crainte qu'ils ne veuillent venger César. Au cours de cette première phase d'observation méfiante, le jeune homme est sous-estimé par tous, sauf probablement par Balbus mais c'est une autre histoire. Il n'est pas aisé de savoir avec certitude ce que pensait Atticus d'Octave: une lettre de Cicéron du 19 avril 44 nous permet néanmoins de savoir qu'il ne lui prédisait pas grand avenir une fois l'héritage de César accepté à cause du risque de conflit avec Antoine. Le passage est corrompu: "*Octavius Neapolim uenit XIII Kal.; ibi eum Balbus mane postridie eodemque die mecum in Cumano; illum hereditatem aditurum, sed, ut scribis, ῥηζίθεμν magnam*

47 La jeunesse à Rome, sujet complexe s'il en est, a fait l'objet en particulier d'une synthèse de Eyben (1993), spécialiste de la question. On trouve également des réflexions intéressantes sur les âges de la vie à Rome dans Néraudau 1984: 21-61. Le fond du problème était probablement le fossé de dix ans entre prise de la toge virile et âge requis pour la questure pendant lequel il fallait patienter, ou se signaler par le tribunat de la plèbe ou un procès. La question fut justement réglée par Auguste qui remodela le cursus et créa des charges nouvelles pour ces années-là.

48 Sur Atia et l'enfance d'Octave, voir Néraudau 1996: 39-59. Octave fut confié à sa grand-mère Julia, auprès de qui il vécut de 59 à 51 lorsque Julia décéda.

49 Une lettre de Cicéron atteste qu'il est en contact permanent avec Brutus, cf Cic Att 14 8 2. Et le jeu très ironique des adjectifs possessifs *tuus/meus* montre la même chose, cf Cic Att 14 10 1: *Hoc meus et tuus Brutus egit ...*

cum Antonio.⁵⁰ Nous suivons ici la *lectio* de la CUF qui essaie de faire avec ce que laissent à deviner les manuscrits. L'hypothèse *rixam timet* de D Shackleton-Bailey ne nous séduit pas entièrement à cause de l'introduction du verbe *timere*, comme si Octave avait peur d'Antoine, ce qui n'est pas sûr. Cicéron qui aime si souvent jouer avec le grec dans ses analyses politiques avec Atticus⁵¹ pourrait très bien simplement indiquer que son ami prévoit un affrontement sévère entre les deux Césariens.

Quels étaient les motifs de méfiance? Ce n'était pas tant la personnalité d'Octave, mal connue sinon inconnue, et de toute façon décrédibilisé par son jeune âge aux yeux de Cicéron et sans doute d'Atticus: il est systématiquement appelé *puer*,⁵² alors que c'est un *adulescens* comme le dit très justement un Césarien. Non, c'est que son entourage, dont le fameux Balbus⁵³ mais également Matius,⁵⁴ pourrait lui donner l'idée de venger le meurtre de César. On trouve un écho sûr de l'hostilité d'Atticus à l'égard d'Octave lorsque Cicéron fait écho à ses commentaires à propos des premiers pas en public du jeune homme:

*De Octaui contione idem sentio quod tu, ludorumque eius apparatus et Matius ac Postumus mihi procuratores non placent; Saserna collega dignus. Sed isti omnes, quem ad modum sentis, non minus otium timent quam nos arma.*⁵⁵

La *contio* fait allusion au discours d'Octave du 7 (ou 8) mai. Les *ludi* évoqués sont les jeux de la Victoire de César préparés pour la fin juillet 44. Il faut préciser que d'après Cicéron c'est Atticus qui organisa en sous-main ceux que Brutus alors préteur devait organiser – les *ludi Apollinares* – pour le même mois.⁵⁶ On le devine également essayant de garantir le talent de Cicéron pour appuyer la cause de Brutus, en vain.⁵⁷

Octave est vu comme un pion, que l'on pourrait gagner à la cause de Brutus, que l'on pourrait opposer à Antoine, indispensable pour régler les problèmes des habitants de Buthrote chers à Atticus,⁵⁸ mais de plus en plus tyrannique:

In Octauiano, ut perspexi, satis ingeni, satis animi, uidebaturque erga nostros ἥπρωας ita fore ut nos uellemus animatus. Sed quid aetati credendum sit, quid nomini, quid hereditati, quid

50 Cic Att 14 10 3.

51 Voir ainsi Dunkel 2000: 122-129.

52 Cf, par exemple, Cic Att 14 12 2 et Cic Att 16 9 et Cic Att 16 11, 6; *puerile* cf Cic Att 16 8 1 (début novembre 44). *Idem* Cic Fam 10 28 3.

53 Voir Alföldy 1976: 43-54, et Benferhat 2005: 247-256 sur Balbus. Également Roddaz 2010: 133-143.

54 Celui-ci fut commissaire aux jeux de la Victoire de César (*Victoriae Caesaris*) organisés les 20-30 juillet par Octave et célèbres pour le passage d'une comète dans le ciel: voir Néraudeau 2007: 64-66. Matius décrit Octave comme *optimae spei adulescens ac dignissimus Caesare*, cf Cic Fam 11 28 6. Voir Grattarola 1990: 44-47.

55 Cic Att 15 2 3 (18 mai 44).

56 Cf Cic Att 15 18 2.

57 Cf Cic Att 15 4 2.

58 Voir Deniaux 1987: 245-254.

*κατηχῆσαι, magni consili est; uitricus quidem nihil censebat, quem Asturae uidimus. Sed tamen alendus est et, nihil aliud, ab Antonio seiungendus.*⁵⁹

Ce que l'on voit ici, c'est une inversion de situation: de même qu'Atticus et Brutus partageaient les mêmes codes qu'un *homo novus* comme Cicéron ne possédait pas, de même Cicéron est séduit dans le fond par Octave fils d'un *homo novus* alors qu'Atticus reste méfiant⁶⁰ devant celui qui était un intrus sur tous les plans. Cicéron est aussi sensible à la popularité du jeune homme, en particulier dans les municipes, un monde qui lui était cher.

Une étape suivante voit donc Cicéron choisir de soutenir les entreprises d'Octave, alors qu'Atticus était plus réticent, comme on le voit dans une lettre de la mi-novembre:

*Ad ea autem quae scripsisti (tris enim acceperam III Id. a te epistulas), ualde tibi adsentior, si multum possit Octavianus, multo firmitus acta tyranni comprobatum iri quam in Telluris, atque id contra Brutum fore ...*⁶¹

Atticus considérait Octave comme un danger beaucoup plus grand qu'Antoine contre les meurtriers de César et attendait donc de voir sa réaction au moment de la fin des fonctions de l'un des complices des Ides de mars, C Servilius Casca, tribun de la plèbe en 44: "*Sed ut scribis, certissimum uideo esse discrimen Cascae nostri tribunatum ...*"⁶²

La suite de la correspondance en 43 ne nous permet pas de savoir clairement quelle fut l'attitude d'Atticus face à Octave: on devine cependant que la stratégie adoptée par Cicéron de soutenir Octave pour éliminer Antoine qu'il considérait comme le plus grand danger, n'était pas partagée par les autres admirateurs des Ides de mars, dont Atticus très probablement: "*egregius puer Caesar, de quo spero equidem reliqua.*"⁶³ Dans cette description d'Octave il faut noter surtout le *equidem* qui marque un certain isolement. Nous ne pouvons que supputer que les doutes exprimés par Brutus en mai 43 à propos d'Octave étaient partagés par Atticus: "*Itaque timeo de consulatu, ne Caesar tuus altius se ascendisse putet decretis tuis quam inde, si consul factus sit, descensurum.*"⁶⁴

La répétition de l'adjectif *tuus* est assez éclairante: on a un ton de reproche ici, et une mise en garde. Brutus souligne plus loin la crainte que lui inspire l'héritier de César: "*quod utinam inspectare posses timorem de illo meum!*" Une autre

59 Cic Att 15 12 2 (9 ou 10 juin 44).

60 Leslie 1950: 55 considère que cette méfiance venait peut-être de Brutus qui aurait influencé Atticus.

61 Cic Att 16 14 1.

62 Cic Att 16 15 3.

63 Cic Fam 10 28 3 (à Trebonius, début février 43).

64 Cic Ad Br 1 4a 2. Voir Ortmann (1988) sur la relation triangulaire entre Cicéron, Brutus et Octave, et Willcock (1996) pour un commentaire de la correspondance en 43.

lettre de Brutus, adressée à Atticus,⁶⁵ exprime les mêmes angoisses, mais elle est jugée apocryphe par plusieurs.⁶⁶ Il est assez évident qu'Atticus lui aussi n'avait pas confiance en Octave et doutait de la stratégie de Cicéron. On sait qu'il aida financièrement Brutus dans sa fuite en lui faisant envoyer d'abord cent mille, puis trois cent mille sesterces comme le rapporte son biographe Cornelius Nepos⁶⁷ avant, il est vrai, de mettre en lumière, l'aide apportée à Fulvia épouse de Marc Antoine. Antoine ou Brutus, de toute façon ce n'était jamais en faveur d'Octave.

Alors que faire de ce passage de la biographie d'Atticus décrivant des liens exceptionnels avec Octave? Reprenons un peu l'extrait qui concerne les fiançailles entre Tibère et la petite-fille d'Atticus:

*Quae coniunctio necessitudinem eorum sanxit, familiaritatem reddidit frequentiore. Quamvis ante haec sponsalia non solum, cum ab urbe abesset, numquam ad suorum quemquam litteras misit, quin Attico mitteret, quid ageret, in primis, quid legeret quibusque in locis et quamdiu esset moraturus, sed etiam, cum esset in urbe et propter infinitas suas occupationes minus saepe quam uellet, Attico frueretur, nullus dies temere intercessit, quo non ad eum scriberet, cum modo aliquid de antiquitate ab eo requireret, modo aliquam quaestionem poeticam ei proponeret, interdum iocans eius uerbosiores eliceret epistulas.*⁶⁸

Soulignons tout d'abord que c'est Octave qui fait des efforts pour soigner Atticus, et non l'inverse; le champ lexical également ne plaide pas en faveur d'une grande complicité entre les deux hommes puisque *necessitudo* renvoie simplement à un lien de parenté, tandis que le comparatif *frequentiore* peut laisser supposer que les relations étaient assez limitées alors que la fille d'Atticus⁶⁹ était déjà mariée à Agrippa, principal lieutenant d'Octave.

Il faudrait ensuite se demander quelle période est ici décrite: il ne s'agit certes pas des mois qui précédèrent la mise en place du second Triumvirat, mais bien plutôt des temps qui ont suivi la proscription, quand Atticus survivait à un monde qui n'était plus. Il était désormais obligé de se plier au bon vouloir des maîtres du moment, Antoine et Octave, et la signification politique du mariage de sa fille avec Agrippa n'a peut-être pas été soulignée assez:⁷⁰ ils se sont mariés en 37, l'année des accords de Tarente.

Permettons-nous une hypothèse: de même que la mise en place du premier triumvirat fut scellée par deux mariages, celui de Pompée avec Julie et celui de César avec Calpurnia, de même après les accords de Brindes scellés par le double mariage

65 Cic *Ad Br* 1 17.

66 Voir ainsi J Beaujeu, éditeur de la correspondance, CUF (Paris, 1996), tome XI, 175-182, en particulier 179 pour l'analyse des invraisemblances.

67 Nep *Att* 9 6.

68 Nep *Att* 19 4-20, 1-2.

69 Elle était née probablement vers 51: voir Horsfall 1989a: 84.

70 Voir ainsi Leslie 1951: 60 qui ne s'intéresse guère de toute façon aux années suivant la mort de Cicéron. Voir cependant Roddaz 1984: 80-84 et plus récemment Canas 2012: 155-164.

d'Antoine et d'Octavie et d'Octave avec Scribonia, le traité de Tarente fut suivi de l'union de la fille d'un partisan d'Antoine avec le bras droit d'Octave. Ce mariage avait un poids politique indéniable et devait contribuer à renforcer, manifester aussi, la volonté d'entente des deux rivaux.⁷¹ Accessoirement, il confirme qu'Atticus était classé dans les soutiens d'Antoine, qui le sauva de la proscription. Mais aussi il montre la perte d'indépendance d'Atticus puisque les membres de sa famille étaient désormais utilisés comme des pions sur l'échiquier des triumvirs. Lorsque Octave multiplie les signes d'égard, sinon d'affection, à l'égard d'Atticus, il s'agit ni plus ni moins de se mettre dans les traces des disparus, Cicéron et Brutus, pour créer une illusoire continuité avec une période républicaine bien achevée. Atticus et Octave avaient de fait tous deux intérêt à s'entendre, l'un pour sauver ce qui restait à sauver, l'autre pour asseoir son pouvoir.

Que retenir de ces relations entre membres de différentes générations au moment de la fin de la République? On aura compris qu'il y avait plusieurs âges pour apparaître comme la relève en politique: vingt ans, trente ans, quarante ans. A vingt ans on risquait d'être traité de *puer* en voulant bousculer les autres; à trente ans on avait le profil idéal en entamant le *cursus honorum*; à quarante ans on pouvait encore faire illusion surtout si des circonstances exceptionnelles, comme une guerre civile, empêchaient d'avancer sa carrière comme à la normale. Octave et Brutus ont offert deux profils différents de jeunes pousses, le moins âgé finissant par l'emporter. D'autre part, le rôle joué par Atticus permet de mesurer la connivence entre membres de l'élite romaine, qu'ils fassent ou non carrière, et le choc que représenta de ce fait l'irruption d'Octave sur la scène. Il fut l'homme de la *nouitas*, même s'il a cherché ensuite à se rallier ces anciennes élites: Atticus en offre un bon exemple.

Abstract

Youth in politics might be a default – a lack of experience justifying waiting for your turn – or an advantage, as a promise of renewal and energy. In ancient Rome youth was something more positive than one could expect: the Roman people, if not the Senate, was fond of young leaders like Scipio Nero, whilst Galba was despised for being too old. This paper aims at studying the case of two young men in the Late

71 *Contra* Potter 1934: 669 qui considère ce mariage comme une tentative d'Antoine pour détacher Agrippa d'Octave, avant que celui-ci ne reprenne la main en fiançant la fille de son lieutenant âgée d'un an au futur Tibère. Cela soulève la question de la marge d'indépendance d'Agrippa par rapport à Octave dans des années de tensions entre celui-ci et Antoine: on peut se demander s'il aurait conclu une alliance déplaisant au fils adoptif de César. Quoi qu'il en soit, qu'Octave ait été favorable ou non, cela ne change rien au fait qu'Atticus devait désormais renoncer à sa neutralité comme à son indépendance en acceptant que sa fille soit mariée en fonction des alliances politiques.

Republic – Brutus and Octavian – through their relationship with a much older man, Atticus. The first part focuses on Brutus, born approximately 85 BC and belonging to the ancient elite like Atticus, who was considered a promising young leader of the *Optimates* since his beginnings in 58 BC until his misfortune in 44-43 when he could not manage to apply the murder of Caesar to his own advantage. The second part concerns Octavius, the real young man, born in 63. He was nineteen years old when he became Caesar's heir, while Brutus was already forty. The vocabulary is revealing: Octavius is called *puer* by his opponents, but he is an *adulescens* for the Caesarians, and Brutus is described as an *adulescens* though already a *iuvenis*. Atticus, who always helped Brutus, had to change his way: a wedding between Attica and Agrippa, planned by Antony, resulted in him finally belonging to Octavian's party. Octavian, the new man who had won the war, needed a symbol of the old elite and of Republican Rome. Atticus had to save what could be saved.

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NATURAL LAW: VOET'S CRITICISM OF DE GROOT

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Keywords: Hugo de Groot; Jacobus Arminius; Franciscus Gomarus; Gisbertus Voetius; Johannes Voet; freedom of will; predestination; determinism; Remonstrants and Counter-Remonstrants; orthodox Calvinism; lapsarianism; Synod of Dordt; the law of nature

1 Introduction

Hugo de Groot (Grotius) (1583-1645), internationally known as the father of international law, is also celebrated for his seminal works on the law of nature and for his exposition of seventeenth century Dutch civil law in his *Inleidinge tot de Hollandsche Rechts-geleerdheid*, first published in 1631. Johannes Voet's principal work is his comprehensive *Commentarius ad Pandectas*, published in two volumes in 1698 and 1704. In the commentary, his explanations of Roman law are followed by that of modern law (the *jus hodiernum*). The latter are to a large extent based on his lectures, and among the sources quoted, De Groot's *Inleidinge* "occupies pride of place".¹

1 See Feenstra & Waal 1975: 41.

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† We regret to announce that the author of this article, former Judge HJ Erasmus, passed away on 15 June 2016. An obituary of this much-valued contributor to our journal appears in this volume of *Fundamina*.

Voet does not enjoy the international acclaim accorded to De Groot, and his general views on the nature of law and the law of nature, as expounded in the first part of the first title of his Commentary, has not received much attention in scholarly discourse.² Yet he remains a foremost representative of Dutch legal scholarship of the seventeenth century.

In his exposition of the law of nature, Voet expresses criticism of De Groot's views as to the basis (foundation) of the law of nature. The criticism provides fascinating insight into the exposure of De Groot and Voet to the subtleties of the esoteric theological debates in Reformed (Calvinist) circles of seventeenth-century Holland. The purpose of this note is to highlight the theological background to the difference of opinion between two prominent seventeenth-century Dutch lawyers as to the foundations of natural law.

2 Religious debates

As the seventeenth century commenced the Netherlands faced a number of problems.³ Foremost in the early years was the debate between the Leiden professors Jacobus Arminius (1560-1609) and Franciscus Gomarus (1563-1641) about the freedom of will, predestination and determinism.⁴ The Reformed (Calvinist) orthodoxy of the early seventeenth century resolved the problem of reconciling God's omnipotence and omniscience with human free will by the adoption of a doctrine of rigid and absolute predestination as an eternal decree of God.

Arminius leant towards the Pelagian emphasis on the free will of man. He contended that God elected on the basis of his foreknowledge of the individual's decision whether or not to accept God's offer of salvation; that is, he advocated a conditional predestination in contrast to the absolute (and double) predestination of John Calvin (1509-1567) and Theodore Beza (1519-1605). Arminius was vehemently opposed by Gomarus who firmly supported the orthodox Calvinist view on predestination.

The debate created deep divisions in Dutch society. De Groot was a firm supporter of Arminius, as were other prominent personalities such as Oldenbarneveldt, Episcopius and Uytenbogaert. When Arminius died in 1609, De Groot helped his successor, Simon Episcopius, in drawing up the famous *Remonstrantie*, a document in which five points of divergence from orthodox Calvinism are set out. The principal divergence that needs to be highlighted within the present context is the advocating of the conditional predestination of Arminius rather than the absolute (and double)

2 The only comprehensive evaluation of Voet's views of which I am aware is Domanski 2013: 251-265.

3 For a brief but full account, see Price 1994: 109-205.

4 See Gottschalk-Stuckrath 2010: 104-121.

predestination of Calvin and Beza. The supporters of Gomarus countered with a “counter-Remonstrant” in which orthodox Calvinism was affirmed.

The Dutch Reformed Church (*Nederlands Hervormde Kerk*, previous *Nederduits Gereformeerde Kerk*) as established state church since 1579, had embraced particularly the Calvinist creed and it was inevitable that any attack upon its doctrine and authority would carry political overtones. The religious controversy aggravated the dispute between the province of Holland and the orthodox Calvinist majority of the States General under the leadership of Prince Maurits. The tolerant attitude of the Arminians elicited accusations of treason – Uytenbogaert was accused of having become a papist and that he and Arminius were pensioners of Catholic Spain. De Groot was looked upon as a crypto-catholic, and his plea for moderation in his *Pietas Ordinum Hollandiae ac West-Frisiae Vindicata* (1613)⁵ had little impact.

Prince Maurits, with the support of the Counter-Remonstrants, resolved the issues by convening the Synod of Dordt in 1618. The Synod has, perhaps somewhat cynically, been described as an ecclesiastical smokescreen for the resolution of a political power struggle (“een kerkelijk rookgordijn waarachter een politieke machtsrijd werd beslecht”).⁶

At the Synod, the Counter-Remonstrants outnumbered the Remonstrants. Arminianism was rejected and Gomarus (who by then was professor in Groningen) vindicated. In addition, the orthodox view of predestination was confirmed. Remonstrant church services were banned and Remonstrant preachers (including Episcopius) were deposed. In the political outflow, Oldenbarneveldt was condemned to death and executed; Uytenbogaert was forced into exile; and De Groot was sentenced to life imprisonment and incarcerated in Loevenstein castle from where he made his famous escape after two years.

It was during this period that the esoteric supra-infralapsarian debate became part of the theological discourse in orthodox Calvinism.⁷ In Calvinist theology, lapsarianism concerns the logical order of God’s eternal decrees of salvation: Did God’s decree to save certain people come before (*supra*, *ante*) or after (*infra*, *post* or *sub*) the decree to permit the fall (*lapsus*) of mankind into sin? According to supralapsarians, the double predestination of election and reprobation occurred prior to God’s decree that encapsulates mankind’s fall (*lapsus*) into sin. Infralapsarians insisted that the decree of predestination follows on the decree of creation and the fall into sin. The Canons of Dordt softened the doctrine of predestination in the direction of infralapsarianism though supralapsarianism was not explicitly rejected. Gomarus continued to hold strong supralapsarian views.

5 The full title is *Ordinum Hollandiae ac Westfrisiae pietas ab improbissimis multorum calumniis, praesertim vero a nupera Sibrandi Lubberti epistola quam ad reverendissimum archiepiscopum Cantuariensem scripsit, vindicata per Hugonem Grotium* (Lugdunum Batavorum, 1613).

6 Panhuysen 2015: 182.

7 See Durand 2007: 175.

The youngest delegate to attend the Synod of Dordt was Gisbertus Voetius, at the time preacher at Vlijmen. He was a strong supporter of Gomarus and they remained firm supralapsarians.

3 Gisbertus (Gijsbert) Voetius (1589-1676)

The paths of Gisbertus Voetius and De Groot crossed when Voetius was still a young preacher and De Groot was *advocaat-fiscaal* of Holland, Zeeland and Friesland. In Heusden, where Voetius was born, the Arminian party had for years tried to prevent his nomination as minister. De Groot more than once intervened in the conflict with Voetius' Remonstrant colleague Johannes de Greeff. Voetius had his "revenge" many years later, at a provincial synod in Leiden in 1620, when De Greeff was banished and ended up in Germany.⁸

Gisbertus Voetius⁹ became Professor of Theology, Hebrew and Oriental Languages at Utrecht in 1634. He held the position till his death in 1676. He was a formidable, often controversial figure. He engaged in theological debate with Catholics, Arminians, Jansenites and Socinians. Inspired by English Puritanism, he became a leading figure in the so-called *Nadere Reformatie* (Dutch Second Reformation) which called for a Christian purification of society through the private and public practice of piety. In 1640 he became involved in a drawn-out dispute with Descartes, which was to become known as the *Querelle d'Utrecht*. Voetius also opposed the Covenant Theology of the Leiden theologian Johannes Cocceius (1603-1669). The Voetian-Cocceian controversy persisted in the Reformed Church until long after the death of the initial antagonists.¹⁰ At the time of his death, Voetius was involved in a controversy with one Cephas Pistophilus. This was the pseudonym of Petrus Allinga who was born in Enkhuizen, studied in Utrecht, and thereafter became preacher in Wijderen in Noord-Holland. He has been described as "a strong supporter of Cartesian Coccejanism" ("een hevig voorstander van het Cartesiaansche Coccejanisme").¹¹

Voetius' son Paulus was in 1635 appointed Professor of Metaphysics at Utrecht, and Professor of Roman law in 1654. Paulus' wife, Elizabeth van Winssen, died when her son Johannes was still a child. Paulus raised his son as a single parent, remarrying when Johannes was about sixteen. This may account for the life-long

8 "A Short Biography of Gisbertus Voetius (1589-1676)" (accessed 12 Oct 2015) available at <https://witsius.wordpress.com/2011/09/17/a-short-biography-of-gisbertus-voetius-158>. With the material at my disposal, I was unable to follow up on the allegation by Howard Hotson that this was taken over word for word, without acknowledgment, from Henri Krop's article in the *Dictionary of Seventeenth- and Eighteenth-Century Dutch Philosophers* (Bristol, 2003).

9 The standard biography is that by Duker 1897-1915.

10 See the collection of essays in Van Asselt *et al* 1994.

11 Molhuysen & Blok 1918: 37. His role in the Voetian-Cocceian debate is considered by Van der Wall 1994: 131-145.

close relationship between grandfather and grandson.¹² Voetius dedicated the second part of his *Politica Ecclesiastica* (1669) to his grandson.

4 Hugo de Groot (1583-1645)

Like Johannes Voet, De Groot was a deeply religious man and a devout Christian.¹³ He had a large body of theological works to his name which were collected and published after his death.¹⁴ De Groot's spiritual and intellectual roots are in the Renaissance and Christian Humanism of More, Colet, Desiderius Erasmus, Arminius and the Spanish scholastics.¹⁵ GHM Posthumus Meyjes¹⁶ says that De Groot was "primarily a Christian Humanist scholar whose desire was to uphold and continue the religious programme as interpreted in the 16th century by Erasmus and others, in defiance of the bitter reality of a Christian world split and hardened by confessional differences".

De Groot rejected as unreasonable and illogical the determinism of orthodox Calvinism and defended the doctrine and ideal of freedom of the will.¹⁷ AH Haentjens says that "[d]e erkenning van de wilsvryheid was voor hem een onontbeerlijk en zeer belangrijk onderdeel van die waarheid van den Christelijken godsdienst".¹⁸ The doctrine of the freedom of will finds powerful expression in De Groot's theological works such as his *De Veritate Religionis Christianae*.¹⁹

De Groot's understanding of natural law must be seen against this background. It has been said that his understanding of natural law cannot be divorced from his theology, and that we cannot understand his ideas on natural law without recognising their theological nature.²⁰

De Groot's natural law doctrine makes a first brief appearance in the second chapter of his *De Jure Praedae*, written in 1604, but published only in 1868.²¹ It is thereafter set out in detail in the *Prolegomena* and first and second Books of his *De*

12 See De Wet 1948: 51; Duker 1897-1915 Part 9 states that "(e)en lichtpunt was werderom in Voetius' familie de zeldzaam-gunstige aanleg en ontwikkeling van Johannes, oudste zoon van Paul uit diens eersten echt".

13 Pont 1945: 190 says that De Groot was a "diep religieuze mens".

14 *Hugonis Grotii Opera Omnia theologica: in tres tomos divisa ante quidem per partes, nunc autem conjunctim et accuratius edita: quid porro huic editioni prae ceteris accesserit, praefatio ad lectorem docebit* (Amsterdam, 1679).

15 See Haentjens 1946: *passim*; Van der Wall 1994: 51-58; and Decock 2013: *passim*.

16 Van der Wall 1994: 52.

17 See Vetterli & Bryner 1993: 370-402.

18 Haentjens 1946: 76-77.

19 It was first published in 1622 in Dutch under the title *Bewys van den waren godsdient, in ses boeken gestelt by Hugo de Groot*, and in 1627 in Latin under the title *Sensus librorum sex, quos pro veritate religionis Christianae Batavice scripsit Hugo Grotius* (Lugduni Batavorum, 1627). See Knight 1962: 168ff.

20 Vetterli & Bryner 1993: 371-372.

21 *Hugonis Grotii De jure praedae commentarius. Ex auctoris codice descripsit et vulgavit HG Hamaker* (Hagae Comitum, 1868).

Jure Belli ac Pacis (1625) and ultimately finds mention in summarised form in the *Inleidinge* (1631). His theories have been subjected to detailed scholarly analysis and searching criticism. It is not my intention to indulge in yet another such analysis. It is sufficient for present purposes to trace, in summary form, his thoughts on the source of law, and of the law of nature.

In the *Prolegomena*²² to the *De Jure Belli ac Pacis* De Groot says the following about the source (*fons*) of law:²³

This maintenance of the social order, which we have roughly sketched, and which is constant with human intelligence, is the source of law properly so called.²⁴

In a later paragraph²⁵ of the *Prolegomena* De Groot says that there is also another source of law besides the source in nature:

Another source of law besides the source in nature, is the free will of God to which beyond all cavil our reason tells us that we must render obedience.²⁶

These two passages encapsulate in summary form the essence of De Groot's thinking on the source and nature of law. Human reason is for him the basis of the laws and institutions of society. But law also has a divine base, the free will of God, which it is for man to discover and apply. Reason is accordingly the means by which man gains knowledge of law in nature and of the will of God.

Building on this foundation, De Groot defines natural law as follows:²⁶

The law of nature is a dictate of right reason, which points out that an act according as it is or is not in conformity with rational nature, has in it a quality of moral baseness or moral necessity; and that, in consequence, such an act is either forbidden or enjoined by the author of nature, God.²⁸

The idea that the source of natural law is to be found in the rational and social nature of man is re-stated in the passage singled out by Voet in his criticism of De Groot:²⁹

(1) In two ways men are wont to prove that something is according to the law of nature, from that which is antecedent and from that which is consequent. Of the two lines of proof the

22 Paragraph 8.

23 The translations cited of passages from the *De Jure Belli ac Pacis* are by Kelsey 1925.

24 "*Haec vero quam rudi modo iam expressimus societatis custodia, humano intellectui conveniens, fons est ejus juris quod proprio tali nomine appellatur.*"

25 Paragraph 12.

26 "*Et haec iam alia juris origo est praeter illam naturalem, veniens scilicet ex libera Dei voluntate, cui nos subjici debere, intellectus ipse noster nobis irrefragabiliter dictat.*"

27 *De Jure Belli ac Pacis* 1 110.

28 "*Ius naturale est dictatum rectae rationis indicans actui alicui, ex ejus convenientia aut disconvenientia cum ipsa natura rationali, inesse moralem turpitudinem aut necessitatem moralem, ac consequenter ab auctore naturae Deo talem actum aut vetari aut praecipiri.*"

29 *De Jure Belli ac Pacis* 1 12 1.

former is more subtle, the latter more familiar. Proof *a priore* consists in demonstrating the necessary agreement or disagreement of anything with a rational and social nature; proof *a posteriori*, in concluding, if not with absolute assurance, at least with every probability, that that is according to the law of nature which is believed to be such among all nations, or among all those that are more advanced in civilization. For an effect that is universal demands a universal cause; and the cause of such an opinion can hardly be anything else than the feeling which is called the common sense of mankind.³⁰

Finally, De Groot's concept of natural law is summarised in his *Inleidinge*³¹ in a form which embraces the very essence of his thinking:³²

- (4) Law is either *natural* or *positive*.
- (5) The natural law of man is the dictate of reason pointing out what things are in their very nature honourable or dishonourable, with an obligation to observe the same imposed by God.³³

It is to be expected that the idea that first principles of natural law have their origin in the social consciousness and the dictates of reason of man would be anathema to orthodox Calvinism with its firm belief in divine determinism and predestination.

5 Johannes Voet (1647-1713)

Johannes Voet was appointed as Professor *Ordinarius Pandectarum* at Utrecht in 1673 where his grandfather had been Professor of Theology since 1634. After the death of his grandfather, he accepted an invitation to Leiden where he remained till his death on 9 September 1713.

His personal life was that of a devout Christian: he served as a member of the church council of the Reformed Church in Utrecht.

In his professional life he remained in essence a lawyer whose main achievement was the exposition of the current Dutch civil law in the light of the *Pandects* of Roman law. His Christian convictions, however, come to the fore in his discussion of the fundamental principles of law and justice, of equity and justice and of natural

30 "Esse autem aliquid juris naturalis probari solet tum ab eo quod prius est, tum ab eo quod posterius, quarum probandi rationum illa subtilior est, haec popularior. A priori, si ostentatur rei alicujus convenientia aut disconventia necessaria cum natura rationali ac sociali: a posteriori vero, si non certissima fide, certe probabiliter admodum, juris naturalis colligitur id, quod apud omnes gentes, aut moriatores omnes tale esse creditur. Nam universalis effectus universalem requirit causam: talis autem existimationis causa vix ulla videtur esse posse praeter sensum ipsum, communis qui dicitur."

31 1 2 (4) and (5).

32 The translation is that of Maasdorp 1903.

33 "(4) Want alle Wet is aangeboren ofte gegeven. (5) Aangeboren wet in den mensche is het oordeel des verstands, te kenne ghevende wat zaken uit haer eigen aerd zijn eerlick ofte oneerlick, met verbintenisse van Gods wegen om't zelve te volgen."

law.³⁴ Gisbertius Voetius' *Politica Ecclesiastica* is often mentioned in the early part of the *Commentarius*, and in his title on high treason³⁵ the grandson refers to his grandfather's *Disputatio* on atheism.

The devotion of Johannes to his grandfather, and what he stood for, is apparent from the defence of his grandfather who, at the time of his death in 1676, had been involved in a theological disputation with Cephias Pistophilus (Petrus Allinga) who, as has been pointed out above, was "a strong supporter of Cartesian Coccejanism". Johannes' defence appeared in print in 1676:

Iohannis Voet responsio ad libellum personati cujusdam Cephae Pistophili, titulo Sententia Theologorum veterum et recentiorum, ... De amore in fide, contra inamadversiones Gisberti Voetii (Hagae Comitum, 1676).

Cephias Pistophilus responded by an attack on Johannes Voet:

Cephae Pistophili Epistulae duae responsoriae ad consultissimum et doctissimum D. Johannem Voet, Juris in Academia Ultrajectina Professorem, pro Defensio Sententiae Theologorum Veterum et Recentiorum de Amore in Fide (Lugdunum Batavorum, 1677).

Voet also refers to the matter in the *Praefatio* of his *Compendium juris juxta seriem Pandectorum* (1683) where he defends himself against his *calumniator*. In the preface, Voet refers to his latest letter to a friend *typis expressa*. The letter to which Voet refers³⁶ was published in 1679 under the title *Epistola ad amicum de Petri Allingae praefatione Erotematibus praemissa*.³⁷

Within the stark divisions in Reformed circles in seventeenth-century Holland, Johannes Voet and De Groot belonged to opposing camps. The spiritual roots of Johannes Voet are in the orthodox Calvinism propounded by his grandfather. Those of De Groot are in the Christian Humanism of Desiderius Erasmus and others. It was inevitable that these differences would be reflected in their concept of the fundamental principles of law and justice, and of natural law. What is more, in their discourse the supra-infralapsarian discourse raises its head in a subtle way.

Voet has a fair amount of criticism about the matter: It will be convenient, at the outset, to have regard in some detail to his opening statement in the first title of the first book of the *Commentarius ad Pandectas* in which he states as follows:³⁸

34 See Domanski 2013: *passim*.

35 48 1 4.

36 Roberts 1933: 15 refers to Cephias Pistophilus as "unknown" to him and was unable to trace the letter.

37 *Epistola ad amicum de Petri Allingae praefatione Erotematibus praemissa Ultrajecti, apud Franciscum Halma 1679* (as part of Melchior Leydecker *Vis Veritatis, sive disquisitionum ad nonnullas controversias quae hodie in Belgio potissimum moventur de Oeconomia Foedorum Dei, Libri quinque* (Utrecht 1679). See Feenstra & Waal 1975: 39 n 158.

38 The translations of passages from the *Commentarius ad Pandectas* are all from Gane (1955-1959).

Whenever our fancy leads us to scan with close attention the origins, the growth as well and the prolonged continuation of right up to the present day of mankind, we shall find that at no time and in no place has it found itself without law of right and honour. This was not so even in those quarters or ages in which savage mortals knew nothing whatever of the way of a life with culture, but in which herbs and acorns were their food, the forests their homes, and their woodland beds spread by their hill-wives.

It is quite true that the use of untainted reason, precise in everything and unacquainted with deceit, perished along with the original uprightness of morals owing to the fall of our first-formed parents (*per lapsum protoplastarum*).

Yet strength of mind and sense of virtue were not so utterly extinguished in mankind that no few sparks remained of the principles of justice and honour, like rubble from some fine mansion or planks taken from a wrecked ship. Thus certain rules of justice and equity remained divinely engraved on men's hearts and inborn, dictating to each one what was lawful or unlawful, what things to do and what to avoid. These rules no man, if he debates it with himself and reflects privately upon them in quietness of mind, eradicate without an inward conflict. Not only does Holy Writ invoke them, but even the best and most learned of heathen recognize them ...³⁹

The use by Voet of the term *per lapsum protoplastarum* is revealing: *lapsus* is the term used in theological discourse in Latin to denote the Fall of Man as described in *Genesis*, the first Book of the Christian Bible.⁴⁰ *Protoplastus* (derived from the Greek πρωτοπλαστός) is used to denote the first formed man, Adam, and in the plural, the first of mankind.⁴¹ What Voet is in essence saying is that the principles of law were in existence before the fall of mankind into sin, that after the fall there remained ingrained into the hearts of men some remnants (*scintillae*) of the knowledge of right and wrong, but that these were ascertainable not by man's own efforts, but in Holy Scripture (*sacrae literae*) and in the teachings of the best and most learned men.

39 "Quoties cum generis humani primordiis eiusdem quoque incrementa, et in hunc usque diem productam durationem, attenta contemplatione libet intueri; nullo umquam loco, nullo tempore, illud sine recti honestique legibus substituisseprehendimus; ac ne illis quidem aut regionibus, aut seculis, quibus seri mortales omnem ignorabant vitae cultioris usum, quibus herbae ac glandes victus iis, nemora domus, ac thorum sylvestrem montana frondibus sternebat uxor. Quamvis etiam per lapsum protoplastarum cum primaeva morum integritate perierit quoque in exactus in omnibus et fallere nescius incorruptae rationis usus: non tamen ita in universum in hominibus extinctus fuit aut mentis vigor, aut virtutis sensus, quin scintillae quaedam principiorum justi et honesti superfuerint, quasi rudera egregiae domus, aut tabulae ex naufragio subductae; atque adeo cordibus insculptae divinitus et innatae remanserit nonnullae iustitiae et aequitatis regulae, quid licitum illicitumve, quae agenda, quae fugienda sint, cuique dictantes: quas et quisque semetipsum sedato excutiens animo, secumque cogitans, non potest non Marte proprio eruere: non sacris tantum literis illud indigitantibus, sed et agnoscentibus gentilium optimis, atque doctissimis ..."

40 See Latham (ed) 1965: sv "lapsus".

41 See Latham (ed) 1965: sv "proto – protoplastus". The forms "protoplaustus", "protoplasta" and "protoplausta" also occur. The term is used by the early Christian (patristic) writer Tertullianus in his *De Exortatione Castitatis* 2 fin and *Adversus Iudaeos* 13.

Underlying Voet's concept of law and of the basis of natural law is the supralapsarian thinking of orthodox Calvinism. In *Commentarius* 1 1 14 he states:

It is enough to say that God, the creator of nature, is also the founder of natural law ...⁴²

In *Commentarius* 1 1 15 he adds that

natural law is more ancient than any human society; and hence society, being later than that law, cannot be conceived as the foundation of that law, which is prior in time.⁴³

This is the background of Voet's criticism of De Groot as enunciated in *Commentarius* 1 1 15. He asks the question as to the *primum principium* (first principle) of natural law, and observes that there are many diverse answers to the old question of the highest good (*summum bonum*). He proceeds as follows:

As to what is the groundwork of this natural law, what is the foundation and first principle from which it can be proved *a priori* (as they say)⁴⁴ and as it were drawn out of the holy shrine of justice itself, and what is the province of natural law, there has been no fewer disagreements on those points than in the many discordant opinions which divided philosophers of old on the question of the highest good (*summum bonum*).

Some thought it right to place the foundation in a concordance or discordance with natural and social reason before it had been sullied by the fall of man (Grotius *De Jure Belli ac Pacis* 1 1 12). But what, pray, is that but to beg the question? The very question is whether this thing or that is in concordance with uncorrupted nature or right reason; and it follows that the answer must be derived from some other foundation. Others seek the main principle of all natural law in the social character of man (Pufendorf *De Jure Naturae et Gentium*, in the preface).⁴⁵ But not rightly, in my opinion; for natural law embraces in its scope not only duties to other men living in the same society, but also towards God and towards one's own self, even when sundered from all relation to human society.⁴⁶

Voet states his final conclusion as follows (*Commentarius* 1 1 15):

This being so, nothing strikes one more clearly on deep examination of the whole matter than that the source and wellhead of the whole of natural law, from which every principle of

42 "Sufficit, Deum, auctorem naturae, juris quoque naturalis conditorem esse ..."

43 "Jus naturae omni societate humana antiquius est; unde societas, eo jure posterior, concipi non potest juris illius."

44 This is an allusion to De Groot *De Jure Belli ac Pacis* 1 12 which is quoted above.

45 In his *De Jure Naturae et Gentium* (1672) Samuel Pufendorf took up the theories of De Groot and sought to complete them by the doctrines of Hobbes and his own ideas on the *jus gentium*.

46 "Sunt enim, quibus visum fuit ejus fundamentum ponere in conventia et disconventia cum natura rationali ac sociali, non per lapsum depravata. Grotius *De Jure Belli ac Pacis* 1.12. Sed quid, obsecro, est principium petere, si non hoc? Cum id ipsum in quaestione sit, an hoc aut illud sit conveniens incorruptae naturae seu rectae rationi: ut proinde ex alio id feurit fundamento deducendum. Alii in hominis socialitate primum juris totius naturalis quaerunt principium. Puffendorf *De Jure Naturae et Gentium* in praefat. Sed, ut opinor, minus recte: cum jus naturale ambitu suo non modo complectatur officia erga hominos alios, in eadem viventes societate; sed et erga Deum, et semet ipsum, etiam ab omni societatis humane relatione remotum."

justice will have to be derived like streams from a source, or boughs from a tree, is nothing but the law of God the Creator (*ex qua, uti ex fonte rivali, ex radice rami, derivanda erit omnis justitiae ratio, quam jus Dei creatoris*), mighty as He is, and yet at the same time kind and most generous to all His creatures. Why, God thrice Great and High (*Deus ter Optimus Maximus*)⁴⁷ brought to being man himself and all things else for his benefit. Man seeing this with right reason and own judgment, and acknowledging the high benevolence, wisdom and power of the Creator, cannot but be conscious and convinced of the very close obligation arising from the very blessing of his creation.⁴⁸

In the ultimate result, the difference between De Groot and Voet is to be found in the way in which they conceive the role of mankind's freedom of will. For De Groot, the law of nature finds its foundation and substance in the dictates of right reason, and right reason is firmly within the sphere of mankind's freedom of will. Voet finds the origin of the law of nature in an eternal decree of God, and mankind's role is confined to acknowledgment of the wisdom and power of God, and consciousness of the obligation arising from this blessing of God's creation.⁴⁹

6 Conclusion

Voet's criticism of De Groot's concept of the first principles underlying the law of nature has left little or no traces in subsequent debates or learned discourse among the writers on the Roman-Dutch law. Both Van der Keessel and Van der Linden in their respective commentaries on De Groot's *Inleidinge* followed De Groot's views without making any reference to Voet.

By the time Voet penned his criticism of De Groot, the vehemence which had characterised the theological debate in the early part of the seventeenth century had abated. Moreover, the lawyers were not interested in this kind of debate, and the

47 Underlying this is the doctrine of the Holy Trinity which is central to much of Christianity, including orthodox Calvinism.

48 "*Quae cum ita sint, poenitus cuncta scrutanti non alius evidentius occurit juris naturalis universi fundamentum ac scaturgio, ex qua, uti ex fonte rivali, ex radice rami, derivanda erit omnis justitiae ratio, quam jus Dei creatori, potentis quidem, sed et pariter benigni ac summe benefici in suas creaturas. Produxit nempe Deus ter Optimus Maximus ipsum hominem, et omnia reliqua in usum ejus. Quod ratione recta ac judicio suo homo percipiens, et benevolentiam, sapientiam, potentiamque creatoris agnoscens maximam, non potest non sibi conscius ac convictus esse natae ex ipso creationis beneficio obligationes illius arctissimae ...*"

49 It is beyond the scope of this note to explore the extent to which the divergent views of both De Groot and Voet find their roots in medieval scholasticism. Durand 2007: 186 refers to "[t]he heavy scholasticism of Reformed Orthodoxy" which "became dominant in the Reformed Churches of the Netherlands". Knight 1925: 84 points out that the *De Jure Praedae*, which "may have been almost a first draft" of the *De Jure Belli ac Pacis*, "is in form, and very much in substance, a work most carefully cast in the scholastic mode". De Groot's indebtedness to the Spanish scholastics is traced in detail by Decock 2013 who concludes (at 643): "If anyone, Hugo Grotius appears to be the ultimate bridge-figure between the moral theologians and the 'modern' natural lawyers. A superficial indication of Grotius' indebtedness to the late medieval *ius commune* and the Spanish scholastics is the great number of references to these sources in the *De iure belli ac pacis*."

churchmen were finding other points of debate in which they could vent the spleen of their *odium theologicum*.

ABSTRACT

Hugo de Groot (1583-1645) is internationally known as the father of international law and also celebrated for his seminal work on the law of nature. The principal work of Johannes Voet (1647-1713) is his *Commentarius ad Pandectas* in which he expounds the modern law (the *jus hodiernum*) in the light of the *Pandects* of Roman law. In the first title of his *Commentary*, Voet briefly sets out his views on the foundations of natural law. He rejects the views of De Groot on this score as unacceptable. The purpose of this note is to trace the exposure of De Groot and Voet to the subtleties of the esoteric theological debates in Reformed (Calvinist) circles in seventeenth century Holland, and to highlight the theological background to their differing views on the source of the law of nature.

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THE ORIGINS OF HATE-CRIME LAWS

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Key words: Hate crime; hate-crime laws; history; origins

1 Introduction

The non-recognition of hate crime as a specific category of criminal conduct in South African law has prompted recent calls for the enactment of hate-crime legislation.¹ A hate crime may be described as criminal conduct which is motivated

- 1 In this regard see Duncan & Nel 2011: 33; Naidoo & Karels 2012: 624; and Mollema & Van der Bijl 2014: 679. See, also, Harris (accessed 11 Nov 2015). Most of the present South African public and academic debate surrounding the non-recognition of hate crime in South African law and the need for hate-crime laws concern sexual orientation in light of the rapes and murders of Black lesbian women. However, calls for hate-crime legislation also concern race and ethnicity following the large-scale outbreaks of xenophobic violence against black African foreigners in 2008 and 2015. It should be noted that despite the non-recognition of hate crime as a specific category of criminal conduct in South African criminal law, hate-speech provisions exist in South Africa. Sections 10 and 12 of the Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (hereinafter referred to as the Promotion of Equality Act) contain specific prohibitions on hate speech. These provisions are applicable to the publication and dissemination of words and information that could incite harm or promote hatred towards a specific group of people. This statute provides a civil remedy for hate speech in the form of damages. The conduct that is prohibited by the Promotion of Equality Act does not, however, address physically violent and coercive criminal conduct that is motivated by prejudice or bias. The Promotion of Equality Act therefore does not afford protection to most victims of hate crimes in South Africa.

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by the perpetrator's prejudice or bias, commonly referred to as "hate", towards the victim's race, ethnicity, gender, sexual orientation, religion, disability and several other victim characteristics.²

A hate crime therefore consists of conduct which complies with the definition of a crime and which is motivated by the perpetrator's bias or prejudice against the victim.³ In most jurisdictions that recognise hate crime as a specific category of criminal conduct, laws have been enacted which create specific hate crimes⁴ and which allow sentencing officers to impose harsher sentences on convicted hate-crime perpetrators; these are referred to as aggravated or enhanced penalties.⁵

Several academic scholars agree that the United States of America has been at the forefront of the enactment of hate-crime legislation for more than two decades.⁶ While the recognition of hate crime as a category of criminal conduct undoubtedly has its roots in the United States of America, there is no consensus as to the date when criminal conduct motivated by specific prejudices or biases was first accorded such recognition in American history.⁷ This article attempts to trace the origins of both hate crime as a specific category of criminal conduct as well as hate-crime laws.

2 Post-American Civil-War origins of hate-crime laws

Several writers trace the origins of hate-crime laws to the post-Civil War period in the United States of America when the American Congress passed numerous federal civil-rights laws.⁸ Petrosino⁹ opines that the "antecedents" of present hate-crime laws can be traced to the post-Civil War or "Reconstruction" period which

2 Since hate crimes are crimes that are motivated by bias or prejudice, there is a tendency in some American literature to refer to hate crimes as "bias crimes". However the term "hate crime" will be used in this article.

3 In the context of hate-crime laws, the crime is referred to as the "underlying" crime, or the "base" or the "predicate" crime. The motivation is regarded as a "bias motivation". See, further, Lawrence 1999: 9.

4 If, eg, a crime of assault is motivated by prejudice or bias towards the race of the victim, the bias motivation would render the crime a racially-motivated assault and consequently as a hate crime.

5 An aggravated or enhanced penalty is more severe than the penalty imposed on the same crime when it is not motivated by bias or prejudice towards the victim's race, ethnicity, sexual orientation, gender etc. See, in this regard, s 7 of the American statute, the Matthew Shepard and James Byrd Junior Hate Crimes Prevention Act of 2009 as well as s 28 of the British statute, the Crime and Disorder Act of 1998, which allow for the imposition of enhanced or aggravated penalties on convicted hate-crime perpetrators.

6 Levin 1999: 6; Gerstenfeld 2013: 31-32; Hall 2013: 18.

7 The earliest example of a contemporary federal hate-crime law in the USA is the Hate Crime Statistics Act of 1990. This latter Act may be considered as the first modern federal hate-crime law in the USA. However, as will become clear below, several American states had enacted their own hate-crime laws during the early 1980s.

8 Levin 2002: 227; Hall 2013: 20; Gerstenfeld 2013: 12-13.

9 1999: 15.

culminated in a number of legal reforms and constitutional amendments. A similar view is expressed by Levin¹⁰ who sees the “seeds” of present American hate-crime laws in post-Civil War laws which protected groups of people on the basis of their status, and in particular on the basis of their race.

The foundations of the American civil-rights model were laid during the post-Civil-War period. The American Congress ratified several amendments to the Constitution: the Thirteenth Amendment in 1865 abolished slavery, the Fourteenth Amendment in 1868 granted citizenship to all persons born or nationalised in the United States of America and the Fifteenth Amendment in 1870 extended voting rights to citizens who were previously denied this right because of their race, colour or status as slaves.¹¹ All the aforementioned Constitutional amendments included provisions for Congress to pass legislation to enforce the amendments at state level thereby removing the autonomy of states to deprive minorities of their rights.¹² A number of federal statutes were subsequently passed during this period which supplemented and enforced the constitutional amendments and which protected newly-freed slaves, especially in the Southern states where they were “at best second-class citizens and at worst subject to harassment, intimidation and murder”.¹³

The reluctance of state-level local authorities to prosecute crimes committed by Whites against Blacks¹⁴ led to the American Congress passing the Civil Rights Act of 1866 which established citizenship for all those born in the United States of America and the Enforcement Act of 1870, which guaranteed the rights of due process of law and equal protection of the law guaranteed by the Fourteenth Amendment, and the right to vote established by the Fifteenth Amendment.¹⁵

According to the Civil Rights Act of 1866¹⁶

all persons born in the United States and not subject to any foreign power, excluding Indians not taxed, are hereby declared to be citizens of the United States; and such citizens, of every race and colour, without regard to any previous condition of slavery or involuntary servitude, except as punishment for crime whereof the party shall have been duly convicted, shall have the same right in every State and Territory in the United States, to make and enforce contracts, to sue, be parties, and give evidence, to inherit, purchase, lease, sell, hold, and

10 2002: 228.

11 See Hall 2013: 21; Levin 2002: 231.

12 See Hall 2013: 21. Section 5 of the Fourteenth Amendment gave Congress the power to pass any laws necessary to enforce the amendment. See “Civil rights: An overview” (accessed 30 Jul 2015).

13 Lawrence 1999: 122. Lawrence cites the examples of the 1866 New Orleans and Memphis riots in which many Blacks were killed, as well as the increasing attacks on freed slaves by the Ku Klux Klan and smaller organised hate groups such as the Knights of White Carmelia and the White Brotherhood (see, in general, Lawrence 1999: 199-200).

14 Jacobs & Potter 1998: 36.

15 See Lawrence 1999: 22.

16 Quoted from “The Civil Rights Act of 1866” (accessed 30 Jul 2015).

convey real and personal property, and to full and equal benefit of all laws and proceedings for the security of persons and property, as is enjoyed by white citizens, and shall be subject to like punishment, pains, and penalties, and to none other, any law, statute, ordinance, regulation, or custom, to the contrary notwithstanding.

In the above statute citizenship and class or group-based protection were extended to all races (except for certain categories of Native Americans or “Indians”), to former slaves and generally to people of colour.

Levin describes the period of Reconstruction as follows:¹⁷

New, sweeping Constitutional and statutory reforms cut off the traditional legal and political methods Whites relied upon to deprive Blacks of their rights ... although their initial success was fleeting, these new, egalitarian post-war reforms laid the foundation for changes that extended into the latter half of the next century, including the emergence of hate-crime laws.

The American Congress also passed the Civil Rights Act of 1871 which permitted the federal government to prosecute people who conspired to deprive others of their civil rights or to prosecute government agents who deprived persons of their rights.

According to the Civil Rights Act of 1871¹⁸

[w]hoever, under colour of any law, statute, ordinance, regulation, or custom, subjects any person in any State, Territory, Commonwealth, Possession or District to the deprivation of any rights, privileges, or immunities secured or protected by the Constitution or laws of the United States, or to different punishments, pains, or penalties, on account of such person being an alien, or by reason of his colour, or race, than are prescribed for the punishment of citizens, shall be fined under this title or imprisoned for not more than a year, or both; and if bodily injury results from the acts committed in violation of this section, or if such acts include the use, attempted use, or threatened use of a dangerous weapon, explosives, or fire, shall be fined under this title or imprisoned not more than ten years, or both; and if death results from the acts committed in violation of this section or if such acts include kidnapping or an attempt to kidnap, aggravated sexual abuse or an attempt to commit aggravated sexual abuse, or an attempt to kill, they shall be fined under this title or imprisoned for any term of year or for life, or both, or may be sentenced to death.

Jacobs and Potter¹⁹ opine that the purpose of the Civil Rights Act of 1871 was to guarantee fair law enforcement irrespective of the race of the victim. Levin²⁰ is of the view that these civil-rights laws consisted of “a protected group ... a covered activity ... and a prohibition on some type of detrimental conduct”.²¹ The 1871 Act

17 See Levin 2002: 231.

18 Quoted from “The Civil Rights Act of 1871” (accessed 30 Jul 2015).

19 1998: 37.

20 2009: 4.

21 The “protected group(s)” refer specifically to persons of colour, freed slaves and aliens. The “covered activities” included the exercise of property rights, contractual rights, litigation and due process of law (in terms of the Civil Rights Act of 1866). The “prohibited conduct” included a general prohibition against violent behaviour, with or without the use of weapons, kidnapping and sexual abuse (in terms of the Civil Rights Act of 1871).

further extended protection to classes or groups of people, in this instance to “aliens” and to persons on the basis of race and colour. According to Levin²² these laws “represented a newfound validation of federal authority in the area of criminal law and supremacy of national power over that of the states to protect minorities from the harms of race-based violence and discrimination”.²³

The American Congress also enacted the Ku Klux Klan Act of 1871 which expanded the federal government’s power to intervene where states failed to protect the constitutional rights of its citizens. The Ku Klux Klan Act of 1871 permitted federal authorities to intervene in an enumerated list of activities where there was a conspiracy to violate civil rights, for example threatening government officials, intimidating witnesses and jurors at a federal trial, and interfering with a citizen’s right to equal protection under the law and a citizen’s voting rights. These were among the conspiracies that were practised by the Ku Klux Klan against Blacks.²⁴

The American Congress further passed the Civil Rights Act of 1875 which provided for equal treatment of all races in public accommodation, facilities, transport and places of entertainment.²⁵

Jacobs and Potter²⁶ regard the various federal civil-rights laws referred to above as “federal-criminal civil-rights statutes” since they were the only option available to the federal government to ensure that crimes committed against former slaves at local and state level would be investigated and prosecuted. If state and local authorities had investigated and prosecuted crimes against former slaves there would have been no need for the enactment of these statutes. During the Reconstruction period one also finds some judicial recognition accorded to racial bias motivation albeit in a dissenting judgement only. According to Lawrence,²⁷ Justice Bradley “anticipated the modern development of bias-crime law, reading the Thirteenth Amendment as a

22 2002: 231.

23 According to Hall 2013: 47, during this period of American history, a debate raged between states and the federal government over control of criminal law enforcement. According to Meese 1997: 6, the drafters of the American Constitution had intended crime and law enforcement to fall largely within the jurisdiction of states.

24 According to Lawrence 1999: 122-123, during the congressional debates on the Bill, the intention was to provide federal authorities with the right to intervene in a number of common-law crimes such as murder, arson and robbery. However, the Bill was amended and federal prosecution was then limited to the specified activities. Thus, rather than a broad, hate-crime law, the Ku Klux Klan Act of 1870 confined federal criminal jurisdiction only to cases of “rights-interference crimes”.

25 According to the Civil Rights Act of 1875 “[a]ll persons within the jurisdiction of the United States shall be entitled to full and equal enjoyment of the accommodations, advantages, facilities and privileges of inns, public conveyances on land or water, theatres, and other places of public amusement, subject only to the conditions and limitations established by law, and applicable alike to citizens of every race and colour, regardless of any previous condition of servitude”. It is submitted that the Civil Rights Act of 1875 is an early example of an anti-discrimination law.

26 1998: 36.

27 1999: 127.

font of federal authority for all crimes committed with racial *animus*” in the case of *United States v Cruikshank*.²⁸

In the case of *Cruikshank* Justice Bradley opined that in order to federalise a common-law crime:²⁹

There must be a design to injure a person, or deprive him of his equal right of the protection of the laws, by reason of his race, colour, or previous condition of servitude ... otherwise it is a case exclusively within the jurisdiction of the state and its courts.

According to Levin hate crimes belong to a “subset” of old civil-rights and anti-discrimination laws.³⁰ He therefore does not regard the present recognition of hate crime as a specific category of criminal conduct as a novel phenomenon. Jacobs and Potter,³¹ however, argue that while federal civil-rights statutes dealt with issues of race and discrimination, as some hate-crime laws do, this is the only similarity that these laws have with the present American régime of hate-crime legislation. They further opine that the civil-rights statutes of the Reconstruction era were not aimed at hate crimes as the concept is presently understood, but were intended to deal with interference with a person’s civil rights. Moreover, the federal civil-rights laws of the nineteenth century did not enhance penalties and recriminalise conduct already criminalised in law.³²

3 The twentieth-century origins of hate-crime laws

There is some suggestion that the recognition of hate crime as a specific category of criminal conduct and the origin of hate-crime laws may be traced to the post-Second World War period when bigotry based on race, ethnicity and gender were increasingly condemned by American society.³³

During this period the state of Connecticut was one of the first American states to pass a statute which addressed the problem of “racially-motivated assaults”. The Connecticut General Statute of 1949 “criminalised the ridiculing of an individual

28 *United States v Cruikshank* 25 Fed Cases 707 (1874).

29 *United States v Cruikshank* 25 Fed Cases 707 (1874) at 712.

30 2009: 3.

31 1998: 36.

32 *Ibid.*

33 This is an alternative view that is expressed by Jacobs & Potter 1998: 5. According to Henderson 2010: 164, in order to avert a genocide like the Holocaust, a number of international treaties were negotiated in the post-Second World War period which were designed to eradicate incitement to racial discrimination (which, in turn, led to the 1965 International Convention on the Elimination of All Forms of Racial Discrimination) and to prohibit advocacy of national, religious and racial hatred (which resulted in the 1966 International Covenant on Civil and Political Rights). It would be trite to add that in the immediate aftermath of the Second World War there was increased international awareness of bigotry, prejudice and racism and the devastating consequences thereof.

based on race, colour or creed”.³⁴ Petrosino³⁵ suggests that the origin of modern hate-crime laws in the United States of America could also be linked to the 1954 United States Supreme Court decision in *Brown v Board of Education of Topeka*³⁶ which overturned the “separate but equal” doctrine in American public schools.³⁷

Some scholarly research traces the origins of hate-crime laws in the United States of America to the Civil-Rights Movement³⁸ of the 1960s, the women’s rights and the gay and lesbians’ rights movement of the 1970s as well as the subsequent disabilities and victims’ rights movement.³⁹ Jacobs and Potter regard the Civil Rights Movement of the 1960s as significant since it resulted in the development of “identity politics” which they link to the modern hate-crime movement as follows:⁴⁰

[I]dentity politics refers to a politics whereby individuals relate to one another as members of competing groups based upon characteristics like race, gender, religion and sexual orientation ... according to the logic of identity politics, it is strategically advantageous to be recognised as disadvantaged and victimised. The greater a group’s victimisation, the stronger its moral claim on the larger society ... the current hate-crime movement is generated not by an epidemic of unprecedented bigotry but by heightened sensitivity to prejudice and, more important, by our society’s emphasis on identity politics.

According to Hall,⁴¹ after the Civil-Rights Movement there followed a shift in thinking in relation to the treatment of certain minority groups. The advantages to be gained in recognising a group’s prior mistreatment and victimisation included official recognition in a number of social contexts such as employment benefits, university admissions, the awarding of public contracts and the creation of voting districts.⁴² In terms of the logic of identity politics, “a group can assert a moral claim to special entitlements and affirmative action”.⁴³ In a similar vein, Jenness and Grattet write that⁴⁴

34 See Lawrence 1999: 20. In this regard, refer to ss 53 to 57 of the Connecticut General Statute of 1949.

35 1999: 15.

36 347 US 483 (1954).

37 While it is conceded that the case of *Brown v Board of Education of Topeka* marked a new, more liberal direction in the jurisprudence of the American Supreme Court, Petrosino does not provide any convincing proof that the origins of hate-crime laws can be traced to this period.

38 According to Shimamoto 2003-2004: 831, the Civil-Rights Movement refers to a period commencing in the early 1960s that was marked by violent protests and demonstrations, sit-ins and marches against racist practices and segregation in the USA.

39 See, eg, Jacobs 1992-1993: 542; Jacobs & Potter 1998: 5; Grattet & Jenness 2004: 23-24; and Jenness 2002: 19-22.

40 1998: 5-6.

41 2013: 23.

42 See Jacobs & Potter 1998: 66.

43 *Ibid.*

44 2004: 26.

The anti-hate crime movement emerged through a fusion of the strategies and goals of several identifiable precursor movements that laid the foundation for a new movement to question and make publicly debateable, issues of rights and harm as they relate to a variety of constituencies.

These diverse social movements, in asserting their respective demands, stimulated public discussions about violence based on prejudice and bigotry and began demanding legal changes, especially in criminal law, to address the problem.⁴⁵ According to Jenness,⁴⁶ these movements politicised and emphasised violence against minority groups because of their minority status: the Civil-Rights Movement politicised violence against racial minorities (such as police brutality against Blacks), the women's-rights movement politicised violence against women (such as rape and domestic violence), the gay and lesbian-rights movement politicised violence against homosexuals (such as "gay bashing") and the disabilities movement politicised violence against people with disabilities (such as "mercy killings"). The predominant issue that these diverse civil-rights movements had in common was the perpetration of violence against specific minority groups. A later social movement to have a significant influence on the development of hate-crime laws was the victims' rights movement which emphasised that the victims of crime, especially violent crimes, have the right to special assistance such as counselling services, increased participation in the criminal-justice process, civil remedies and other special protections.⁴⁷ The modern anti-hate crime movement thus arose out of these diverse social movements representing the interests of different groups of victims who have been aptly referred to as "strange bedfellows".⁴⁸

A significant American law which was passed as a result of the Civil-Rights Movement and which may be considered as a precursor of modern hate-crime laws was the Civil Rights Act of 1968.⁴⁹ Although this Act was not aimed at hate crimes *per se*, it is considered as a "catalyst for modern hate-crime legislation".⁵⁰ The Civil Rights Act of 1968 prohibits interference with a person's federally-protected rights in cases of violence or threats of violence *because of a person's race, colour, religion or national origin*. The federally-protected rights include, *inter alia*, the rights to vote, to public education, to participation in jury service, to interstate travel and access to public places and services. According to Wang,⁵¹ the Civil Rights Act of 1968 requires the defendant to have acted with a bias motive since it uses the words *because of* the victim's protected status and that prior to the creation of a purely

45 See Grattet & Jenness 2004: 25-26.

46 2002: 20.

47 See Grattet & Jenness 2004: 26.

48 See Jenness 2002: 21.

49 See Jacobs & Potter 1998: 38.

50 See Hall 2013: 24.

51 2000: 1401.

federal hate-crime law, the American federal government resorted to the use of this Act to prosecute hate crimes. The Civil Rights Act of 1968 places the onus on the prosecution to prove that the defendant was motivated by bias and attacked the victim who was engaged in a federally-protected activity.⁵²

Jacobs and Potter⁵³ write that the Civil Rights Act of 1968 was intended to provide a remedy for the violence that resulted from opposition to civil-rights marches, to voter registration and voting issues, to the admission of Black students to formerly all-white schools and universities and to efforts to abolish the laws that enforced segregation. However, the complicated nature of the Civil Rights Act of 1968⁵⁴ and the high burden of proof required to secure convictions led to the emergence of state-level hate-crime laws in the United States of America with less onerous evidentiary requirements.⁵⁵

As the Civil-Rights Movement gained momentum, civil-society organisations such as the Anti-Defamation League⁵⁶ and the Southern Poverty Law Centre⁵⁷ began compiling statistical reports to establish the number and frequency of crimes motivated by prejudice, bias and bigotry.⁵⁸ In 1981 the Anti-Defamation League, concerned by the rise in crimes motivated by racial and ethnic bias and prejudice in the United States of America, particularly anti-Semitic crimes, and the fact that media exposure, education and law enforcement were ineffective, drafted a model hate-crime statute which recognised racial, religious and ethnic biases.⁵⁹ It should be noted at this point that gender and sexual orientation biases were only subsequently added to an amended model hate-crime statute.⁶⁰ The model statute was intended to influence state legislatures and the Federal government to enact hate-crime laws. The Anti-Defamation League's model hate-crime statute had the desired effect since a number of state legislatures in the United States of America subsequently enacted laws based on the model statute.⁶¹ Shortly after the drafting of the Anti-Defamation

52 According to Wang 2000: 1402-1403, the Civil Rights Act of 1968 was a difficult statute to invoke in hate crimes since it required proof of bias motivation in order to fulfil the culpability requirements and that a victim's "enumerated right" had been interfered with or that the victim was engaged in a "federally-protected activity".

53 1998: 38.

54 *Ibid.*

55 See Hall 2013: 114.

56 The Anti-Defamation League of B'nai B'rith (or the ADL) is a civil-rights organisation that was formed in 1913, initially with a focus on anti-Semitism, but subsequently countering all forms of discrimination and infringements of civil rights. See Walker 1994: 18.

57 The Southern Poverty Law Center (SPLC) was formed in the southern American state of Alabama by a group of civil-rights lawyers in 1971. Its mission was to test civil-rights laws and to seek justice for the poor and disenfranchised. See Howard (accessed 30 Jul 2015).

58 See Grattet & Jenness 2004: 26.

59 Freeman 1992-1993: 582.

60 See Grattet & Jenness 2004: 27.

61 See Freeman 1992-1993: 583.

League's model hate-crime statute in 1981, the states of Oregon and Washington passed similar laws.⁶² According to Gerstenfeld,⁶³ while many states used the Anti-Defamation League's model as a prototype, they often made changes, while other states drafted their own original statutes. Gerstenfeld⁶⁴ writes that this is the reason for the diversity of hate-crimes laws in the United States of America today.

Perhaps the most significant federal law of the modern hate-crimes era to be passed in the United States of America was the Hate Crime Statistics Act of 1990 which has been briefly referred to in the introduction to this article. What is particularly significant about this statute is that the term "hate crime" was first coined by three members of the House who were sponsoring the Bill when being debated in the American House of Representatives.⁶⁵ Jacobs and Potter⁶⁶ acknowledge representatives John Conyers, Barbara Kennelly and Mario Biaggi, who used the term "hate crime" in 1985 to refer to crimes motivated by racial, religious and ethnic prejudice.

From 1985, the term "hate crime" entered media and social discourse in the United States of America and appeared in eleven newspaper articles nationwide.⁶⁷ Ehrlich⁶⁸ opines that his term "ethnoviolence" which had hitherto been commonly used to refer to criminal conduct motivated by bias and prejudice was replaced by the term "hate crime" since it was a term that appealed to issues of crime, law and social control which were considered as legitimate issues by the media popularising such issues. The Hate Crimes Statistics Act simply obliged the United States Department of Justice to collect statistics of hate-crime incidents across the United States of America.⁶⁹

4 Conclusion

The origins of hate-crime laws and the recognition of hate crime as a specific category of criminal conduct are shrouded in some uncertainty. The existing research suggests that shortly after the American Civil War laws were enacted which provided for status-based protection. However, the federal civil-rights laws which were passed during this period of American history were intended to protect vulnerable groups on the basis of race or previous conditions of servitude but did not provide for enhanced or aggravated penalties. The ostensible precursor of modern hate-crime laws can be traced to the period of the Civil Rights Movement which culminated in the

62 See Gerstenfeld 2013: 31.

63 *Ibid.*

64 *Ibid.*

65 See Hall 2013: 25.

66 1998: 4.

67 *Ibid.*

68 2009: 18.

69 See Lawrence 1999: 22.

enactment of the Civil Rights Act of 1968. This was one of the earliest American laws to specifically recognise criminal conduct motivated by prejudice or bias towards a victim based on the victim's *race, colour, religion or national origin*. However, the Civil Rights Act of 1968 also did not allow for the imposition of enhanced or aggravated penalties.

It is submitted that the criminalisation of conduct motivated by prejudice and bias (or "hate") and the imposition of enhanced or aggravated penalties for crimes that are motivated by racial, ethnic, gender or sexual orientation bias reflect the abhorrence with which such crimes are viewed by modern, democratic societies.

The imposition of enhanced or aggravated penalties therefore reflects modern society's denunciation of criminal conduct that is motivated by such biases.⁷⁰ Since hate crimes that are motivated by the race, ethnicity or sexual orientation of the victim conflict with society's established, acceptable values, they may be punished more severely.

Since the enactment of the Hate Crimes Statistics Act in 1990 a number of federal hate-crime laws have been passed in the United States of America. Contemporary hate-crime laws recognise a wide spectrum of victim characteristics that includes race, ethnicity, religion, disability, gender and sexual orientation. These hate-crime laws include the Hate Crimes Sentencing Enhancement Act of 1994 and the Matthew Shepherd and James Byrd Junior Hate Crimes Prevention Act of 2009. To date, over forty-five American states and the District of Columbia have enacted hate-crime statutes based on the Anti-Defamation League's model statute.⁷¹ The American trend to enact hate-crime laws has had some international impact, particularly in Western democratic countries. In 1998 the United Kingdom passed the Crime and Disorder Act which is the British equivalent of a hate-crime law and in 2003 France passed its first hate-crime law, which is commonly referred to as *la loi Lellouche*.⁷²

In South Africa, civil-society organisations have made several submissions to the Department of Justice which have recommended the enactment of hate-crime legislation.⁷³ It is lamentable that these calls have not been heeded given post-apartheid South Africa's status as a constitutional state and its commitment to equality.⁷⁴ While hate-crime laws will not eradicate crimes motivated by bias and

70 In this regard, see Iganski 2002: 138.

71 See the "Website of the Anti-Defamation League" (accessed 1 Aug 2015).

72 Which may be translated as "the Lellouche law". The full title of the "Lellouche law" is *Loi No 2003-88 du 3 février 2003*. See Bleich 2008: 12.

73 Refer to the "Website of the Hate Crimes Working Group" (accessed 1 Jul 2015). As has been stated in the introduction to this article, these calls for the enactment of hate-crime laws should be considered in light of the crimes that have been perpetrated against black lesbian women and the large-scale outbreaks of xenophobic violence against black African foreigners in South Africa.

74 The Constitution of the Republic of South Africa, 1996, which includes a justiciable Bill of Rights, is regarded as supreme law. The right to equality is enshrined in s 9 of the Constitution. It is submitted that the victims of crimes motivated by race, ethnicity and sexual orientation cannot fully enjoy their rights as equal citizens in a democratic South Africa until the enactment of hate-crime laws.

prejudice, the imposition of the criminal sanction and an aggravated penalty to such conduct may be considered as the ultimate “symbolic message”⁷⁵ that a government has at its disposal to try and change prejudiced attitudes and the manifestations thereof.

Abstract

Hate crimes were first recognised as a specific category of criminal conduct in the United States of America. Evidence of such recognition is supported by a number of state level and federal hate-crime laws that were enacted in the United States between the early 1980s and 1990s. There is a tendency in some American literature, however, to trace the recognition of hate crime as a specific category of criminal conduct to two specific historical time periods. The first historical period that is usually considered, is the nineteenth-century post-American Civil War period when federal civil-rights statutes were passed by the American Congress to protect vulnerable groups of people who were victimised because of their race and prior status as slaves. The second time period that is considered is the mid-twentieth century, post-Second World War era up to the period of the Civil-Rights Movement. Irrespective of the origins of hate crime as a category of criminal conduct, their recognition has spawned a new category of crime and criminal laws in the United States of America and internationally. Contemporary hate-crime laws recognise a wide spectrum of prejudices and biases. Despite the international trend, particularly in democratic Western nations towards the recognition of hate crimes and the enactment of hate-crime laws, the Republic of South Africa has yet to enact a hate-crime law.

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75 See Hall 2013: 124.

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AT THE BASE OF ROME'S *PECULIUM* ECONOMY

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Keywords: *peculium*; *ut manumittatur*; self-purchase; contractual slave; indentured servitude; imperfections in capital market; oath

1 Why were Roman slaves allowed to have a *peculium*?

Surprisingly, this is not a question to which Roman scholars have devoted a great deal of economic analysis. One noteworthy exception is Keith Hopkins:¹

The concept '*peculium*' applied originally to the money which a father allowed a son, who was still under his authority; in our sources, however, it is most commonly used to describe a slave's possessions. The institution of *peculium* allowed the slave a working capital, 'borrowed' from his master ... The very idea that slaves could *de facto* control their own property, including their own slaves, implied independence of action ... The slave's desire to buy his freedom was the master's protection against laziness and shoddy work – although

1 1978: 125-128.

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the slave might also cheat his master to speed his chances of buying freedom. The slave had freedom to work for. The master held out the carrot as well as the stick; the stick itself, as the American experience showed, was ineffectual. The cost of providing an incentive for good work was liberty ... Of course, it was not a legal contract ... but in general the ‘contract’ was honoured ... In the final analysis, the liberation of so many slaves was acceptable to masters only because it was profitable. As we have seen, masters derived some of their profit from the extra work which favoured slaves did under the spur of freedom enticingly visible on the horizon.

Basically, what Hopkins is suggesting, is that by granting *peculia* masters sought to lower their costs of supervision by encouraging slaves to *self-enforce* the performance of their assigned duties. Hopkins’ understanding is explicitly supported by Garnsey² and also by Zwallye³ when he calls the *peculium* “a *bellissima machinato* originating from the hard and cynical legal minds of the likes of Cato who perceived that the prospect of liberty by industry is one of the strongest incentives of human ingenuity and resourcefulness”.

Upon this *peculium* base is erected, or so it would appear, an impressive Roman legal and commercial superstructure. Thus, in commenting on its legal implications, Gamauf notes that the *peculium* “conferred upon the slave unrestricted powers to acquire without requiring accompanying surveillance by the master”.⁴ Fleckner⁵ elaborates: “For those who exert authority, the grant of *peculium* offers the prospect of participating indirectly, and therefore at lower risk, in business ventures that the recipient may conduct; the *peculium* could then be seen as an instrument for investments in business enterprises.” The businesses managed by slaves might be located “beyond the sea or in regions where they [the owners] are not living themselves ...”.⁶ Again, Ulpian⁷ takes note of Labeo’s discussion “about a provincial who, in order to sell his merchandise, has a slave keeping a shop in Rome”. In the countryside, bailiffs (*vilici*) ran estates far from the estates of their owners.⁸

Not only might slaves with a *peculium* and *libera administratio* (“license to administer”) conclude legal contracts with third parties, but they could also do so with their owners.⁹ In this connection, Martin¹⁰ calls attention to Cicero *QFr* 3 1 5-6 wherein Cicero writes to Quintus:

Your bailiff (*vilicus*) Nicephorus impressed me very favorably. I asked him whether you had given him any instructions about that little bit of building at Laterium of

2 1981: 362-363.

3 2002: 127.

4 2009: 339.

5 2014: 219.

6 D 40 9 10 Gaius (tr Watson).

7 D 5 1 19 3.

8 Laes 2008: 249, citing mainly Apuleius *Metamorphoses*.

9 Carlsen 1995: 99 with nn 325, 326 citing D 12 16 13 and D 13 7 18 4.

10 1989: 55-57.

which you had spoken to me. He answered that he had contracted to do the job himself (the technical term *conductorem*) for 16,000 *sesterces*, but that you had later made considerable additions to the work and none to the price, so he had done nothing about it.¹¹

Thus, not only might a slave form a contract with his owner, but he could decline to perform if the latter introduced cost-raising conditions. With respect to the legal status of Nicephorus, there is ample evidence of slave *vilici* and little or none of free *vilici*.¹² That Nicephorus made a legal building contract with Quintus provides no basis for assuming that he was free any more than his making a self-purchase contract with Quintus would have done.¹³

A dramatic illustration of the *peculium* economy at work is provided in the report of Hippolytus regarding the banking career of the slave Callistus, who became Pope in 217 CE. As a young slave, Callistus received a large sum of money from his owner Carpophorus (an imperial slave) with the “instruction/order to bring him profits from banking deals”.¹⁴ As noted by Andreau,¹⁵ this scenario suggests that the sum given to Callistus was a *peculium* and, despite legal irregularities, it appears that Carpophorus received regular “dividends” from the profits of a banking enterprise independently managed by his slave Callistus.

Moreover, the grant of a *peculium* offers a legal vehicle for building large enterprises: “Instead of running the business on his own, he [the master] could transfer the funds and assets to one of his slaves and thereby limit his risk, in general to the current value of the *peculium* ... In this way, the master could set up a business enterprise with a sort of limited liability ... Now, if several masters pooled their funds and vested a common slave with the capital, they could mitigate some of the structural disadvantages of the *societas* ...”¹⁶ Whether very large “common slave” enterprises actually existed remains an open question.

This article points out that forcibly taken slaves (including born-slaves), the kind taken for granted by Hopkins and in most of the literature, would be insufficiently incentivised by *peculia*. It is argued that the *peculium* economy is nevertheless able

11 *Letter to Quintus* 21 (tr Shackleton Bailey 2014).

12 Roman *vilici* (“stewards/bailiffs”) were typically slaves (Beare 1978: esp 398; Carlsen 1995: esp 202; Schumacher 2011: *passim*). Scheidel 1990 provides evidence for *free-born* bailiffs but this is not evidence for *free* bailiffs. To gain employment in such financially sensitive positions individuals probably had to volunteer for slavery. Estate owners, especially absentees or those otherwise occupied, preferred slaves to free employees because those suspected of peculation or careless behavior could legally be put to torture. The use of volunteer slaves in sensitive financial positions is found not only in Rome but also among Early Modern Russia’s “registered” (administrative/financial) slaves – “he who has the key shall be a slave” (Hellie 1982: 36-39). Hellie (1982: 36) furthermore remarks that contemporary observers have been baffled by the fact that “scions of the important, genealogically ranked families ... sold themselves into slavery”.

13 See 3 *supra*.

14 *Refutation of All Heresies* 9 12 1-12 (tr Andreau 2006: 207).

15 2006: 205-208.

16 Fleckner 2014: 222; cf Földi 1996: 201-205.

to stand as a dominant Roman socio-economic reality because the slaves forming its base are slaves by contract/self-sellers.

2 The self-enforcement explanation is not credible

Upon further review the proposition that allowing a slave to possess and grow a *peculium* encourages him to self-enforce his effort, is self-negating and, hence, problematic. The master has no contract or agreement with his slave, from whom he extracts labor by physical force. “Slaves were forcibly imported aliens who were exploited to a degree and in a way which citizens would not allow.”¹⁷ Bradley¹⁸ expands on this theme: “[S]lavery as an institution was based ultimately on the violent subjection of one person to another that arose from the dominating power claimed when life was spared upon defeat in warfare ... So slaves were always at war with their owners ...” He also maintains: “Escape was a direct form of resistance to slavery by means of which the slave rejected his subjection to the authority of his master in favor of securing his freedom.”¹⁹

Unfortunately, there are no slave diaries or other slave accounts from ancient Rome. It is possible to supplement empathy with other kinds of evidence, however. Plautus’s slave owner Hegio helps to confirm Bradley’s insight into slave psychology: “A free man taken prisoner (*liber captivus*) is like a wild bird: once he’s given a chance of escape, it’s enough, you can never catch him afterwards.”²⁰ Hegio’s “free captive” prisoners of war were to be kept in chains which is hardly conducive to discretionary services. Macer anticipates that a criminal slave who was whipped and then returned to serve the remainder of his sentence in chains (*vincula*) might not be accepted back by his owner.²¹

The trust/resentment problem inherent in forcible slavery cannot be solved by asserting that many slaves were *slaves by birth* and not by way of war or piracy. Even if this was true, and direct evidence on the fertility of Roman slaves is lacking,²² the slave status of “houseborn” children rests solely on the violent subjection of their parents. These “*vernae*,” just as much as their parents taken in open war and raids, are outsiders enslaved by physical force. Why else would they be slaves? For houseborn slaves, however, the trauma of capture increased over a lifetime and they must have viewed their subjection as totally unjust. The war with owners was the inheritance of born slaves, and *peculia* would rarely be awarded to enemies.

17 Hopkins 1978: 112.

18 2010: 630.

19 1989: 38.

20 *The Captives* 110-119 (tr De Melo 2011).

21 D 48 19 10pr.

22 The estimates of slave fertility cited in the literature are based on demographic modeling, and not on actual evidence of Roman slave fertility. For a full critique and references, see Silver 2011a: 109-113.

It follows from the deep adversarial relationship between a typical slave (whether houseborn or war prisoner) and owner that any diminution of supervision would have the immediate effect of facilitating escape (or revenge) and, indeed, the possession of property (money, goods or slaves) would have the immediate effect of increasing the odds that the slave would make good on his escape. But the opposing behavioral effects of granting *peculia* to slaves – slaves with a *peculium* work harder and slaves with a *peculium* run away – do not simply tend to cancel out. As a product of human evolution, a forcibly enslaved individual is much less motivated to gradually accumulate a ransom for the *thief* who has stolen his life than to resist his thief and reclaim his *rightful* status of free man. Masters knew better than to believe that slaves would wait patiently for manumission to legally depart with their purses and/or accumulate cash to pay their ransom. The point is simple: Rome's extensive *peculium* economy could not possibly have rested on a base as fragile and uncertain as self-supervised forcible captives.

It is not easy to demonstrate the limited economic value of actual prisoners of war but we do have Strabo's²³ contemporary observations about forcibly taken Corsicans: "At any rate, whenever, the Roman generals have made a sally, and falling suddenly upon the strongholds, have taken a large number of people as slaves, you can at Rome see and marvel at, the extent to which the nature of wild beasts, as also that of battenning cattle, is manifested in them; for either they cannot endure to live in captivity, or, if they do live, they so irritate their purchasers by their apathy and insensibility, that, even though the purchasers may have paid for them no more than an insignificant sum, nevertheless they repent the purchase." Slave owners would be well aware of the intense resentment and demoralisation felt by forcibly taken captives and would not be inclined to grant them a *peculium*, and thereby to subsidise the flight of their property.²⁴ Very little is known about the ultimate destinations of prisoners of war. However, it is reasonable to assume that, if enslaved, such hostile and dangerous individuals would normally be allocated to easily policed labours whether in offices and factories, or much more rigorously in mills, mining, road repair; they would be granted little or no freedom, including even the opportunity to reproduce.²⁵ Seneca sympathises with the "prisoner of war (*captivus*), who having

23 Strabo 5 2 7 (tr Jones 1924).

24 Silver 2011a: 95-96.

25 For war captives sent to dig Nero's canal, see Josephus *Jewish Wars* 3 540; for slaves sent to mills (*pistrinum*): Millar 1984: esp 143-144. Cicero (*Letters to Atticus* 4 16 7) cautioned in 54 BCE that war captives from Britain would not include many qualified in literature and music. The implication being that skilled captives were assigned within their areas of expertise. Still, owners would bear the extra cost of carefully controlling them. The Romans were quite interested in the ethnic origin of slaves (D 21 1 31; D 50 15 4 5; cf Varro *De Lingua Latina* 9 93). Ethnic origin conveyed information to purchasers including, I suspect, whether a slave was more likely to have been a forcible captive than a volunteer/self-seller (see 4 *infra*). This, it is argued, was the distinction that operated to bifurcate the Roman market for labour-power, not legal status as a slave.

suddenly been reduced to the condition of a slave, still retains some remnants of liberty, and does not run nimbly to perform foul and toilsome tasks ...²⁶

It is even more difficult to present specific evidence bearing on the resentment harbored by the offspring, if there were any, of forcibly taken captives. “Slave children are rarely mentioned in literature. They remain invisible. We learn hardly anything about their life or relations to parents and masters ... In the legal texts too, *vernae* are mentioned very infrequently.”²⁷ There is some evidence for especially young captives, however. Cato the Elder, says Plutarch²⁸ “owned many domestics and usually bought those prisoners of war (*aichmalōtos*) who were young and still capable of being reared and trained like whelps or colts. Not one of his slaves ever entered another man’s house unless sent thither by Cato or his wife ...” I take this restriction on free movement to mean that Cato had little trust in his youthful forcible captives. A counter-example, albeit fictional, is provided by the absolute loyalty of the swineherd Eumaios who had been kidnapped as a child and then sold to Odysseus.²⁹

Of course, the above examples do not *prove* that forcibly taken captives were typically distrusted. On the other hand, there are no real life examples indicating that owners trusted them.

3 The *peculium* and the *peculium* economy are not myths

It is the understanding of the (at best) mixed consequences of granting a *peculium* to a forcibly enslaved person (the only kind usually recognised in orthodox scholarship) that probably explains why some scholars seem to regard the *peculium* with suspicion.

However, references to self-purchase are commonplace not only in comedy, also but in other kinds of literary sources, in epigraphy, and in legal texts. Koops (forthcoming) notes almost 200 references to aspects of self-purchase in legal texts alone. As early as c 450 BCE, Rome’s Law of the Twelve Tables 5 8 takes note of freedmen with inheritances and 7 12 envisions self-purchase: “A slave is ordered in a will to be a free man under this condition: ‘if he has given 10,000 asses to the heir’; although the slave has been alienated by the heir, yet the slave by giving the said money to the buyer shall enter into his freedom”³⁰ In *Digest* 12 4 3 5 Ulpian illustrates his legal argument by noting that “Neratius tells in his book, *Parchments*, how Paris the dancer recovered before a judge from Domitia, daughter of Nero, the ten [ten thousand?] he had paid her for his freedom ...”³¹ A slave takes over

26 *On Anger* 3 29 1 (tr Stewart 1900).

27 See Sigismund Nielsen 1991: 226-227.

28 See *Cato* 21 1 (tr Perrin 1914).

29 Homer *Odyssey* 14 56-61, 15 390-484.

30 Translated by Johnson *et al* 1961.

31 Cf Tacitus *Annals* 13 27.

the owner's liability for a debt in lieu of payment for freedom in *Digest* 15 1 11 1 (Ulpian). A slave might borrow money on the loan market to purchase freedom: "A slave whom I thought to be mine borrowed money from Titius and gave it to me in return for freedom."³²

Once payment had been made the manumission contract/agreement could not be rescinded by the owner of the slave.³³ If the manumission preceded the payment the owner still had the right to collect the agreed sum from his former slave.³⁴ In *Digest* 40 1 19 Papinian states as follows: "If anyone received cash from another person so that he may manumit his slave, the slave's freedom can be wrung even from the unwilling master, although very commonly it is the slave's money that is paid out, especially if the money has been given by his natural brother or father, in fact he will resemble the slave who has been purchased with his own cash." For an attempt to aid slaves by imposing an upper limit on payments for freedom, see Ulpian³⁵ who refers to the shadowy edict of the praetor Rutilius Rufus in about 118 BCE. Bargaining over the price of manumission is explicitly mentioned by Alfenus Varus: "A slave had bargained (*pactus*) for freedom in return for money and paid the money to the master ..."³⁶

In *Annals* 14 42 Tacitus tells that an outraged slave killed his owner when he refused to free him at the agreed price. In a famous funerary inscription from Assisi the physician Publius Decimius Eros Merula records that he paid the substantial sum of 50,000 sesterces to purchase his freedom.³⁷ Tityrus mentions his laziness which prevented him from accumulating a sufficient *peculium* together with the result that freedom (*libertas*) came to him only at an advanced age.³⁸ Martial³⁹ refers to self-purchase: "Because I now address you by your name, when I used before to call you lord and master, do not regard me as presumptuous. At the price of all my chattels I have purchased my cap of liberty. He only wants lords and masters who cannot

32 See D 15 1 50 3 (Papinian); cf D 15 33pr 40 16 (Ulpian); Alfenus Varus 15 3 2 (Javolenus). It is difficult to know how to take Achilles Tatius 5 17 which apparently dates to the second century CE. Here we have a number of standard elements: Lacaena, a free woman from Thessaly, is taken by "pirates" and later sold in Ephesus by a slave dealer to a lustful steward; the fettered woman displays her scars from resisting his sexual demands and then is freed by the wealthy Melitte (the owner of the steward?) and returned to Thessaly. What does not seem to fit the clichéd account is that Lacaena attempts to purchase her freedom with borrowed cash when she says to Melitte: "Save me from this threatening disaster, grant me security until I pay you the two thousand pieces of gold; that was the sum for which Sothenes [the steward] bought me from the hands of the pirates, and be sure that I can raise it with very small delay; if not, I will be your slave" (tr Gaselee 1917). Lacaena can pledge control over her body to obtain a loan.

33 C 7 16 33 (dated 294 CE).

34 D 44 5 2 2.

35 D 38 2 1 1.

36 D 40 1 6.

37 *Corpus Inscriptionum Latinarum* 11 5400 (hereafter *CIL*).

38 See Virgil *Eclogue* 1 27ff (tr Fairclough; but cf Mouritsen 2011: 162).

39 See *Epigrams* 2 68 (tr Ker 1920).

govern himself and who covets what lords and masters covet. If you can do without a servant, Olus, you can do without a master.” Seneca, in the *Letters to Lucilius* wrote:⁴⁰ “And what do you need in order to become good? To wish it. But what better thing could you wish for than to break away from this slavery, a slavery that oppresses us all, a slavery which even chattels of the lowest estate, born amid such degradation, strive in every possible way to strip off? In exchange for freedom they pay out the savings which they have scraped together by cheating their own bellies; shall *you* not be eager to attain liberty at any price, seeing that you claim it as your birthright?” This passage permeated by Stoic ideology at least grants that payment for freedom was made by ordinary slaves, not just by entertainers and physicians. Similarly, Dionysus of Halicarnassus⁴¹ observes a trend which has slaves increasingly paying for freedom with their earnings in sordid labours (crime and prostitution).⁴² Further, there are grounds for believing that the self-purchase agreement (*pactum libertatis*) “was even actionable on the part of the slave: if his master failed to set him free on being offered the price agreed upon, the slave could file a complaint with the *praefectus urbi* or the *praeses provinciae*”.⁴³ Note also what Ulpian has to say in *Digest* 29 2 71 2: “If someone had given money to his master in order to be manumitted, I think that assistance should be given to him in every case.”

That even ordinary agricultural slaves possessed *peculia* is suggested by Cato’s scheme to charge male slaves a fee for access to the female slave quarters,⁴⁴ and is explicitly stated by Varro.⁴⁵ The *peculia* of agricultural slaves included cash, animals, and slaves.⁴⁶ The bylaws of the *Collegium Dianae et Antinoi* from the Italian town of Lanuvium dated to 136 CE state that slaves might belong and, like free members, they had to pay a membership fee and annual dues; if manumitted, a member slave was expected to contribute “an amphora of good wine” to the association.⁴⁷ A female slave might use her *peculium* to give a “dowry” (*dos*) to a male slave⁴⁸ or, apparently, to buy a tomb: “Valeria Lycisca, freedwoman of a woman. At the age of 12, I came to Rome, which gave me the rights of a citizen and gave me, still living, a place where I would be taken when I became a bag of ash.”⁴⁹

The *peculium* is perfectly real and not exclusively urban but its prevalence cannot be explained by the proposition that it was intended to motivate effort by forcibly taken slaves. Given the slave owner’s contractual liability, as Aubert⁵⁰ points

40 At 80 4.

41 At 4 24 1-6 (tr Gummere 1925).

42 For other examples of cash payments for manumission, see Mouritsen 2011: 162-66; Rawson 1993: 221; Schumacher 2011: 595; and, most likely, Cicero *Philippics* 8 32.

43 Zwally 2002: 122 citing D 40 15pr; cf D 1 12 11; D 40 1 19; C 4 57 4; and D 7 16 8.

44 Plutarch *Cato the Elder* 21 2.

45 *Res Rustica* 1 2 17, 1 19 3; cf Roth 2005: 282.

46 *CIL* 11 871 as discussed by Roth 2005: 288-289.

47 *CIL* 14 2112; Bendlin 2011.

48 See D 23 3 39pr.

49 *CIL* D 6 28228 (tr MacLean 2012: 202); *CIL* 6 8495 for purchase of a tomb by an imperial slave.

out, he would be inclined to grant a *peculium* to “well-tested, trustworthy servants”, which hardly describes forcible captives (recall the Corsicans). A forcible captive might even swear to the owner not to run away with his purse or not to use it to commit mischief against his master but no one would believe him as he would not feel morally bound to honor a promise to his kidnapper. The impressive superstructure (the *peculium* economy) is likewise perfectly real but its defining lack of supervision is incompatible with the prevalence of forced slavery. It cannot be supported on the shoulders of a residue of captives with abnormal psychologies.

4 The *peculium* is a benefit negotiated by free individuals

The *peculium* and the *peculium* economy can be made to rest on a solid base. The outlines of a solution become visible once it is wondered whether an unsupervised slave who did not “take the money (or sheep) and run” is really a forcibly taken captive.

The solution to the problem of the *peculium* is not that it emerged as a one-sided device for manipulating a helpless captive, as assumed by Hopkins, Bradley⁵¹ and Cohen⁵² or as a gift, as considered by Fleckner,⁵³ but rather the *peculium* is a contractual benefit desired by and typically made available to free men who volunteered for slavery.⁵⁴ This, as is demonstrated below, is precisely how the “*peculium*” arose in

50 2009: 182.

51 1984: 6.

52 1951: 220, 222.

53 2014.

54 Roth 2005: 290 notes that “no master was obliged to furnish his slaves with *peculium* allowances”. On the other hand, free men were not obliged to contract into slavery. Roth is, I believe, implicitly assuming that slaves were necessarily forcible captives. The possession or not of a *peculium* was the subject of a negotiation. See, generally, on self-sale, Ramin & Veyne 1981; Silver 2011a. Probably the proceeds of a self-sale constituted a (first) contribution to the *peculium* (Brunt 1958: 167). Hegio’s instructions (noted above) concerning the necessity specifically to keep in chains *free men made into war prisoners* lest they fly away are actually addressed to an unchained slave, his *lorarius* “overseer of slaves” (indicated in the scene-heading). The overseer replies, “*omnes profecto liberi lubentius sumus quam seruimus*” (meaning, more or less) “[a]ll of us slaves would prefer to be free” (*The Captives* 120). Hegio responds to his unchained slave who has not flown away: “You, indeed, don’t seem to think so” (120), meaning that if the overseer really valued freedom he would build/use his *peculium* to pay for freedom. This exchange is followed by banter about flight. Hegio knows, because Plautus knows from life experience, that the *lorarius* is not a war prisoner. He is a taken for granted contractual slave. The contrast is made explicit in lines 206–209 wherein Tyndarus says: “What does he [Hegio] have to fear from us? We know what our duty is if he lets us loose” to which the sympathetic *lorarius* replies “But you’re planning to flee” (tr De Melo 2011). However, the *lorarius* has no interest in escaping for he is not a *liber captivus*. Sosia, another of Plautus’s unchained slaves who serves the Theban general Amphityron, replies to the god Mercury: “The Thebans call me Sosia, the son of my father Davus” (Plautus *Amphityron* 365 (tr Riley)). Clearly, he is a contractual slave unless the Theban military captured and enslaved Thebans.

the eighteenth century trade in “indentured servants” between England and North America. Galenson⁵⁵ reports an estimate that “between one-half and two-thirds of all white immigrants to the British colonies between the Puritan migration of the 1630s and the Revolution came under indenture” – that is, they came as voluntary slaves. On the other hand, I know of no historical episode in which *peculia* were granted to forcible captives.

Obviously, owning a slave was valued by owners. Ownership of a slave increased an owner’s opportunity to invest in very large or very small market or non-market activities, without having to bear the costs (time and money) of closely monitoring the enslaved actors. Entrepreneurially orientated individuals might also invest in and profit from forming human capital in their slaves knowing that the latter lacked the legal right to directly market their augmented skills.⁵⁶ It must be recalled that owners did not, as in an economics text-book, simply contract for a claim on the future labour services of the self-seller but rather on his way of life and physical well-being.⁵⁷ The seller/mortgager of himself – the slave – agreed to a totalitarian relationship in which the buyer was granted recourse to his body and the right to inflict corporal punishment for insubordination. The slave is “subject to alien law” (*alieno iuri*), that is, slaves are under the “power of their masters” (*potestas dominorum*).⁵⁸ A slave deemed to have failed in his assigned duties was answerable to the owner with his body and, whether maid or merchant, might be liquidated in the slave market. A voluntary slave was a slave subject to all the controls inherent in that status.

For the self-seller having a *peculium* was valued because the individual might employ it to accumulate funds for purchasing freedom and with it the prized Roman citizenship and/or for setting up an enterprise after manumission for raising his/her current and future living standard. With respect to building a *peculium* for investing in a business, it may be objected that self-sale is unnecessary as bankers and other lenders were plentiful in the Roman economy. This perspective overlooks that possession of collateral and/or the commitment of an initial investment capital to the business (the *peculium*) enable the investor/borrower (the freedman) to better negotiate with risk-averse lenders for a larger loan and for a lower interest rate. Totally unsecured loans are rare.⁵⁹ In a most interesting passage, Seneca⁶⁰ advises Lucilius:

55 1984: 1.

56 Thus, the noted investor Cato the Elder (Plutarch *Cato the Elder* 21 7; cf 21 5) “used to lend money ... to those of his slaves who wished it, and they would buy boys (*pais*) with it, and after training and teaching them for a year, at Cato’s expense, would sell them again. Many of these Cato would retain for himself, reckoning to the credit of the trainer the highest price bid for the trainee” (tr adapted from Perrin 1914). Note that the “boys” purchased for enslavement and training might be slave or free.

57 Silver 2011a: 94-95.

58 Inst 1 48 & 52; Schumacher 2011: 591.

59 See, eg, Steijvers & Voordeckers 2009.

60 *Letters to Lucilius* 119 1-2 (tr Gummere 1925).

"I shall lead you by a short cut to the greatest riches. It will be necessary, however, for you to find a loan. In order to be able to do business you must contract a debt, although I do not wish you to arrange the loan through a middleman [*intercessor*], nor do I wish the brokers [*proxenetae*] to be discussing your rating." Success in business required a loan but for many free natives of the Roman Empire this was not an easy hurdle to clear.

When Cicero⁶¹ asks: "Is there any doubt about the slavery of people, who because of their covetousness for property (*peculium*) refuse no condition of the harshest slavery (*servitus*)?"⁶² he is reminding (and warning) his affluent readers about the distasteful behavior of those who volunteer for slavery.

Unfortunately, there are no real life Roman texts in which individuals directly explain why they sold themselves into slavery. However, one overlooked text shows us a self-seller who was motivated by building a large *peculium* for investment. Pliny the Elder⁶³ tells that "during the reign of Claudius, a Thessalian eunuch, the freedman (*libertus*) of M Claudius Marcellus Aeserninus, who ... from motives of ambition (*potentia*) had enrolled himself (*adoptasset*) in the number of freedmen of the emperor, and had acquired very considerable wealth, introduced the plane into Italy, in order to beautify his country-seat: so that he may not inappropriately be styled a second Dionysus". As one cannot become an imperial freedman without first becoming an imperial slave, the obvious explanation of his self-enrollment is that this free individual (he was already a freedman) *volunteered* to become an imperial slave in the (justified) hope of reaping future commercial gains.⁶⁴ With respect to motivation for self-enslavement, note also a family letter about pregnancy of the second century CE from Roman Egypt⁶⁵ wherein an otherwise unknown Herminos is said to have "gone off to Rome and become a freedman of Caesar so he can get official posts".⁶⁶ It may be understood that recruiters gave preference to bright young volunteers for slavery who might be trained in an imperial (or private) *paedagium*.⁶⁷

61 *Paradoxa Stoicorum* 5 39.

62 *An eorum servitus dubia est, qui cupiditate peculii nullam condicionem recusant durissimae servitutis?* (tr by Cohen 1951: 138).

63 See *Natural History* 12 5 12 (tr Bostock & Reilly 1855).

64 For self-sale by freedmen, note *CJ* 7 16 19 (293 CE) dealing with a case in which one Paulus protests that a slave manumitted by him (hence a Roman citizen) *agreed* to become the slave of someone else (*consentiat servituti*). Also, in Plautus's *The Twin Brothers* (1149), the slave Messenio having been freed by his master says: "But I need a better start, so that I stay free forever" (tr Rawson 1993: 225). He does finally obtain the right to serve as auctioneer of a substantial property. Rawson 1993: 225 thinks Messenio was worried about becoming a debt-slave. I would suggest he was thinking of having to sell himself back into slavery in order to obtain capital to set up in business. Meijer 2003: 51 notes ex-gladiators who reapplied for gladiator status after fulfilling their contractual obligations (see below on gladiators as voluntary slaves).

65 See *Papyrus Oxyrhynchus* 3312, lines 10-13.

66 Translated by Rowlandson 1998: 264 no 219.

67 See Mohler 1940: 270-271.

Understood broadly as a type of economically valuable asset (but not in the strict juristic sense), the *peculium* might take the form not only of cash, slaves, and material assets but also of human capital as when the master paid the volunteer's transportation expenses to Rome (locational capital) and/or when the master bore the cost of vocationally training or educating him (recall the example of Cato the Elder). "Why did Roman masters free so many slaves?" asks Hopkins.⁶⁸ Because there were so many self-sellers who saw an advantage in serving as slaves and negotiated for a reasonable opportunity to become free.⁶⁹ Market prices were adjusted accordingly. The *peculium* was a "major reinforcement" of the slave system because by offering it, buyers attracted volunteers for enslavement. The insertion of *peculium* clauses in self-sale contracts might be roughly understood in terms of creating liens on sold slaves.⁷⁰

That Romans distinguished between the forcibly enslaved and self-selling slaves is suggested when Seneca⁷¹ lectures Nero that he should treat justly free persons of all statuses (freedman, freeborn, elite) and, for the same reasons, to "spare even captives (*captivus*) and purchased slaves (*mancipiis*)".⁷² There would be little reason to mention captives and purchased slaves separately if there was no difference in

68 1978: 117.

69 That individuals found reasons to freely contract into slavery may cast light on a discussed question (Andreau 2009: 122). Why did slaves and former slaves themselves own slaves? I propose that the typical former slave saw nothing shameful about his former status and therefore saw nothing shameful or contradictory about seeking to profit by using the services of the next generation of upwardly mobile volunteer slaves. Indeed, freed slaves as a social category *sui generis* probably harbored feelings of solidarity for newcomer slaves and so did others freed in the more distant past (cf George 2005: 51, 54). We have here the makings of a social class "in the modern sense". Petronius (*Satyricon* 57 5-11) makes the manumitted self-described contractual slave Hermeros aware of and proud of his achievement: "I am a man among men (*homo inter homines*); I walk about bare-headed [undisguised and unashamed]; I owe nobody a brass farthing; I have never been in the Courts ... I prefer my reputation to any riches ... These are the real victories: for being born free is as easy as saying 'Come here'" (tr Heseltine 1969). But the *Satyricon* is fiction and it will of course be objected that Petronius, himself a member of the elite, did not and could not accurately convey the attitudes of former slaves. However, in a funerary inscription of 100 BCE, one Aulus Granius, like the fictional Hermeros, is proud of his achievements and status: "Here lie the bones of Aulus Granius, an auctioneer and herald, a man of honor, integrity, and great trustworthiness. He wanted you to know this. Aulus Granius, auctioneer and herald, freedman of Marcus" (*CIL* 1 2 1210; tr Shelton 1998: 197, Text 237). The tomb-reliefs of freedmen demonstrate the pride they took in their stable familial relationships and Roman citizenship (see Zanker: 1975). It seems that, as in Petronius, freedmen may well have had an in-your-face sense of honour!

70 *Leges mancipio dictae*; see, further, 5 *infra*.

71 *On Clemency* 1 181.

72 *Servis imperare moderate laus est. Et in mancipio cogitandum est, non quantum illud impune possit pati, sed quantum tibi permittat aequi bonique natura, quae parcere etiam captivis et pretio paratis iubet. Quanto iustius iubet hominibus liberis, ingenuis, honestis non ut mancipiis abuti sed ut his, quos gradu antecedas quorumque tibi non servitus tradita sit, sed tutela. Servis ad statuum licet confugere* (tr by Joshel 2011: 231).

treatment and, indeed, if all or virtually all slaves were captives. Seneca does not mention home-born slaves. Note that from a Roman Empire perspective a captive slave sold by one resident to another does not shift the slave to purchased status. Seneca's dichotomy refers to captives and slaves *purchased from themselves*.

There is also the case of "the dog that *did* bark". Rome's *Edict of the Curule Aediles*⁷³ requires vendors to make explicit to purchasers that a slave has been chained, preferably by displaying him in chains, or has attempted escape.⁷⁴ Why bother stating the obvious? The implication of the rules is that having been chained and attempting to escape are not routine "defects" that would be taken for granted by purchasers of slaves. Macer,⁷⁵ as noted earlier, anticipates that a criminal slave who was whipped and then returned to serve the remainder of his sentence in chains (*vincula*) might not be accepted back by his owner. Yet there is no reason to believe that the resistance and the motivation of captives to escape had dissipated during the interval separating Plautus⁷⁶ and Pomponius.⁷⁷ One way of understanding the need for the chaining rule is that the typical slave on the market was (or had become) a volunteer.

It is most informative to compare the forcibly-taken Corsicans who in fact were not valued as slaves with those ethnic groups who were regarded as "born slaves" – specifically "Jews and Syrians"⁷⁸ and "Syrians and Asiatic Greeks"⁷⁹. A substantial body of evidence suggests that the numerous slaves from Syria and the Greek East attested in Rome during the late Republic and earlier Empire were not prisoners of war or victims of kidnappers.⁸⁰ Slaves from the eastern Mediterranean wished especially to come to Rome itself and they (or sometimes their parents) volunteered for enslavement as the best available vehicle to fulfil their material needs and ambitions. Whether the Jews "born for slavery" were also volunteers is more debatable. It is well to note that Rome knew a large Jewish community before there was any large influx of forcible captives.⁸¹

Large numbers of prisoners were captured by Pompey during his war in Judaea in 63 BC and brought to Rome for his triumph in 61, but this does not explain the existence of the second-century BC community, which may have consisted of a small number of free immigrants and individuals who reached Rome through the slave trade. The Jews, acting collectively, were a significant factor at public gatherings (*contiones*) in 59 BC, which seems too early for substantial numbers of Pompey's prisoners to have been manumitted. The politically active Jews of 59 were presumably Roman citizens, which implies that they were themselves freedmen or the descendants of freedmen; at this date few free immigrants from the East

73 D 21 1 48 3-4 (Pomponius).

74 Arzt-Grabner 2010.

75 D 48 19 10*pr.*

76 Circa 254–c 184 BCE.

77 Mid-second century CE 78.

79 Cicero *On the Consular Provinces* 2 5 10.

80 Livy 36 17 4-5.

81 Noy 2000: 36 esp at n 33.

must have had citizenship. It seems therefore that Jewish slaves must have been reaching Rome in the late second and early first centuries BC, achieving manumission (which implies that they were doing skilled work rather than being used as forced labour) and establishing themselves as a significant and recognizable presence in the city.⁸²

Speaking of an early Jewish presence in Rome, Philo⁸³ remarks: “And they were mostly Roman citizens, having been emancipated; for, having been brought as captives into Italy, they were manumitted by those who had bought them for slaves, without ever having been compelled to alter any of their hereditary or national observances.” It is doubtful that purchasers would have treated Pompey’s prisoners of war (if this is Philo’s reference) with such consideration and sensitivity.⁸⁴ However, volunteers, especially skilled volunteers, might have contracted for religious respect. The Syrians, Asiatic Greeks and arguably Jews were disdained as “born slaves” because they had mainly volunteered for slavery and consequently could be trusted with a *peculium*.⁸⁵

82 *Idem* 256.

83 *On the Embassy to Gaius* 23 155 (tr Yonge (*sd*)).

84 Hezser 2011: 440-441.

85 Some slaves with a *peculium* were the children of self-sellers. These *vernae* predictably shared the relatively positive outlook of their volunteer parents just as any enslaved children of forcibly enslaved parents would mostly share their parents’ resentment. The postulated difference in emotional status has important implications for trustworthiness and economic productivity. However, despite the heroic efforts of Sigismund Nielsen (1991) and Herrmann-Otto (1994, 2004) very little is known about the origins and careers of individuals described as *vernae*. There is one noteworthy exception. Suetonius (*On Grammarians* 23) tells that Q Remmius Palaemon was the *verna* of a woman who trained him as a weaver in the earlier first century CE. Palaemon went on to found a school, to own shops for ready-made clothes, and to develop new, very productive vines. That he was “of Vicentia” (a town in the territory of Venetia) I understand to mean that his parents were free natives who volunteered for slavery. Tacitus (*Annals* 14 44) maintains: “To our ancestors the temper of their slaves was always suspect, even when they were born on the same estate or under the same roof, and drew in affection for their owners with their earliest breath. But now that we have in our households nations with different customs to our own, with a foreign worship or none at all, it is only by terror you can hold in such a motley rabble” (tr Church & Brodribb). Upon further reflection I now believe that Tacitus is actually referring to the uneasy relationship between owners and voluntary slaves (*cf* Silver 2011a: 96). Voluntary slaves were really slaves and slavery was most unpleasant. In any event, Tacitus does not regard *vernae* as much more trustworthy than their parents. By contrast, according to his biographer Nepos, Atticus “kept an establishment of slaves of the best kind, if we were to judge of it by its utility, but if by its external show, scarcely coming up to mediocrity; for there were in it well-taught youths, excellent readers, and numerous transcribers of books, insomuch that there was not even a footman that could not act in either of those capacities extremely well. Other kinds of artificers, also, such as domestic necessities require, were very good there, yet he had no one among them that was not born and instructed in his house; all which particulars are proofs, not only of his self-restraint, but of his attention to his affairs; for not to desire inordinately what he sees desired by many, gives proof of a man’s moderation; and to procure what he requires by labour rather than by purchase, manifests no small exertion” (*Life of Atticus* 13 2-4 (tr Watson) (accessed 17 Oct 2015) available at <http://www.attalus.org/translate/atticus.html>). Unfortunately, Nepos provides no hint of the parentage of Atticus’ *vernae*.

There is also evidence bearing on the expected treatment of young contractual slaves in post-Roman times (recall Cato's young captives). In 527 CE, Cassiodorus⁸⁶ describes, in a letter drafted for the Ostrogoth king Athalaric, the marketplace of Lucania in southern Italy: "Boys and girls are on display, marked out with the differences in sex and age, brought to the market not as captives, but by freedom: their parents are right to sell them, since they benefit by slavery. Indeed, there is no doubt that slaves can be improved by transference from field work to service in town (*urbana servitia*)."⁸⁷ Note that Cassiodorus twice describes the sold children as *slaves* (*servi*) and it is reasonable to assume that he understood the meaning of the term. For Cassiodorus the sale of the children into slavery is a means for upgrading their economic prospects (probably via vocational training) and, hence, he does not wish the practice to be made illegal as it was elsewhere under Germanic rule.⁸⁸

The scene described by Cassiodorus provides the key for understanding a provision in Roman law reported by Ulpian:⁸⁹ "Vivian goes on to say that if a slave leaves his master and comes back to his mother, the question whether he be a fugitive is one for consideration; if he so fled to conceal himself and not to return to his master, he is a fugitive; but he is no fugitive if he seeks that some wrongdoing of his may be better extenuated by his mother's entreaties." The "mother" the slave returns to is obviously located outside the jurisdiction of the master and given the expectation of "entreaties" she may be identified as the free woman who sold (or exposed) her child into slavery to improve his/her life prospects.⁹⁰ She would (re)emphasise this motivation to the child just as would a woman who had volunteered for slavery and later borne (enslaved) children. No forcibly enslaved mother could make this kind of affirmative explanation to her slave born offspring or pacify his owner.

Some scholars may nevertheless object that a volunteer is not really a slave.⁹¹ The only meaningful test of definitions is whether they are coherent and fruitful. Let it be noted, however, that if contractual slaves are excluded then the Roman Empire must be "demoted" from the status of "slave society".⁹²

86 8 33 4.

87 Translated by Barnish 1992: 10.

88 See Vuolanto 2003: 186.

89 D 21 1 17 5.

90 The validity of this interpretation is reinforced by another testimony from Roman times. Writing at the end of the second century CE, Tertullian of Carthage (*The Apology* 9) disdainfully remarks: "You first of all expose your children, that they may be taken up by any compassionate passer-by, to whom they are quite unknown; or you give them away, to be adopted by those who will do better to them the part of parents" (tr Thelwall in Roberts 1994/1995).

91 This is like saying that someone who is fasting (starving himself) instead of being starved by someone else is not really hungry. Contractualism undoubtedly complicates socio-economic analysis but it sometimes appears that the main problem is that it distracts from the effort to prosecute Rome for atrocities committed in the antebellum South.

92 Finley 1980: 125-160; Bradley 1987: 14-15; Harper 2011: 39-40, 60-61.

5 Some evidence for slave markets serving volunteers

There are several particularly relevant testimonies that Rome knew structured slave markets serving those who wished to volunteer to become slaves.⁹³

(1) Seneca suggests:⁹⁴ A benefit has in view the advantage of him upon whom we bestow it, not our own ... Many things, therefore, which are of the greatest possible use to others, lose all claim to gratitude by being paid for. Merchants are of use to cities, physicians to invalids, *dealers [mangones] to slaves*, yet all these have no claim to the gratitude of those whom they benefit, because they seek their own advantage through that of others.⁹⁵ How precisely did *mangones* make themselves useful to self-sellers? How else but by becoming familiar with the volunteer's preferences and abilities, helping him to negotiate price and placement, and possibly acting as a fiduciary seller incorporating various covenants in contracts transmitting free men from themselves to their new owners? Moreover, as the seller, the dealer would be in a position to help the slave to enforce the contract with his/her owner including perhaps by means of seizure (*manus iniectio*).⁹⁶

(2) Reputable free persons sold themselves (or were sold by parents) into slavery to qualify themselves to obtain otherwise unattainable sensitive private and public positions such as *actor* (steward), *procurator* (financial manager) or *vilicus/vilica* (manager of a rural estate).⁹⁷ The most important legal text is that of Ulpian in Digest 28 3 6 5, wherein the phrase *ad actum gerendum pretiumve participandum* ("to

93 See, also, Silver 2011a, 2013, 2014, 2015.

94 *On Benefits* 4 13 3.

95 Translated by Gummere 1925, emphasis added.

96 See McGinn 1990: 342-343. In Lucian of Samasota's "*Sale of Philosophies*" (*Vitarum Auctio* 7) dating to the mid-second century CE we find Zeus and Hermes selling philosophers: "*Zeus*. They are welcome to him. Now up with the next. *Hermes*. What about yonder grubby Pontian? *Zeus*. Yes, he will do. *Hermes*. You there with the wallet and cloak, come along, walk round the room. Lot No. 2. A most sturdy and valiant creed, free-born. What offers? *Second Dealer*. Hullo, Mr. Auctioneer, are you going to sell a free man? *Hermes*. That was the idea. *Second Dealer*. Take care, he may have you up for kidnapping (*andrapodimos*). This might be a matter for the Areopagus. *Hermes*. Oh, he would as soon be sold as not, He feels just as free as ever. *Second Dealer*. But what is one to do with such a dirty fellow? He is a pitiable sight. One might put him to dig perhaps, or to carry water. *Hermes*. That he can do and more. Set him to guard your house, and you will find him better than any watch-dog – They call him Dog for short" (tr Fowler & Fowler 1905). The buyer raises the concern that the free man will claim that he was kidnapped. Hermes explains that the free man wishes to be sold. This seems to satisfy the dealer for at the end he is concerned only with how the purchased slave's services might be utilized. Hermes, like a good dealer, speaks favorably of the self-seller's (apparently limited) skills. I owe to Egbert Koops the thought that self-sellers might be transmitted by fiduciary sellers to final purchasers by means of a sale *ut manumittatur* or by another restrictive covenant (D 40 8; Buckland 1908: 628-646; McGinn 1990).

97 See 4 *supra*.

performing an act or sharing in the price”) denotes precisely self-sale behavior; see, also, *Theodosian Code* 4 8 6.⁹⁸ Also, in a difficult passage, Augustine writes: “After all, free men are often asked to be stewards, and they think they gain an advantage if they do what they are asked to do ... If a free man became a slave as a result of this advantage ...”⁹⁹

As noted below, some (disreputable?) people found it worthwhile to sell themselves into slavery to be trained and serve profitably as gladiators. Also, in Plautus (*Curculio* 482) the *choragus* (“property manager”) informs Curculio: “In the Tuscan Quarter there are those persons who sell themselves.”¹⁰⁰ The property manager’s reference to self-sale in the Tuscan Quarter is embedded in a recognisable tour around the south side of the Forum Romanum. For this and other reasons, there is no reason to assume it refers, or refers only, to the sale of sexual services.¹⁰¹

Again, after referring to some rather distasteful Roman occupations (draining sewers and carrying corpses), Juvenal refers to those “[w]ho offer themselves for sale according to auctioneers’ rules”.¹⁰² The meaning is that in return for the opportunity to climb up the occupational ladder, a Roman might be willing to be sold/auctioned into slavery and in so doing surrender his freedom or citizenship (diminish his legal status or *caput*).¹⁰³

Most directly, Dio Chrysostom,¹⁰⁴ who came to Rome in the later first century CE, composed a dialogue in which a citizen responds to a question put to him by a slave: “But what do you mean by saying that I might become a slave?” The slave explains: “I mean that great numbers of men, we may suppose, who are free-born sell themselves, so that they are *slaves by contract* (Greek: *doulouein kata syggraphēn*), sometimes on no easy terms but the most severe imaginable.”¹⁰⁵ Harrill suggests that *doulos* (slave) here means something less than or different from real slavery:¹⁰⁶ “The interlocutor ... refers to educated Greeks who contract themselves not into chattel bondage but a kind of *indentured servitude* ... for a specified time.

98 D 28 3 6 5: “Erratum fit testamentum, quotiens ipsi testatori aliquid contigit, puta si civitatem amittat per subitam servitutem, ab hostibus verbi gratia captus, vel si maior annis viginti venum se dari passus sit ad actum gerendum pretiumve participandum.” Based on an erasure, *ad actum gerendum* might be a later interpolation (a new law) or perhaps the compilers worked with an edition of Ulpian *ad Sabinum* where it was already in the original text.

99 *Letters* 24* 2; tr Teske 2005.

100 “In Tusco vico, ibi sunt homines qui ipsi sese venditant” (tr De Melo 2011).

101 Silver 2014.

102 Juvenal 3 33: “Et praebere caput domina venale sub hasta” (tr Kline, available at http://www.poetryintranslation.com/PITBR/Latin/JuvenalSatires3.htm#anchor_Toc281039203). For the symbolism of the spear at auctions, see Seneca the Elder (*Declamations* 9 3 3).

103 D 4 5 3pr-1; Silver 2011a: 87.

104 *Discourses* 15 23.

105 Translated by Cohoon 1939, emphasis added.

106 1995: 31.

Presumably, the indentured servants neither contracted themselves permanently nor included their children, both of which are essential to chattel slavery.” One may well wonder whether a soldier enslaved on a battlefield and sold to slave traders is really a “chattel slave” when his wife, children and other family members lodged far from the battlefield remain free. The point remains that an “educated Greek” who sold himself into slavery was legally transferable and answerable to his owner with his body – that is, he is unquestionably a “chattel” slave.¹⁰⁷

Harrill is correct in noting the resemblance between Roman “slavery by contract” and the later practice known as “indentured servitude” in which, despite the circumlocution, it is very clear that chattel slavery with a *peculium* (and other benefits) was the outcome of a contractual transaction involving free individuals. The essential features of this popular transaction have been summarised by Galenson:¹⁰⁸

It [indentured servitude] functioned through two markets linked by a recruiting agent. In England, in the first market, a prospective servant signed a contract, or “indenture,” with a merchant, promising to serve the latter or his assigns in a particular colony for a given period under stated conditions. The servant was then transported to the specified [North American] colonial destination, where the merchant or his representative sold the contract to a colonial planter or farmer in the second market ... Once signed, the indenture was negotiable property, and at any time before its conclusion the servant could be sold to a new master for the balance of his term There were a number of potentially variable dimensions to the contract. These included the length of the term for which the servant was bound and the amount of freedom dues he was to receive [upon completing his indenture]. Provisions could be inserted into the contract for cash payments to be made to the servant, either as an initial lump sum or as a salary during the course of the contract. Restrictions could also be placed on the kind of work the servant could be required to perform ... [S]ervants were universally subject to strict requirements of specific performance of their contractual obligations by colonial courts and were subject to harsh punishments for attempts to avoid them ... And although colonial laws protected servants from excessive corporal punishment, and masters who killed their servants would be tried for murder, masters generally were permitted considerable latitude in beating their servants.

The merchant in effect acted as a fiduciary seller of the “indentured servant” whose contract was fully transferable. With respect to the corporal punishment of servants, a Maryland law of the eighteenth century permitted ten lashes for a single offense or as many as thirty lashes with the approval of a Justice of the Peace.¹⁰⁹ The payment for the ocean passage of the “servant” plus any occupational or language training plus any initial lump sum payment plus any salary paid plus “freedom dues” can be viewed as functional equivalents of the Roman *peculium*.

107 Note, also, that several Roman legal texts suggest that individuals might sell themselves into slavery while other members of their families remained free (see D 40 12 1pr 1, 2; D 47 10 1 5).

108 1981: 97, 98, 171; 1984: 8.

109 Steinfeld 1991: 45-46.

Indeed, the “freedom dues” paid upon completion of the indenture corresponds to the *peculium liberti*, a grant of patrimony mentioned in the *Formulae Visigothicae*¹¹⁰ for manumission.¹¹¹ Scholars believe that the *Formulae* were written down in about 620 CE. Córcoles Olaitz concludes that “the influence of the Roman law in the theory of the Visigothic donation is determinative”.¹¹²

(3) Roman self-sellers, like English indentured servants, might volunteer to serve for a limited term. An inscription¹¹³ from Smyrna dated to the second or third century concerns one Erichthonius who died at the age of twenty-eight when it appears there was an obligation (*deberet*) to manumit him at thirty.¹¹⁴

There is additional inconclusive (but potentially powerful) evidence that Roman self-sellers, like English indentured servants, might insert clauses into their self-sale contracts. Besides incorporating a legally recognised manumission clause (*ut manumittatur*), self-sellers might negotiate a sales clause calling for them to be exported (*ut exportetur*) (or not to be exported) or a covenant which forbade the buyer to prostitute them (*ne serva prostituatur*).¹¹⁵

Indeed, although not mentioned in the legal sources, contractual clauses mandating a *peculium*¹¹⁶ or occupational training or some other benefit for the slave are quite possible. Thus, although McGinn¹¹⁷ expresses doubts concerning benefits to the public of extending the range of legally recognised covenants (beyond prostitution, export, and manumission) restricting the buyer’s rights of ownership over his slave he acknowledges that “(t)heoretically, it might be possible to frame any agreement regarding the slave after sale, at least on a contractual basis”. Koops (forthcoming) reasons: “This construction of transfer *ut manumittatur* was particularly suited to cases of self-sale into slavery, since it allowed the self-seller to negotiate the conditions of future manumission (including the grant of a *peculium*) and gave him legal redress, through still a slave, if the conditions were met, but manumission did not follow.”¹¹⁸

Admittedly, I cannot cite a legal case specifically dealing with a *peculium* covenant and this weakens my argument for contractual flexibility. On the other

110 For example *FV* 2.

111 Cf Schumacher 2011: 600.

112 2006: 347 with n 47 citing the legal background.

113 *RMO Leiden* unpublished EDCS-58700011.

114 *Dis manibus / Erichonio animae / sanctissimae-hic / cum deberet ann(is) XXX / manumitti ann(os) XXIIIX / decessut / C(aius) Cilnius-Philetus / filio carissimo / fec(it)*. See Koops (forthcoming), cited with permission.

115 D 18 7 6; D 40 8 6 1; McGinn 1990; Buckland 1908: esp 69-72, 628-640.

116 See 4 *supra*.

117 1990: 319-320 with n 14, 345-346.

118 Quoted with permission.

hand, Roman law reinforced long traditional practices in providing a kind of omnibus solution for disputes between masters and slaves. Slaves taking refuge at a statue of the emperor were entitled to an official hearing about their varied complaints with the possible outcome that they had to be sold to a new, more congenial master. The legal authorities wished the “complaints” lodged by slaves to involve gross illegalities, not mere “accusations” against masters.¹¹⁹ Nevertheless, the responsible officials were kept busy as is resentfully reported by Tacitus¹²⁰ and as is suggested by the analogical reference to hordes seeking refuge in C Th 6 27 18. Perhaps a few slaves used refuge to gain an audience for vindictively motivated charges,¹²¹ but most would have been deterred from pursuing revenge by the danger of being branded a fugitive and the threat of reprisal. Some of those who took the chance would have been concerned with mending broken agreements concerning such matters as the granting of a *peculium*.¹²² Moreover, slaves might take refuge at an altar. As explained by Naiden,¹²³ a statue of the emperor is not the same as a shrine: “At a shrine, supplicants are inviolable until a decision is rendered; at a statue they are subject to transportation ... A shrine offers protection in the same manner as any other altar, and an altar does not have to be [legally] regulated. As regards supplication, private altars are never regulated.”

More generally, contractual rituals rehearsed under the auspices of gods may well have played the decisive role in enforcing covenants in self-sale transactions. That is, priests played a more important role than prefects. Did volunteer slaves and purchasers build mutual trust (*fides*) by swearing mutual contractual oaths? As noted earlier, Visigothic Spain had explicit formulas (the *Formulae Visigothicae*) that probably had to be publicly rehearsed when individuals sold themselves into slavery. *Formula Visigothicae* 32, for example, explicitly mentions the willingness of the seller to become a slave (he takes an oath) in order to better his position and the seller’s receipt of payment.¹²⁴ It cannot be proven that these *formulae* were taken over from Roman law but neither is it evident that they are either idiosyncratic or entirely adaptations to a new post-Roman environment.¹²⁵

119 D 1 12 1 7-8.

120 *Annals* 3 36 1.

121 D 47 11 5; D 48 19 28 7.

122 Seneca (*On Benefits* 3 22 3), writing in about the mid-first century CE, remarks: “Now an official has been appointed to hear complaints of the wrongs done by masters to their slaves, whose duty it is to restrain cruelty and lust, or avarice in providing them with the necessities of life” (tr Stewart 1887 (accessed 12 Dec 2015) available at http://en.wikisource.org/wiki/On_Benefits). This formulation seems to leave flexibility for pursuing contractual breaches: “He [the prefect of the city] is to give a hearing to slaves who have taken refuge by the statue or who have paid with their own money for their manumission, when they make complaints against their masters” (D 1 12 1 1 Ulpian).

123 2006: 256.

124 See Díaz 2007; cf, too, Rio 2011: 9-15.

125 See Córcoles Olaitz 2006: 347-348.

For explicitly Roman times, note Petronius:¹²⁶

So to keep the lie safe among us all, we took an oath [*sacramentum gladiatorum* or better the *auctoramentum gladiatorum*] to obey Eumolpus; to endure burning, bondage, flogging, death by the sword, or anything else that Eumolpus ordered. We pledged our bodies and souls to our master most solemnly (*religiosissime*), like regular gladiators. When the oath was over, we posed like slaves (*servilis*) and saluted (*consaluto*) our master (*dominum*) ...”

The final sentence describing the binding outcome of the oath resonates, especially since it is estimated that by the first half of the first century CE more than half of gladiators were *auctorati*, that is, free men who were paid money by gladiator managers and thereby assumed slave status contractually.¹²⁷

6 Economic growth and the *peculium* economy: Conclusion

The prime engine of economic growth is the accumulation of capital, physical and human. Individuals differ in their ability and motivation to accumulate capital by means of investment. Moreover there is no necessary congruence between initial endowments of capital and the ability/motivation to invest it productively. For maximum growth to occur, the capital market must transfer resources from less to more productive users/uses. This transfer process is inhibited by (what economists call) “imperfections” in the capital market which basically arise from the cost to lenders of securing repayment from borrowers. A loan can be offered (be economic) only when the expected value of the resources used up to collect repayment is less than the net proceeds of the loan. Thus, innovations reducing loan-collection costs would, other things remaining equal, increase lending, investment and economic growth.

The ancient world generally, and Rome in particular, innovated in two very special (interrelated) ways to reduce/avoid loan-collection costs, namely by means of the institutions of contractual slavery and of the oath. With respect to the first, in Rome an individual could pledge his body to a lender;¹²⁸ or, the main theme in the present paper, the individual could sell his body to a purchaser. Self-sale fostered economic growth by facilitating the movement of labor power from regions of lower to regions of higher labor productivity. To understand the pro-growth contribution of self-sale note first that the direct cost of transportation of a human being to Rome from (say) Asia Minor might be relatively high and that to this cost would have to be added the cost (foregone earnings plus direct search costs plus vocational training;

126 *Satyricon* 117 4-6 (tr Heseltine 1969).

127 For more on gladiators, see Barton 1993: 13-24; Carter 2003: 104-105 with n 72; Crook 1967: 61; Edwards 1997: 77; and Meijer 2003: 51.

128 Silver 2012: 236-238: note the tale of Lacaena in n 32 *supra*.

plus language acquisition) of acclimatising the migrant in a new environment.¹²⁹ Local lenders to prospective migrants who sought to take advantage of differences in productivity would easily be deterred by the cost of enforcing loan repayments with free migrants over distances and across political jurisdictions. A more cost-effective alternative was for local merchants (slave dealers) to purchase local volunteers for migration and then to resell them in Rome to a middleman or final user. As has been stressed in this article, free individuals were encouraged to sell themselves into slavery by the promise of sharing in the economic gains generated by the movement of their labor power from less to more economically dynamic regions. The grant of a *peculium* to voluntarily enslaved migrants was the main device by means of which the sharing of gains was pre-arranged between capitalists and workers.

The problem of flight by self-sellers (including flight to non-owning Roman employers) was to be managed (never eliminated) by means of mutually advantageous ongoing relationships between the contracting parties (eg training, contacts, advances of capital) and, most importantly, by means of joint appeals to the gods – that is, mutual loyalty oaths. Ritualised oaths were sworn not only, as is well known, when slaves were transformed from things into persons (by being manumitted), but also when persons were transformed into things (by self-sale).

Antiquity teaches that modern technology and impersonal enforcement of contracts by states are not required to build a growing market economy. Self-sale into slavery and oaths were excellent substitutes. More specifically, this article has argued that the vast superstructure of the Roman *peculium* economy was erected by contract, not by force and that its base was formed by individuals who had sold themselves into slavery in order to advance their material and social interests.

Abstract

Why did Roman slaves have a *peculium* or purse? It has been suggested that the grant of a *peculium* was a clever arrangement, a trick actually, by means of which owners incentivised slaves to perform unsupervised labour. Upon this incentive base stands Rome's "*peculium* economy" in which diverse and far-flung business and other activities are performed by minimally supervised slaves. However, forcibly taken slaves (including born-slaves), the kind still taken for granted in the scholarly literature, would not be sufficiently incentivised by *peculia*. The "*peculium* economy" stands, however, because the slaves forming its base are slaves by contract/self-sellers. The *peculium*, the legal and other evidence suggests, is a contractual benefit desired

129 See Noy 2000: 141-144, 149-152. More generally, oath-taking and ritualised contracting substituted for contemporary means of communication in reducing total transaction costs and thereby facilitating extensive market behavior (Silver 2004; Silver 2011b: esp 51-60). To put it starkly, where modern society relies (imperfectly) on technology, the ancients relied (imperfectly) on gods and rituals. The oath-curse mechanism in particular provided antiquity with a measure of social control otherwise prohibitively expensive or unavailable.

by and typically made available to free individuals who volunteered for slavery. This is precisely how, for example, the “peculium” arose in the eighteenth century trade in “indentured servants” between England and North America. The paper explores this finding and develops its implications for Roman economic growth.

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REVISITING THE HISTORICAL CONTEXT SURROUNDING THE DEVELOPMENT OF THE ULTIMATE-ISSUE RULE TO INFORM ITS FUTURE IN SOUTH AFRICAN LAW OF EVIDENCE

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Key words: Ultimate-issue rule; historical context; South African law of evidence; child sexual abuse cases

1 Introduction

Whenever courts are confronted with issues that cannot be determined on the basis of ordinary judgement and practical experience, the appreciable help of experts in the respective field is always merited. Experts have been permitted to testify in a wide

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range of fields. One such field is that of child sexual abuse. In child sexual abuse cases, experts have over the years advanced medical evidence and behavioural science evidence. Generally, the advancement of medical evidence is less controversial. Behavioural science evidence,¹ however, continues to provoke controversy in terms of its interpretation and application. The issue whether or not behavioural science experts should advance an opinion that treads the path of the ultimate-issue stands out as one that continues to be a topic of intense debate. Presently, in South Africa, there is still scholarly and judicial divergence on the exact place of the ultimate-issue rule when mental health professionals are advancing behavioural science evidence in court. This controversial debate is far from being settled as the arguments of the proponents and opponents of the rule alike are sound and convincing. Since arguments on the exact place of the ultimate-issue rule are often advanced in the abstract, with no detailed reference to the legal history of the rule, it is important to trace the legal history of this rule to inform the debate going forward. In this article, we revisit the history surrounding the development of the ultimate-issue rule. We demonstrate that the fact that this rule largely finds justification in the Anglo-American jury-based system of trial renders its application in non-jury systems such as South Africa's out of context. We underscore the negative effect of the dogmatic application of the ultimate-issue rule on the full exploitation of behavioural science evidence in child sexual abuse prosecutions. Drawing inspiration from the practice of justice systems like that of the United States of America, where this rule partly finds its home, we make a case for its express abolition.

2 The scholarly divergence on the exact place of the ultimate-issue rule

In the absence of a codified system on certain rules of evidence, the eloquent arguments of academics in the field are always persuasive and often fill the gaps arising from the impreciseness of the law. In the course of adjudication of cases, judicial officers can draw on these arguments to inform their decisions. However, where the arguments of academics on a particular un-codified aspect of law are divergent or rather unsettled, then serious problems arise in terms of inconsistencies in application and interpretation. This is seemingly the dilemma that South Africa's system is facing up to with regard to the ultimate-issue rule of exclusion in the law of evidence.

- 1 This evidence can be adduced by mental health professionals such as psychologists, psychiatrists and social workers. It could equally be advanced by non-mental health professionals such as law enforcement authorities and victim advocates who have experience in dealing with child sexual abuse cases. The opinion offered by experts can serve two purposes, namely first as substantive or diagnostic evidence serving the purpose of resolving the issue of whether or not child sexual abuse occurred. Secondly, it can serve the purpose of providing background or rehabilitative evidence, therein providing a proper context within which to evaluate the testimony of the alleged child sexual abuse victim.

Freckleton and Selby define the ultimate-issue as “the central question which is the responsibility of the judge or jury to determine – an issue of fact or law”.² In principle, the ultimate-issue rule advances the notion that an expert cannot testify on the ultimate-issue to be decided by the court because to do so would be to usurp the function of the jury. This rule has now developed into a technical limitation upon the kind of language that the expert is permitted to use in expressing an opinion. The fear that some courts express about expert conclusions that embrace the ultimate-issue is that the jury will defer to the opinion of the expert and abdicate their decision-making duties. Presently, South Africa’s legislative framework does not have a codified framework delineating on the exact place of the ultimate-issue rule. This being the case, recourse is often made to scholarly literature and precedents on the subject to inform its exact place. However, the arguments of evidence scholars in South Africa are inconsistent and far from harmonious. Indeed, these inconsistencies have equally reflected in the divergence in the decisions of the court when confronted with behavioural science evidence.

Kenny, though not a South African scholar, is one of the evidence scholars, who decades ago advanced arguments for the application of the ultimate-issue rule when courts are dealing with expert opinion.³ Based on the argument that opining on the ultimate-issue usurps the role of the jury, he states that there are three ways in which experts usurp the role of others in the legal process. Firstly, experts may usurp the function of the jury by giving a conclusion on the ultimate-issue in the case rather than providing information to the jury to enable them to reach a more informed conclusion. Secondly, they may usurp the role of the judge, by imposing on the jury their own interpretation of statutory terms such as responsibility. Finally, they may usurp the role of the legislature by giving opinions on general policy in relation to the convictions. This, Kenny argues, leads to the risk of unwarranted weight being given to expert evidence. In effect, the opinion of the expert on the ultimate-issue results in a trial by expert. Melton *et al*⁴ similarly argue that mental health professionals should “resist the ultimate-issue question”.

In South Africa, advocacy for the application of the ultimate-issue rule, particularly when dealing with the opinion of mental health professionals is well documented. Gilmer, Louw and Verschoor⁵ offer two justifications on why mental health professionals should not offer opinion testimony that touches upon the ultimate-issue. The first one pertains to the ethical dilemma of purporting to be scientific where there are no bases for such pretension. The second pertains to the risk of usurping the role of the jury. Allan and Louw observe that “at a practical level the rule prohibiting psychologists from expressing opinions on ultimate-issues may

2 2005: 277.

3 1983: 208.

4 2007: 603-604.

5 1995: 268.

be very important for the fair administration of justice”.⁶ Accordingly, they argue that “the profession [of psychology] will be wise to actively discourage its members from giving such opinions. Instead, psychologists should endeavour to write reports which are so informative and complete that asking them to provide an opinion of this nature becomes redundant”.⁷ Nelson⁸ shares the sentiments of Allan and Louw, observing as follows:

The courts have been inconsistent in their application of the ultimate-issue rule to expert testimony. I would suggest that much confusion would be avoided, if expert witnesses adhered to their principal role in lending expert evidence to the assessment of the accused’s incapacity leaving legal policy to the lawyers. Given the longstanding suspicion and mistrust between these two disciplines, the credibility of expert witnesses would be enhanced if they avoided expressing ultimate opinions unless explicitly asked to do so.⁹

With specific regard to behavioural science evidence in child sexual cases, Songca is of the view that¹⁰

[although] behavioural professionals such as psychologists and psychiatrists ... are in a better position to give an opinion or make deductions from proven facts than court itself ...

6 1997: 310.

7 *Idem*: 318.

8 2012: 27.

9 Nelson’s justification for the need to invoke the ultimate-issue rule partly finds basis in the “long standing suspicion and mistrust” between law and the profession of mental health professionals. It is notable that in the past years, the interface between psychology and psychiatry on the one hand and the law on the other hand was laden with conflict. In some cases, lawyers have “accused” mental health experts of making overblown claims and of being willing to modify their testimony to serve social or financial motives. Bersoff 1999: 401 once said this of experts in psychology: “In our courtroom, psychology is still seen as a mysterious inexact discipline ... populated by hired guns who will switch sides and proffer opinions for the right fee and the greatest notoriety.” Hagen 1997: xiii went a step further to overdramatise the impact of psychologists in the courtroom in observing that their opinion is full of “anecdotes, errors, flaming overgeneralisations, and inflammatory charges”. Hagen in fact suggested that justice systems should “throw the experts out”. Nevertheless, over the years, criminal justice professionals have changed their attitudes towards behavioural science and the experts in this field. Without pre-empting the subsequent discussion, with regards to Nelson’s justification, the question is: Does the application of the ultimate-issue rule provide holistic solutions to the problem of suspicion? What Nelson’s justification for the invocation of the ultimate-issue rule conveniently ignores is the fact that some mental health professionals are properly qualified; they apply the right methodologies and standards in the assessment process, and can be logically consistent when advancing behavioural science evidence, making their conclusions defensible even on an ultimate-issue. Indeed, where the opinion of mental health professionals is not grounded, there is reason for suspicion. Arguably, the solution should be for mental health professionals to offer sound opinion so that it does not trigger suspicion from court, regardless of whether or not it touches upon the ultimate-issue. However the ultimate-issue rule in and of itself does little or nothing to address problems of suspicious opinion.

10 2003: 460-461.

these experts should not be allowed to give an opinion on the legal or general merits of the case, or proffer an opinion on the ultimate-issues that the court has to decide.

On the other end of the controversy spectrum, scholars outside of South Africa have over the decades made their position against the application of the ultimate-issue rule very clear. Wigmore,¹¹ for instance, as far back as 1940, argued that the application of the ultimate-issue rule is a “bit of empty rhetoric” as the court is not bound by the opinion of the expert. He added that the rule is “simply one of those impossible and misconceived utterances which lack any justification in principle”. Morgan¹² termed the rule “sheer nonsense” while McCormick¹³ stated that the rule is “unduly restrictive, is pregnant with close questions of application and often unfairly obstructs the party’s presentation of his case”. Kalven and Zeisel¹⁴ as well as Simon¹⁵ went a step further to conduct empirical studies to substantiate the arguments of the proponents of the application of the ultimate-issue rule. Their findings indicated that jurors and judges are not overawed by expert testimony. These authors expressed confidence and faith in courts to independently arrive at decisions without relinquishing their decision-making powers. Bonnie, a defender of psychiatric participation in the criminal process, contends that it is for court to substantiate on the evidence received rather than for experts to be restricted as to the manner in which they are to express opinion.¹⁶

In South Africa, Zeffert and Paizes¹⁷ argue that this formulation serves no purpose other than to “obfuscate the true principle”. They point out that it is impossible for experts to usurp the function of the court because when all is said and done, the court is free to reject the witness’ evidence. Schwikkard and Van der Merwe find the ultimate-issue doctrine puzzling in light of the fact that “[it] fails to explain why courts at times permit not only experts but also lay witnesses to express opinion on the very issue that court has to decide”.¹⁸ Meintjes-Van der Walt shares similar sentiments, arguing that even when a mental health professional adduces evidence that touches upon the ultimate-issue, it remains evidence to be weighed by the court.¹⁹ Stevens refers to this argument and concludes that when dealing with the evidence of mental health, professionals’ opinion testimony should be of less concern.²⁰

11 Wigmore as quoted by Branswell 1987: 623.

12 1962: 218.

13 1954: 26.

14 1971: *passim*.

15 1967: *passim*.

16 1984: 5-20.

17 2009: 315-318.

18 2010: 83.

19 2001: 236-256.

20 2011: 702.

In light of the brief discussion above, it can be garnered that controversy heavily abounds as to whether or not the ultimate-issue rule should be invoked when dealing with the evidence of mental health professionals. Indeed, the arguments of opponents and proponents are sound to the extent that consensus cannot be arrived at so easily. Nowhere is the controversy on the application of the ultimate-issue rule more apparent than when dealing with the opinion of mental health professionals. Yet, with this continued controversy, uncertainty will continue to abound with regard to the exact place of the ultimate-issue rule in the advancement of behavioural science evidence. In the advancement of behavioural science in child sexual abuse prosecution, this controversy has already been reflected in two notable 2011 cases. In one of the cases the ultimate-issue rule was applied and in the other, it was not.²¹ The question we should then ask ourselves is: Can we draw from the legal history surrounding the development of this rule to settle this controversial debate? It is the answer to this question that forms the crux of this article.

3 The legal history surrounding the development of the ultimate-issue rule

A discussion of the ultimate-issue rule cannot be attempted without a discussion of the history of the opinion rule. The opinion rule of exclusion and the use of expert testimony, like much of the law of evidence, developed out of the adversary system of trial. The rules of exclusion, including the opinion rule, originated in England.²² Historically, the opinion rule was designed to prevent witnesses from expressing speculations and persuasions about matters of which they had no personal knowledge.²³ Witnesses were required to testify as to issues they were certain about. Lord Coke, in his 1622 classic dictum, offered a precise requirement of the rule when he ruled that “[i]t is not satisfactory for a witness to say that he thinketh or persuadeth himself”.²⁴

Essentially, the moral behind the rule at common law as it was in England was the insistence on reliable forms of evidence rather than testimony based on conjecture. Thus, the English usage of the term “opinion” in the 1700s and earlier, had the meaning of “notion” or “persuasion” of the mind without proof or certain knowledge. It carried an implication of lack of ground. It is against this backdrop that the term “mere opinion” was derived, with a view of disregarding testimony that was not sound, or was ungrounded or unreliable.

In 1766, Lord Mansfield stated the rule against opinion testimony when he concluded that a witness testimony was “mere opinion which was not evidence”.²⁵ On its face, this rule would appear to bar any testimony deemed opinion as opposed

21 *Godi v S* [2011] ZAWCHC 247; *S v The State* [2011] ZASCA 214.

22 Ladd 1952: 414; Sheldon & Murray 2003: 228.

23 Ladd 1952: 215; Sheldon & Murray 2003: 227-228; Oliver 2003: 1546.

24 See *Adams v Canon* (1622) 1 Dyer 53b, 73 ER 117 (KB) (quoted in Ladd 1952: 415).

25 *Carter v Boehm* (1766) 3 Burr 1905.

to fact. However, in the 1700s, when Lord Mansfield delivered this dictum, the term “opinion” retained its primary meaning of “notion” or “persuasion” of the mind without proof or certain knowledge. Oliver observes that Lord Mansfield’s dictum in 1766 is best understood as a disapproval of unreliable testimony from witnesses who lacked personal knowledge.²⁶

It was not until the 1800s that the opinion rule, dogmatically excluding opinion of witnesses, was established. By the middle of the 1800s, the disparagement of “mere opinion”, but this time not necessarily rooted in unsound and unreliable testimony, had emerged into a canon of exclusion. It furthered the notion that witnesses generally must give facts and not their inferences, conclusions or opinions. This latter approach was a radical departure from the earlier notion which underscored unreliability, unsoundness and conjecture as a basis of exclusion. From the mid-1800s henceforth, the term “opinion” was clothed with new meaning, denoting belief, inference or conclusion. Its classic formulation was based on the assumption that fact and opinion stand in contrast and are distinguishable. For instance, a witness could testify that an alleged child sexual abuse victim was anxious or suffered from post-traumatic stress disorder but could not opine that these reactions can be triggered by child sexual offences. Thus, over the years, the rule developed into a technical limitation upon the kind of language which a witness would be permitted to use in expressing facts which they had personally perceived. In this regard, Ladd has observed that from a historical perspective, the rule was never intended to control the language and manner in which witnesses expressed their testimony.²⁷ Mowrer has similarly observed that on account of this history and based on the imprecise use, misapplication and misinterpretation of words, the exclusionary doctrine, now referred to as the “opinion rule”, failed to carry forward its intended purpose of exclusion of unsound and unreliable testimony.²⁸

Although by the end of the 1800s common law had rejected testimony of witnesses based on inferences as constituting “mere opinion”, courts traditionally made exceptions. One of the exceptions pertained to expert testimony where there was a matter of skill or science to be decided. The courts recognised that the jury might be assisted by the opinion of those peculiarly acquainted with it from their profession or pursuits. But Mowrer adds that just as the imprecise use and application of words led to the extension and distortion of the term “mere opinion”, a like imprecision perpetuated the dogmatic and unsound application of the opinion rule exception pertaining to the admissibility of expert evidence.²⁹ Even though experts were permitted to offer opinion testimony, it was deemed fit for experts not to opine on the ultimate-issue because to do so would be to usurp the role of the jury. McCord³⁰ has equally observed that the ultimate-issue arose out of the ancient rule

26 2003: 1547.

27 Ladd 1952: 415.

28 1977: 410.

29 *Ibid.*

30 1987: 74.

that required that no one should be allowed to give an opinion on any subject. He explains that although courts later begun to relax the rule against opinion testimony, later courts curtailed opinion testimony that touched upon the ultimate-issue as it was deemed to invade the province of the jury. Thus, the form and expression of expert testimony continued to be curtailed even with the opinion testimony exceptions.

Emphasis was placed on the need for experts to resist the ultimate-issue question in offering opinion testimony so as to avoid the risk of overly awing the jury. Thus, “the rule stemmed from concern that jurors might adopt an influential witness’s opinion without independently analysing contested facts”.³¹ It was argued that expert opinion testimony had a powerful force which could awe the jury to the extent that they would abdicate their decision-making role and consequently prefer the opinion of the expert.³² Juries were not trained legal professionals capable of substantiating on critical legal issues and it was only reasonable, as it was argued then, for them to be shielded from the powerful force of opinion testimony that touches upon the ultimate-issue.

The United States of America’s system had over the years drawn insight from the exclusionary rules finding origin in England. In the 1800s, America’s system first put the ultimate exclusionary rule to the test in the 1840 case of *Davis v Fuller*³³ in which the Supreme Court of Vermont excluded the opinion of the expert, ruling that the ultimate-issue regarding the cause of backwater in a river, as it were in this case, was an issue for the jury alone to decide. As such, the court reasoned that expert witnesses may not replace the jury by giving opinions on the point on trial. Soon thereafter, numerous American courts barred witnesses from expressing opinions on ultimate-issues, reasoning that such opinions “invade the province of the jury”. Thus, although the ultimate-issue rule was not *per se* contemplated, it slowly but surely crept in, later becoming a thoroughly grounded technical limitation upon the kind of language which an expert witness would be permitted to use in expressing an opinion. As Maguire has argued, “the real truth is that courts and legislatures, most particularly in [the Anglo-American system] have over the years made up many rules for excluding from trials a great deal of relevant evidence”.³⁴

4 The history of the jury system in the Anglo-American system and why the application of the ultimate-issue rule was emphasised

One of the typical features of the Anglo-American system that distinguishes it from many other justice systems, is its jury-based trials. Many of the exclusionary rules in

31 Braswell 1987: 621.

32 *Ibid*; Kenny 1983: 208; McCormick 1945: 117.

33 *Davis v Fuller* 12 Vt 178 (1840).

34 As quoted by Kunert 1966-1967: 127.

the law of evidence find its basis in jury trials. The ultimate-issue rule has, since its inception in the Anglo-American system, found justification in the fact that it usurps the role of the jury. This rule is a reflection of varying and conflicting notions of the jury's mental incapacities to substantiate on evidence without some form of "shield" by way of exclusion of certain forms of confusing evidence. Earlier proponents of this rule were convinced that the jury's mind must not be contaminated by feeding it conflicting evidence that is seemingly difficult to reconcile when arriving at a decision.³⁵ The theory was that if the evidence the jury receives is screened for impurities before the jury gets it, jurors would not be confused or overawed.³⁶ Given the composition of the jury system as it were when some of these rules were formulated, it is seemingly justifiable that the ultimate-issue rule was considered in the first place.

The English word "juror" comes from the Old French word *jurer* which means to swear.³⁷ The earliest recorded form of jury system is that of Egypt. Beginning around 2000 BCE, ancient Egyptians adjudicated matters through *Kenbet*, which was comprised of eight jurors consisting of four from each side of the Nile.³⁸ In the sixth century BCE, *Dikastes*, in which designated citizens tried and passed judgment on questions of law, became the norm in Greece. The Greek system evolved into Rome's *judices* by the fourth century BCE. It was this system that influenced the first form of juries in England, with it arriving on English shores with the Roman conquest. By the late 800s, under the leadership of Alfred the Great, trial by a jury of one's peers became the norm throughout England.

In England, during the twelfth century, juries were a tool for the king. The earliest recorded juries were employed to discover and present facts in answer to questions addressed to them directly by the king. The jury gave evidence, but only the king or his ministers made the final decision. During the next two centuries, English juries moved from this advisory role to their current role as the decider of facts. By the end of the fifteenth century, the jury system had come to be regarded as the most valuable feature of English common law. Courts at that time began to allow parties to object to certain persons being seated on a jury, usually because they were personal enemies. It was not until the late seventeenth century that a jury could return verdicts. One of the features of England's jury system was the concept of a jury of one's peers. Peers were people with the same general background, chosen at random from members of the community. It was generally believed that a jury of one's peers was better able to understand the nature of the circumstances surrounding a criminal or civil matter based on local experience and could empathise with the parties involved.

35 See, eg, Kenny 1983: 208.

36 *Ibid.*

37 See Collins-Robert *English French Dictionary* 1983.

38 White 2011: 49; Simon 1975: 1-254; Randolph 2003: xx-xxiv; Alschuler & Deiss 1994: 867-928. The following paragraphs are based – in general – on these sources.

However, the jury system quickly spread to the United States. The transplant of the jury system from England to the United States occurred during the American Revolution when most state constitutions adopted the right of jury trials. In the United States of America, the Bill of Rights, written by James Madison, was added to the Constitution in 1791 at the insistence of the states. It explicitly listed the rights of all citizens under the new federal government. These included the right to a jury trial in criminal and civil cases in federal trials. In Africa, the rules of evidence applicable to the jury systems in England became applicable to African countries through reception.

In terms of qualification, jurors were lay people who were generally required to be old enough, in possession of their faculties and of ordinary intelligence. Certain groups were systematically excluded from jury service. For example, it was thought that police officers or lawyers might tend to have a built-in bias about a case or would be too influential with fellow jurors.³⁹ In America, in the State of Georgia, a 1797 statute described qualified jurors merely as people qualified to vote.⁴⁰ In some states during the 1700s jury members were required to have property acquisitions in the form of free holding.⁴¹ Tucker reported that there are cases in the rural areas of Virginia where jurors were constituted of the idle loiterers about the court.⁴² Similarly, there were several cases in which unqualified citizens were summoned by the sheriffs to act as jurors for formality purposes only. In a notable murder case in 1800, the judge halted the proceedings after discovering that a deputy sheriff had summoned jurors from a list of twenty-four prospects submitted by the accused's father.⁴³ In another case, twelve people who were in a courtroom awaiting trial on a charge of rioting were comprised mostly of the jury panel for the trial of another accused charged with horse-stealing.⁴⁴ The waiting accused thus secured payment for some of their time in court.

Due to the criteria for the selection of juries as well as their qualifications, the jury system was generally depicted in a bad light during the 1800s and attracted condescending criticism. In Kentucky, in 1858, a critic described jurors as "miserable wretches".⁴⁵ A Georgia newspaper called them "vagabonds".⁴⁶ An observer in Antebellum, Indiana, described jurors as "idle and dissolute persons" and as "loafers

39 Alschuler 1998: 498 observes that the public who served as jurors at the time were less educated than the norm and selection was generally skewed toward the less formal segment of the population.

40 Act to Revise and Amend the Judiciary System, Laws of the State of Georgia, Act of 9 February 1797.

41 Tucker as cited by Alschuler & Deiss 1994: 880-882.

42 *Ibid.*

43 *Ibid.*

44 *Ibid.*

45 See Ayers 1984: 113.

46 *Ibid.*

and drunkards”.⁴⁷ In the mid-1800s it was reported that in sixty percent of the criminal trials held in Antebellum Marion County, Indiana, bystanders comprised a majority of all jurors.⁴⁸ Twain noted a case in which it afterwards became apparent that one of the jurors thought incest and arson were the same thing.⁴⁹ Twain is said to have observed at the time that “[America has] a jury system that is superior to any in the world, and its efficiency is only marred by the difficulty of finding twelve men everyday who don’t know anything and cannot read”.⁵⁰ Boston⁵¹ also observed as follows:

But in a jury, we have raw recruits who could not as a class do well in any one of the many activities which in civilisation we require from any class in the community. We train recruits to bear arms, we license lawyers, physicians, dentists, midwives, veterinarians, horseshoers, and chauffeurs, but, so long as a man speaks any sort of English, can hear, is on the jury list, and has formed an opinion, he is deemed a competent man to decide disputes in a court of justice ... [I]t is the residue, men of no great responsibility, men whose occupations do not as a rule develop mental acumen, that are left to serve as jurors.

What can be garnered from these reports is that, generally, jurors were depicted as lacking in the understanding of many technical legal issues. It suffices to note that reports about the cognitive inadequacies of jurors at the time coincide with the period when the opinion rule became thoroughly established during the 1800s. With the ultimate-issue rule being born at a time such as this, and when clearly, the risk of jurors being overawed by the more informed experts was present, it is seemingly understandable that the ultimate-issue rule, though untenable in this day and age, was founded in these historical times. The mental inadequacies of jurors at the time played far too great a role in the evidentiary law, including archaic rules such as the so-called ultimate-issue rule. Unfortunately, in the process of transplanting the law which draws its basis from English common law, little regard was had to the fact that some systems, such as that of Africa, are not based on jury trials. In many African systems, including South Africa’s, trials are presided over by judges who are versed in the law of evidence.

5 The redundancy of the ultimate-issue rule in non-jury systems such as that of South Africa

What is clear in the legal historical exposition above is that the ultimate-issue rule finds its basis in jury systems. Although arguments that expert opinion on the ultimate-issue potentially overawes the jury have been the subject of withering

47 As cited by Bodenhamer 1985: 84.

48 *Idem* at 86.

49 1872: 342-343.

50 Shapiro 1993: 223.

51 1912: 11-13.

criticisms, these arguments formed and continue to form the crux of the rule even in non-jury systems. In light of the legal historical context in which the ultimate-issue rule emerged, it is ostensibly reasonable that the rule was considered. Arguably, this rule would make sense if South Africa had jury trials. But the relevance of this rule in non-jury trials, presided over by qualified judges, is questionable. The rule is absurdly inappropriate in any system where there is no jury. Judicial officers are trained in the law of evidence. When judges sit without juries, there is no point in either trying to screen the evidence or issue limiting instructions. Sheldon and Murray correctly observe that screening is superfluous “because the person who does the screening is the very person from whom the evidence is supposed to be screened, and it makes no sense to ask judges to instruct themselves”.⁵²

It should occasion no surprise that even justice systems such as that of England and the United States of America – which are arguably the “hub” of exclusionary rules – have over the years put these rules to question in light of the changing context. The rules of exclusion, though they developed from practices and expressions of the English and American courts, seem to be applied more flexibly at present in those two countries than in South Africa. In some cases in South Africa, the ultimate-issue rule is applied with intense rigor similar to that evident in the 1800s. It is against this backdrop that it is here submitted that at the very least, the major policy consideration for the need to disregard the ultimate-issue rule should find basis in the fact that South Africa’s system does not have jury trials. Precisely put, the judge who is a professional in evaluating evidence should be more readily relied upon to critically sift and weigh evidence which proponents of the application of the rule fear to entrust to a jury. The underlying basis of the rule, namely the usurpation of the role of the jury, does not in fact require the rule in non-jury trials.

The misplacement of received rules such as the ultimate-issue rule is good justification for a reassessment of all received rules. Indeed, no justice system invents all of the legal rules applicable to its system. More often than not, justice systems draw inspiration and insight from rules and doctrines developed elsewhere. The authors, however, caution that the practice of justice systems elsewhere should not be misused by applying them out of context. We endorse the argument of Kanda and Milhaupt who observe that a “fit between the imported rule and the host environment is crucial to the success of a transplant”.⁵³

Indeed, colonialism had a considerable impact on the development of law in South Africa. South African common law consists of a conglomeration of so-called imposed and received laws made up of a mixture of Roman-Dutch law, English common law as well as South African precedents. English law played a vital role in the process of adaptation especially during the nineteenth and early part of the twentieth centuries.⁵⁴ The courts supplemented and adjusted Roman-Dutch law

52 2003: 228.

53 2003: 891.

54 Dubois 2004: 42.

by importing English principles and doctrines.⁵⁵ The law of evidence was equally impacted upon. Zeffert and Paizes observe that when the British forces occupied the Cape in 1806, some of the existing laws were left unchanged.⁵⁶ The authors, however, have correctly observed that a rule of the English law “may be so inappropriate to the South African legal system that it would be wrong slavishly to apply it”.

Over the years, some courts in South Africa have rejected the ultimate-rule.⁵⁷ Despite this position, some courts seemingly continue to be haunted by the English common law position on the ultimate-issue rule.⁵⁸ They continue to indiscriminately apply the rule when experts opine on an ultimate-issue. It is in this regard that this received wisdom from the English needs to be revisited.

6 The present controversy on the exact place of the ultimate-issue rule in the advancement of behavioural science evidence in child sexual abuse cases with reference to two selected cases

6 1 *Godi v The State*⁵⁹

The 2011 case of *Godi v The State* pertained to the offence of rape. The facts of the case were that the appellant lived with her grandmother. The appellant worked in a tuck shop close to where the complainant and her grandmother stayed. As such the appellant and the complainant were acquainted with each other. The complainant testified about the alleged rape, stating that the rapes, on more than one occasion, took place on Fridays⁶⁰ when her grandmother was away. According to the complainant, on the first occasion of the rape occurrence, the appellant invited her into his room and told her to undress upon which he had sexual intercourse with her. The following occasion was when the appellant asked her to wash dishes. It is not clear when the abuse was first reported. The facts, however, indicate that a report was not made immediately after the first alleged rape. In 2008, the appellant was convicted by the regional court and accordingly sentenced to fifteen years imprisonment. The appellant appealed against sentence and conviction in the High Court.

On appeal, pertaining to the testimony of the complainant, the defense submitted that her evidence was unreliable, contained contradictions and did not establish the

55 *Ibid.*

56 2009: 3-29.

57 See, eg, *Hollington v Hewthorn* [1943] KB 587 (CA); *Genturico AG v Fireston SA (Pty) Ltd* 1972 (1) SA 589 (A); *Godi v S* [2011] ZAWCHC 247.

58 See, eg, *Holtzauzen v Roodt* 1997 (4) SA 766 (W); *S v The State* [2011] ZASCA 214.

59 *Godi v The State* [2011] ZAWCHC 247.

60 In 2001.

offence that the appellant was charged with.⁶¹ The defense further submitted that the learned trial magistrate had misdirected himself in relying upon the evidence of the expert called by the prosecution to adduce behavioural science evidence.⁶²

In the proceedings at the Regional Court, the prosecution had called an expert to adduce behavioural science evidence. The expert, an educational psychologist, evaluated the complainant on 4 May 2005 when she was fifteen years of age.⁶³ Amongst other sources, the expert had regard to a trauma report prepared by a welfare worker dated 26 March 2001 as well as a letter by an educational psychologist dated 2 June 2005. These two documents did not form part of the expert's written record and were equally not included in the record. The 2001 report of the welfare officer had stated that "there were objective symptoms of traumatising possibly as a result of sexual molestation, in the form of enuresis, sleep disturbances ...".

With regard to the expert's reference to these documents, the defense argued on appeal that such reference fell foul of the principles pertaining to admissibility of expert evidence as set out by Satchwell J in *Holtzhausen v Roodt*. Amongst others, the principles in the *Holtzhausen* case underscore that the expert's opinion should be based on admissible evidence and should not usurp the role of the court. The defense accordingly submitted that the expert's evidence was inadmissible because the expert's opinion was based on inadmissible evidence and equally usurped the role of court by opining on the ultimate-issue.⁶⁴

In addressing this objection, Olivier J categorically ruled that the expert was obliged to have regard to both documents.⁶⁵ Although the expert had indeed consulted the two documents without them being admitted in evidence, the expert was extensively cross-examined on the results and conclusions drawn in these documents.⁶⁶ The court, in disregarding arguments finding basis in the ultimate-issue rule, ruled that⁶⁷

the fact that the expert drew inferences also as to veracity and truthfulness [of the complainant] does not by itself make the evidence inadmissible – a court is bound to itself examine the facts – which may include expert opinion of the witness – and to draw its own conclusions.

In affirming the role of behavioural science evidence in providing a context within which to evaluate the evidence of the child sexual abuse complainant, the court ruled that the expert gave important evidence with regard to the perception of events by the complainant, both at the time they took place and the time at which the

61 Para 17.

62 *Ibid.*

63 Para 19. With regard to the evidence of the expert, the Appellate Court made reference to the proceedings in the Regional Court.

64 *Ibid.*

65 Para 22.

66 *Ibid.*

67 Para 24.

complainant testified.⁶⁸ More specifically, the court pointed out that the evidence of the educational psychologist was important in informing the court's decision on the competence and truthfulness of the rape itself.⁶⁹ Essentially, the court paid undue regard to the traditional rule of exclusion requiring a mental health professional not to opine on an ultimate-issue.

With the pace set by the court in the *Godi* case, any mental health and justice professional would have expected that in advancing behavioural science evidence in child sexual abuse cases, the rule of exclusion based on the so-called "ultimate-issue rule" can be surmounted. This conclusion does not, however, hold true in light of the 2011 decision in *S v The State* handed down by the Supreme Court of South Africa. The Appellate Court ultimately upheld the decision of the Regional Court.

6.2 *S v The State*⁷⁰

The case of *S v The State* also pertained to the offence of rape. The facts of the case were that between 2001 and 2002, the appellant allegedly raped his daughter, the complainant, who was twelve years of age at the time. During trial in the Regional Court, the complainant testified against her father, recounting three cases of rape. The first, she said, took place in Glenharvie when she was in Grade 4 and 12 years old.⁷¹ The second, she said, took place at their home in the Newcastle Flats in Lucas Street in Rustenburg.⁷² The third, according to her evidence, took place at their dwelling in Van Zyl Street, Rustenburg, when she was in Grade 8 (which was during 2002). All three rapes allegedly took place under similar circumstances (the complainant was in bed, her mother was elsewhere, the appellant undressed her, she resisted but was overpowered and the appellant had intercourse with her). The appellant was convicted in the Regional Court on a charge of rape. He was sentenced to fifteen years imprisonment. The conviction and sentence by the Regional Court was confirmed by the High Court. The appellant appealed against conviction and sentence in the Supreme Court. At trial in the Regional Court, the complainant's allegations were denied by the appellant and in the end, the magistrate was confronted with conflicting versions: that of the complainant and the denial of the appellant. Thus, on appeal in the Supreme Court the only issue in the case was whether the appellant had raped the complainant, and not whether she had been raped or sexually molested.

At trial in the Regional Court, the prosecution had called an educational psychologist, who interviewed the complainant and formed certain impressions

68 Para 25.

69 *Ibid.*

70 [2011] ZASCA 214.

71 Something must be wrong, she was either about 9 and in Grade 4 or 12 and in Grade 7.

72 One may surmise, if the record is read purposively, that this took place while she was in Grade 7 (probably during 2001).

about her.⁷³ The gist of her evidence, as summarised by the magistrate, was that the complainant was unwilling to cooperate or communicate, that she blamed herself for causing a rift in the family, that she was emotionally unstable and lacked confidence and that she hated her father because he was always drunk. As a matter of fact, the education psychologist's report maintained that the complainant had been raped while she was in Grade 4, but did not contain any reference to other instances of rape. On appeal the Supreme Court ruled that the education psychologist's evidence could in no way contribute to the determination of the issue in question – as to whether the appellant had raped the complainant.⁷⁴ The appeal was accordingly upheld and the conviction and sentence set aside.

Admittedly, this case had many inconsistencies which justified the setting aside of the conviction and sentence. However, what is striking about the Supreme Court decision in this case is not the fact that the Supreme Court did not accord due weight to the opinion of the mental health professional, but some of the reasons that the court gave to justify its non-reliance on the mental health professional's opinion. In substantiating on the rules of expert evidence, the court was seemingly inspired by the ultimate-issue rule and consequently adopted an approach different from that in the *Godi* case. In the *State* case, Harms J made reference to the case of *S v Engelbrecht*⁷⁵ wherein Satchwell J had stated as follows:⁷⁶

Courts frequently turn to persons with expertise and skill for assistance. The relevant principles applicable to the admissibility of opinion evidence by experts, including psychologists and social workers, have been set out in numerous authorities. Firstly, the matter in respect of which the witness is called to give evidence should call for specialised skill and knowledge. Secondly, the witness must be a person with experience or skill to render him or her an expert in a particular subject. Thirdly, the guidance offered by the expert should be sufficiently relevant to the matter in issue to be determined by the Court. Fourth, the expertise of any witness should not be elevated to such heights that the Court's own capabilities and responsibilities are abrogated. Fifth, the opinion offered to the Court must be proved by admissible evidence, either facts within the personal knowledge of the expert or on the basis of facts proven by others. Sixth, the opinion of such a witness must not usurp the function of the Court.

Thus, in the *State* case, the court concluded that the evidence of the behavioural science expert did not satisfy requirements four, five or six.⁷⁷ It suffices to re-echo that requirement six pertains to the evidence of the expert not usurping the function of the court by opining on the ultimate-issue.⁷⁸

73 Para 12. These references refer to the Supreme Court of Appeal Judgment.

74 Para 17.

75 *S v Engelbrecht* 2005 (2) SACR 41 (W).

76 As cited in *Godi v S* [2011] ZAWCHC 247 in para 26.

77 Para 19.

78 On balance, the argument here is not that the opinion of mental health professionals should uncritically be given full weight by the court. Rather, it is that the traditional rules of exclusion, particularly the ultimate-issue rule, should not be a basis of excluding relevant behavioural science evidence that has been properly adduced by qualified experts.

7 The negative implication of the application of the ultimate-issue rule to the exploitation of behavioural science evidence in child sexual abuse cases

It is notable that the *Holtzhausen* case is often cited when courts are finding a basis to invoke the ultimate-issue rule. Indeed, the dictum in this case has been lauded as a good illustration of when to receive and when to reject the opinion of an expert on an issue that the court has ultimately to decide. This dictum has, however, been criticised based on the fact that although the court rightly based its conclusion on considerations of relevancy and achieving the correct result, the court resorted to “the meaningless and pernicious expression of usurping the function of the court” which, when invoked, can potentially impact negatively on the admissibility of the expert evidence or on the weight attached to it.⁷⁹ Indeed, although the principle of relevancy was underscored in the *Holtzhausen* case, the courts, in drawing inspiration from this dictum, often indiscriminately emphasised the point of usurpation the role of the jury which has been submitted above, is out of step.

The divergence in the decisions of the courts not only in the *Godi* and *State* cases, but also in many other cases,⁸⁰ demonstrates the general inconsistencies in the application of the ultimate-issue rule when courts are presented with behavioural science evidence in child sexual abuse prosecutions. The application of the ultimate-issue rule negatively impacts on the full use of behavioural science evidence in child sexual abuse prosecutions in two ways. First, if the ultimate-issue rule is invoked, relevant behavioural science evidence can be excluded. Secondly, even when behavioural science evidence is admitted, the courts may fail to accord such evidence the appropriate weight. This is a dilemma that warrants redress given that in child sexual abuse cases mental health professionals are bound to tread the path of the so-called “ultimate-issue”. McCord⁸¹ has correctly argued that behavioural science evidence has a tendency of touching upon the credibility of a witness and often, if not always, on the ultimate-issue for determination before the court. It is therefore not unusual for a mental health professional to submit that the child sexual abuse victim’s behavioural condition is consistent with child sexual abuse. Nevertheless, where the ultimate-issue rule is applied, mental health professionals may be precluded from submitting opinions to this effect.

Aside from the prejudicial implications of the ultimate-issue rule on the weight and admissibility of behavioural science evidence in child sexual abuse cases, the inconsistencies across the courts on the exact place of the ultimate-issue rule cause uncertainties for mental health professionals who are left speculating on how far reaching their opinion ought to be. Currently, mental health professionals may be

79 Zeffert & Paizes 2009: 318.

80 Refer to footnotes 57 and 58 on the other cases.

81 1987: 32.

unsure whether or not they should have a wide scope for adducing their opinions without being weary of this archaic rule. It is notable that although mental health professionals are merely called as witnesses in child sexual abuse cases, their experience in court can either undermine or further their future interface with the justice system. If greater interface between mental health professionals and the justice system is called for within the context of child sexual abuse prosecutions, it is extremely critical for mental health professionals to have a clear understanding of the scope of their (possible) assistance to the courts. This understanding should be precise and clear so that mental health professionals are not left speculating as to the precise scope of their interface with the justice system. Even more critically, unduly restricting the manner in which mental health professionals should adduce their evidence may be unrealistic and consequently account for the exclusion of relevant evidence simply because of undue rigidities.

In sum, the point we make is not that judicial officers should without scrutiny entertain opinions of mental health professionals that touch upon the ultimate-issue. Indeed, where for instance, the opinion of a mental health professional that touches upon the ultimate-issue is adduced by an unqualified professional, is not supported by reliable and sound data, methodology, assessment or standards; is not backed up by sound and logical explanatory power; has a flawed basis; and/or is lacking probative value to the issue of determination before the court, it should certainly be rendered inadmissible by the court or not accorded due weight. Rather, the point we make is that the opinion of a mental health professional should not be subjected to a different standard merely because it touches upon the ultimate-issue. The ultimate standard should be its relevance to the determination of the issue before the court. If the court can receive appreciable assistance from the expert, ultimate-issues should be the least of the court's worries. The other foregoing issues such as qualification and methodology, amongst others, should equally inform the decision of the court.

8 The case for express abolition of the ultimate-issue rule

As implicitly demonstrated thus far, the justice system of the United States of America, as that of South Africa, was considerably impacted upon by the English common law, particularly in terms of the application of the rules of evidence. Years of advocacy from opponents on the efficacy of some rules of exclusion in the United States of America only yielded instructive results with the coming into force of the Federal Rules of Evidence promulgated in 1975. Prior to the adoption of these Rules, there were scholarly and judicial divergent views on the exact place of a considerable number of rules of evidence. Even with the persuasive submissions of proponents on the need to discard rules such as the so-called "ultimate-issue rule", some courts persistently applied them. Precisely put, the exact place of the ultimate-

issue rule remained obscure without express codification. Proponents, however, breathed a sigh of relief with the coming into force of the Federal Rules of Evidence which clarified the position on many of the controversial rules. One of the rules that were dealt with was the ultimate-issue rule. In terms of Rule 704 “an opinion is not objectionable just because it embraces the ultimate-issue”.

Taken together, the point we make pertains to the need for South Africa’s system to develop a codified framework on admissibility of expert evidence that addresses the contextual gaps in the current discourse of expert evidence and the needs in a non-jury system such as South Africa’s. Statutory guidelines should be introduced to strengthen the advancement of behavioural science evidence and expert evidence generally. The statutory rules should be drafted in such a manner as to take cognizance of the fact that South Africa’s system does not have jury trials. Furthermore, these statutory guidelines should be couched in such a manner as to assist judicial officers to evaluate expert evidence, including controversial fields such as behavioural science evidence.

Some South African scholars rightly submit that the traditional rules of exclusion, such as the ultimate-issue rule, are strictly speaking not part of South Africa’s modern law.⁸² As such, it could be argued that codification is meaningless. However, the failure of the law codes to clarify on these issues only serves to further inconsistencies, confusion and unpredictability. The position of the courts is far from harmonious. A study by Allan and Louw demonstrates that in South Africa some lawyers still apply the rule informally to some degree.⁸³ Legal practitioners and mental health professionals differ significantly on the role and place of traditional rules of exclusion. With the current divergence of opinion in South Africa, it is not clear whether a mental health professional can opine on the ultimate-issue or otherwise. Precisely put, there is some sort of legal uncertainty on this issue. As Saltzburg⁸⁴ correctly submits, “[t]here is something terribly wrong with a single system that allows cases to be tried differently in different courtrooms, so that different rules govern the way in which the evidence that is necessary to resolve the case will be presented”. In light of the uncertainty that continues to abound with regarding many exclusionary rules, the issue that falls to be resolved is whether or not the time has not come for South Africa to develop a comprehensive codified framework on the rules of evidence that, amongst others, expressly abolishes the ultimate-issue rule.

The need for the express abolition of the rule not only gains credence in the fact that its application is misplaced in a non-jury system such as South Africa’s, but also that the rule is out of step with modern forensic evidence including the interface between behavioural science and the law in child sexual abuse cases. Thus, although theoretically the rule does not form part of South Africa’s law of

82 Allan & Louw 1997: 307.

83 *Idem* 317.

84 1978: 189.

evidence, this position, in its uncoded form, does not coherently match the practice in some courts when evidence of mental health professionals is adduced. Expressly abolishing this rule would seemingly make its demise more apparent. Arguably, an express abolition of the rule would exert pressure on judicial officers to discard it since some judicial officers and legal practitioners persist in invoking it where none exists. The rule should be codified in such a manner as to allow a mental health professional the leniency in giving an opinion. The judicial officer can ultimately still weigh the opinion of the mental health professional in the same way as any other admitted evidence and consequently arrive at an independent decision. During the weighing process, the judicial officer has the discretion to decide which portions of the evidence to regard as relevant or less relevant. Moreover, with codified rules on the admissibility of expert evidence, the interface between mental health professionals and the justice system would be furthered as both mental health professionals and legal practitioners would be able to view the position through the same lens.

It is to be noted, however, that the authors do not conclude, not even remotely, that expressly abolishing the ultimate-issue rule will conclusively address the uncertainty that mental health professionals encounter in advancing evidence in child sexual abuse cases. Indeed, the jurisprudence in justice systems like that of the United States of America, a system which, arguably, has by far the soundest codified system on the rules of evidence, demonstrates that some form of uncertainty still exists for mental health professionals in terms of the inconsistencies in the decisions of the courts on the ultimate-issue.⁸⁵ It should be emphasised that codification does not provide all the answers to evidentiary problems. Nevertheless, as Saltzburg⁸⁶ persuasively argues, “the fact remains that [codified] rules can be most useful”. When objections finding basis in the traditional rules of exclusion are raised, legal practitioners can make reference to the codified rules of evidence in substantiation of the ambiguity. Thus, focus on codification should not be understood to portray that codification is the only or even primary tool of furthering certainty. Sensitisation of judicial officers on modern rules of evidence, could, for instance, also contribute to legal certainty in the long run. However, since some judicial officers and legal practitioners persist in constructing rigid exclusionary rules where none exist, codification then becomes a viable alternative.

85 See, eg, *People v Jeff* 204 Cal App 3d 309, 251 Cal Rptr 135 (5th Dist 1988); *Re Sara M* 194 Cal App 3d 585, 239 Cal Rptr 605 (3rd Dist 1987); *People v Beckley* 161 Mich App 120, 409 NW 2d 759 (1987); *People v Bowker* 203 Cal App 3d 385, 249 Cal Rptr 886 (4th Dist 1988); *Smith v State* 100 Nev 570, 688 P 2d 326 (1984); *State v Cleveland* 58 Wash App 634, 794 P 2d 546 (1990); *State v Myers* 359 N W 2d 604 (Minn 1984); *Townsend v State of Nevada* 734 P 2d 705 (1987).

86 1978: 185.

9 Conclusion

The purpose of this article has been to emphasise what justice systems often overlook, namely that the legal history surrounding the development of exclusionary rules such as the ultimate-issue rule makes their continued application a misplaced move in non-jury trials such as South Africa's. Getting to grips with the historical context of the ultimate-issue rule suggests that the rule ultimately impairs rather than fosters justice in non-jury trials. The legal historical development further suggests that the continued application of a rule, originally developed and suited for jury trial processes in a non-jury environment, is an imperfect fit and problematic. In England, where the jury system and exclusionary rules arising therefrom originated, the jury trial survives only as a matter of theoretical practice. Many of the rules of exclusion, including the so-called "ultimate-issue rule" have been laid to rest. The United States of America that makes use of jury trials has equally developed a codified framework of rules of evidence to place some of the archaic common-law rules into proper context. It is seemingly safe to conclude that some of the rules that are still applied in South Africa's system, drawing inspiration and insight from English common law, are misplaced. This is because, based on their historical foundation, it is hard to identify the public policy consideration served by such exclusion. The continued application of the ultimate-issue rule by some courts, as well as many other rules of exclusion that were beyond the scope of this article, raises two questions: Has not the time come for South Africa's system to revisit some of the received wisdom in terms of the rules of evidence? Secondly, should not codification of a coherent framework that contextually takes cognizance of South Africa's non-jury system be part of that reform agenda?

Abstract

The controversy surrounding the issue whether or not mental health professionals in South Africa should offer opinion testimony that touches upon the ultimate-issue has been ongoing and remains unsettled. This controversy has left the exact place of the ultimate-issue rule in balance hence causing uncertainty. This uncertainty has impacted negatively on the advancement of opinion testimony by mental health professionals. One notable area that has been affected is the one pertaining to child sexual-abuse cases. The authors trace the historical foundations surrounding the development of the ultimate-issue rule. It is demonstrated that the rule finds its basis in justice systems with jury trials, with the aim of the rule having been to ensure that experts do not usurp the role of the jury. Historically, juries were not schooled in law hence the need to screen the evidence they received ensuring that experts' opinions did not awe them to a point of them relinquishing their decision-making powers. In this context, the unsoundness of the rule in non-jury systems such as South Africa's (where decisions are made by judges schooled in law) is underscored.

It is highlighted that the policy considerations surrounding the development of this rule are not applicable to South Africa. Recommendations are made for its express abolition by way of statutory guidelines.

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OF NAVAL COURTS MARTIAL AND PRIZE CLAIMS: SOME LEGAL CONSEQUENCES OF COMMODORE JOHNSTONE'S SECRET MISSION TO THE CAPE OF GOOD HOPE AND THE "BATTLE" OF SALDANHA BAY, 1781 (PART 2)*

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Key words Maritime history; Cape of Good Hope; English maritime legal history; naval law and intra-naval immunity; prize law and joint captures

3 2 Prize law

3 2 1 Introduction

The possibility of financial gain to be derived from capturing enemy prizes was a central feature of Commodore Johnstone's Cape expedition²⁸⁴ and was no less important to those officers and seamen in his squadron.²⁸⁵ Not surprisingly therefore,

284 Harlow 1952: 110 observes that "prize and plunder seem to have been uppermost in his mind during and after the expedition to the Cape"; Rutherford 1942: 308 remarks that "[h]e still seems to have regarded his task from a privateering point of view and to have been obsessed by the thought of prizes to a degree remarkable even in an admiral of the period when important issues were at stake".

* Continued from (2015) 21 *Fundamina. A J of Legal History* 392-456.

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the prizes that were taken during the campaign gave rise to fierce and prolonged litigation. First, though, it is necessary to describe some of the legal principles involved.

At common law,²⁸⁶ the capture, during war and wherever found, of an enemy ship, whether one of war or a merchantman, and her cargo as prize by a naval vessel²⁸⁷ set in motion an intricate and closely monitored legal process.

The captured property had to be taken as a matter of priority to an Admiralty Court²⁸⁸ for formal adjudication. The legal duty imposed on captors to bring captured property in for adjudication sought to prevent indiscriminate seizures without a strict legal right – say of neutral property or outside of a formally declared war – and to prevent the right of seizure in time of war degenerating into piratical robbery. The Admiralty Court determined the validity of the capture in terms of international law – the law of war – and declared the prize either lawful or unlawful. In the latter case it ordered the property to be fully restored to the owner, either in specie or in the form of compensation or both. In the former case it declared the prize forfeited.

In principle, all forfeited prizes belonged to the Crown, on the basis that it alone could declare war and make peace. The Crown could deal with the forfeited prize as it saw fit: it could keep, abandon or even restore the prize.²⁸⁹

It could also, and most often did, grant the prize, or, more usually, the proceeds it realised at a sale under the auspices of the Admiralty Court, in full or in part, to those who had captured it or to whomever else it wished. A subject's claim to a prize, or to prize proceeds, was therefore subject to the consent and benevolence of the Crown. In the awarding of maritime prizes, the Crown was usually represented by the office of the Lord High Admiral, or, in later times when the office was put in commission, by the Lords Commissioners of the Admiralty who executed that office.

285 Thus, Pasley 1931: 175 was delighted that the naval action in Saldanha Bay was successful and, in a prescient anticipation of what was to materialise, wrote that no soldier landed until a full two hours after the captures had been effected. That meant that the Army had probably been deprived of any hope of sharing in the prize proceeds and that “the Sole and only Right to the Prizes remains in the Navy alone, which makes the Capture a very pretty subject if they get all safe home to Old England”.

286 The sources consulted for the very broad exposition that follows, and from which further detail including references to specific authority may be garnered, include: Anon 1848: 282-330; Browne 1840: 262-266; Phillimore 1857: 354-365.

287 Or, less relevant for present purposes, a privateering vessel, that is, a privately armed vessel authorised, commissioned or licensed by the Crown or state by letters of marque, to act – to make reprisals – against the specified enemy.

288 Either the most convenient (ie, the closest) local Vice-Admiralty Court, which were British courts established in British settlements or colonies, or the High Court of Admiralty in London.

289 Thus, as Brown 1840: 262-263 explains, international law divests an enemy owner of his rights while municipal law vests it in the Crown (or state) and then further provides how the latter may deal with it.

A perpetual royal grant to the Admiralty in 1665 included naval maritime captures of enemy ships coming into English ports and into roadsteads everywhere; captures made at sea by non-commissioned vessels; and derelicts. Such prizes became one of the perquisites to that office and were called droits of the Admiralty. Naval captures outside the scope of this grant did not belong to the Admiralty but remained with the Crown. Thus, naval captures at a time when there was no war and hence no enemy, or in a foreign port, or captures on the high seas by commissioned (naval or private) ships, did not belong to the Admiralty itself, but to the Crown.

In time of war, the Crown, in turn, could award to the actual captors, whether naval captors or commissioned privateers, the benefit of such maritime prizes as fell outside the grant to the Admiralty and thus remained at its disposal as part of its inherent prerogative. It would do so to reward the captors and to encourage others to do likewise. Although not obliged to do so, this came to be done as a matter of course. The award was most frequently made by means of legislation, usually in the form of a prize act.²⁹⁰ Such prize acts, and the rules or regulations made in terms of them by royal proclamation, also provided how – in what shares – the prize proceeds had to be distributed amongst the captor or captors to whom they had been awarded. Whether a prize belonged to the captor, depended upon whether the capture had been made not only in accordance with the international law of war (in which case the prize was a lawful one and belonged to the Crown, and could therefore be conferred by the Crown on, in this case, the captor), but also within the scope of the relevant prize act and proclamation.

Importantly, the royal grant to the Admiralty was an absolute and perpetual alienation by the Crown of its interest in prizes coming within the grant. Only Parliament could restore to the Crown its original rights in droits of the Admiralty. The royal grant to captors contained in prize acts and royal proclamations, by contrast, was merely a temporary transfer of a portion of the remaining rights of the Crown in naval prizes. It could be revoked, or restored, or simply not conferred, as the Crown wished. Also, the Crown could, if circumstances demanded, decide to grant a prize by other means, bypassing the prize acts, say by royal instructions. As will become clear, that is what happened with the Saldanha Bay prizes.

There is a distinction, therefore, between a naval prize condemned to the (Crown in its office of) Admiralty as a droit of the Admiralty, and a naval prize condemned to the Crown itself, by virtue of its prerogative, *iure coronae*, a distinction that is blurred but, as will appear shortly, not extinguished by reason of the fact that the Crown is represented as to the latter by the Admiralty.²⁹¹

290 Usually a prize act was passed at the outbreak of a war, operated against a specified enemy and for a limited period of time (usually a year), and was, if necessary, periodically renewed for the duration of the war.

291 In the former case it is the Admiralty advocate and proctor who appears in the Admiralty Court and conducts the proceedings for condemnation, in the latter case it is the Queen's advocate and proctor, unless the prize and hence also the conduct of proceedings have been granted to the captors. See, further, eg. Tiverton 1914: 28.

The periodic prize acts and proclamations also served another purpose. They conferred upon the relevant Admiralty Court an exclusive and temporary prize jurisdiction²⁹² to adjudicate the lawfulness or otherwise of prizes brought before it.

For present purposes, two pieces of legislation are relevant.

First there was the [Dutch] Prize Act, 1781.²⁹³ Amongst other matters, it extended the relevant provisions of previous prize acts still in force²⁹⁴ to prizes taken from the States General of the United Provinces since 20 December 1781 and during the continuance of the hostilities against the Netherlands by British warships or privateers.²⁹⁵

The Navy Act, 1781,²⁹⁶ passed for the encouragement of seamen, conferred the right to Dutch prizes captured by warships on the captors. It determined in section 1 that flag officers, commanders and other officers, seamen, marines and soldiers on board every ship of war “shall have the sole Interest and Property” of and in all ships and goods they have taken since 20 December 1780 and during the continuance of the hostilities against the United Provinces after such ships and goods had been “finally adjudged lawful Prize to his Majesty” in any Admiralty Court. It further determined that such prizes had to be divided between the captors in such proportions and manner as His Majesty had already ordered by a Royal Proclamation of 27 December 1780.

As far as the distribution, division, apportionment or sharing of prize proceeds amongst captors were concerned, it was a matter governed by municipal and not by international law. Several different – but for present purposes simplified – scenarios have to be distinguished.

Most straightforward was the situation where a single warship made the capture, in which case the prize proceeds had to be distributed amongst those involved with or on board her at the time of the capture. The manner of distribution in such a case – the relevant shares to be accorded to the individuals involved – was initially governed by custom or, later, specified by means of statute or royal proclamation. Thus, the flag officer,²⁹⁷ captain, officers and crew members of the capturing ship were entitled to share in the prize proceeds in specific proportions, decreasing in size in accordance with their rank.

In the case of a naval operation, again, where a squadron or several associated or co-operating ships were jointly involved in effecting a capture, the prizes taken were distributed amongst all the warships involved at the time of the capture. The

292 Only the Admiralty Court exercising its prize jurisdiction, and not common-law courts, could adjudicate prizes, and then only for so long (usually for the duration of a specified war) and in respect of such (specified) enemy property as was included in the jurisdiction that had been granted to it.

293 21 Geo III c 5.

294 That is, the Prize Act, 1778 (18 Geo III c 15), the [French] Prize Act, 1779 (19 Geo III c 5, which extended the Act of 1778 to French prizes), and the [Spanish] Prize Act, 1780 (20 Geo III c 9, which extended the Act of 1778 to Spanish prizes).

295 Section 1. It also declared which goods were to be deemed military or ship stores (s 2).

296 21 Geo III c 1.

297 As to whom see further par 3 2 2 below.

inevitable practice in this case was for the Prize Court, that is, the Admiralty Court exercising its prize jurisdiction, to hold the joint captors²⁹⁸ entitled to share in the prize proceeds according to their relative strength – larger ships got proportionally more than smaller ones – because of the practical impossibility of establishing the extent to which their respective degrees of exertion had contributed to the capture. This was known as the general principle of relative strength, as determined by the size and compliment of the ships involved. Even should one particular naval vessel actually have contributed more than the others to a specific capture, and have been identifiable as the actual captor on the basis, say, of being the one to whom the enemy ship surrendered by striking her flag, no greater proportion was ever allowed her on that basis. The other ships present shared likewise as joint captors, on the ground of association and co-operation. If vessels were associated and co-operating,²⁹⁹ a capture made by one of them (the actual captor) inured to the benefit of all the rest of them (the constructive captors). This rule of practice was regarded as being in accordance with the principles of natural equity and justice.³⁰⁰

In principle,³⁰¹ the same applied in the case of an enemy capture by a privateer, or a group of privateers, except that then the distribution of what was the profits of the privateering venture amongst the crew of one privateering vessel, or amongst several privateers acting in consort, was usually provided for by way of an agreement.³⁰²

298 To be distinguished from joint capture is the case of rival claimants, where the claim of one was not to a share of a prize, but to the sole right to a prize to the exclusion of the other: see Tiverton 1914: 51.

299 A bond of association existed between, eg, warships comprising a blockading or a cruising squadron, or warships sailing together for a particular purpose under a single commander, and therefore not between all the ships in the Navy. Associated ships shared if the capture was made in connection with the purpose of their association. But association alone was not sufficient; there also had to be co-operation. Apart from actual co-operation (which could render ships joint actual captors), there was also co-operation with an actual captor, at least *prima facie* (a warship being under a continuous duty to attack the enemy), if a ship was in sight of the prize and the actual captor under circumstances sufficient to cause intimidation to the prize and encouragement to the captor (so-called constructive assistance).

300 As to joint capture, see specifically also Holland 1888: 74-75; Wheaton 1815: 287-289; Phillimore 1857: 356-359; and Tiverton 1814: 48.

301 Though not in detail. There was, eg, no presumption of assistance from another privateer in sight of the actual captor as there was in the case of naval vessels: privateers were entitled, but unlike warships not obliged, to capture enemy ships. Thus, in addition to being present, some overt act of actual assistance or intimidation was required to entitle a privateer to share with the actual captor.

302 Such an agreement could, of course, adopt general principles, such as that of distribution on the basis of relative strength, from naval practice and law. See, further, Starkey 1990: 279-280, pointing out that the net profits were split between the owners of privateering vessels and the investors or promoters; and the owners' share, or a part of it, was then further divided amongst the crew of the vessel. For early examples of and judicial decisions relating to the sharing of prizes amongst joint captors in terms of consortship agreements, see Marsden 1915: 308-311, 325-327, 349-351, 473-474. Commonly, it was agreed that the ships sailing in consort (and the captain and crew of each) would share in all captures made by any one of them while in the sight of the others or within twenty-four hours of losing sight, the sharing to be rateably according to their respective tonnage and manning ("ton for ton, man for man, according to the custom of the sea").

More complicated was the scenario involving a joint naval capture by different types of captor, such as naval vessels and privateering vessels, or, relevant for present purposes, the Navy and the Army.³⁰³

And in this respect the litigation that followed on the capture of the Dutch prizes in Saldanha Bay provided some clarification, for there it was not only the naval squadron under Commodore Johnstone that was involved – and that thought itself to be entitled to the prize proceeds – but also the military component under General Medows.

First, though, a preliminary prize claim involving Johnstone himself.

3 2 2 Johnstone's personal claim to an earlier prize

When he was offered and accepted the appointment to lead the expedition to the Cape, Commodore Johnstone was as flag officer in charge of the naval squadron based at Lisbon, even though he was not always physically there.

The relevant Admiralty commission appointing him to the secret expedition was made out on 19 January 1781 and received by Johnstone, then at Spithead on the south coast of England, on 3 February and accepted by him shortly afterwards. Earlier, on 16 December 1780, Johnstone had, again from Spithead, given an order to one of the ships under his command at Lisbon to sail on a cruise. The order was received by the captain of the frigate in question on 17 January 1781 and she departed as instructed on 28 January. On 25 February she captured a Spanish prize.

Johnstone no doubt thought that as flag officer of the squadron to which the captor belonged, he was entitled to share in the prize. After all, the capture had been made on orders he had given while still in charge, even though the actual capture itself only took place after he had accepted another command. In any event, no other flag officer had been appointed in his place at the time of the capture, but equally, after 19 January no Admiralty orders had been addressed to him as commander of the Lisbon station.

At issue in *Johnstone v Margetson*³⁰⁴ was the entitlement of a flag officer to share in the proceeds of a prize taken by ship under his command. By the time

303 A terrestrial prize taken by a capture affected by the Army, a land force, was called booty of war and was distinguished from a naval prize in some respects. Thus, although it was also usual for the Crown to grant a large booty to the troops involved and to specify its distribution amongst them, this was done by means of a special proclamation relating to the specific capture and not by means of a standing, albeit temporary, measure covering all captures made during a specific war, as was the case with naval prizes. The *ad hoc* granting of a booty of war did not set any precedent and did not entitle military captors to a similar award in future. However, the Admiralty Court was also given an exclusive statutory jurisdiction in respect of booty of war and its distribution, to be exercised according to the same procedure as in the case of naval prize. As to army prize, see further Anon 1848: 300-305.

304 (1789) 1 H Bl 261, 126 ER 153. See, further, also Prendergast 1852: 60-61 and 293-296.

the claim was brought, in 1789, Johnstone had died and the executor of his estate therefore claimed his one-eighth share of the prize, an amount of £914.

In terms of the proclamation governing the division of prizes in this instance, one of 25 June 1779, the captain of a warship was entitled to a three-eighth share (of the prize money allocated to her) if he was actually on board at the taking of the prize.³⁰⁵ However, if the capturing warship was under command of a flag, the flag officer, being actually on board or directing and assisting in the capture, was entitled to one-third of that three-eighths, that is, to one-eighth of the prize – the so-called “flag eighth” – and the relevant captain only to a two-eighth share.³⁰⁶

The argument on behalf of Johnstone was that although not on board at the time of the capture as was required of the capturing ship’s captain himself, the capture had taken place under his direction. There was such direction or assistance, as the relevant proclamation required, because as flag officer he had given the orders; when not personally present, the only way a flag officer could assist or direct was by giving orders.

The defendant, again, contended that Johnstone’s command did not continue until the time of the capture so as to entitle him to a one-eighth share. He had, by that time, accepted another command, that of “the expedition against the Cape of Good Hope”³⁰⁷ and the existing one therefore ceased as the duties of both together were incompatible. It was not necessary for Johnstone’s command to end that another flag officer had to be appointed in his place. In this case there was neither the actual nor the constructive presence required for the flag officer to share. At the time of the capture, the captain of the frigate acted as the immediate officer of the Admiralty to which he was amenable, and he was thus entitled to the whole of his three-eighth share.

The Court of Common Pleas, *per* Lord Loughborough, held against Johnstone. It thought that for a flag officer to share in the captain’s share under the proclamation, it was necessary, first, that an appropriate order should have been given and, secondly, that the capture should have been made under the actual command of a flag officer, although not necessarily the same one that had given the order. The commission sent by the Admiralty to and accepted by Johnstone, appointing him to take another

305 Others on board received the following shares of her prize money: the other officers together got a two-eighth share, the midshipmen and warrant officers a one-eighth share, and all the other seamen on board a two-eighth share.

306 It seems that actually or constructively directing or assisting flag officers became entitled to a – passive – share only from 1708. This meant a flag officer got a share of all prizes taken by the ships under his command, even if he was not present at the time. Apart from the provisions entitling flag officers to share, other provisions, likewise refined in 1744 and restated in 1756, were designed to prevent disputes between flag officers, where several were involved or where one succeeded another. They were not relevant here as there was no other flag officer on the Lisbon station after Johnstone had quitted it and at the time of the capture.

307 At 266, 156.

command, amounted to a termination of his command on the Lisbon station; on the acceptance of his new command, all his former duties and entitlements ceased. Thus, at the time of the capture, Johnstone was not, or no longer, the flag officer on the Lisbon station.³⁰⁸

3 2 3 The Navy v the Army: The preliminary judicial rulings

The Saldanha Bay prize proceeds gave rise to litigation and a series of decisions involving rival claims by the Navy and the Army.

A few facts featured prominently and were not in dispute in the litigation: first, that a squadron of warships with a detachment of military – as opposed to marine – troops on board had been sent, as a conjoint force, with the sole object of attacking an enemy settlement, the Cape of Good Hope; secondly, that the secret royal instructions under the King's sign manual given to the two commanders of the expedition, Johnstone and Medows, directed that to avoid disputes concerning the distribution of any prizes or booty taken during the attack on the Cape by the joint operation of the Navy and the Army, such prizes had to be divided between the sea and the land forces in two shares according to the numbers mustered in each service;³⁰⁹ thirdly, that the sea forces' share had to be divided according to naval regulations and that out of the land forces' share, its commander was to be entitled to the same share as was the naval commander in proportion to the naval share, with the remainder to be distributed among the army officers and men in proportion to their respective pay; and fourthly, that after the two forces had arrived within

308 See, further, Wheaton 1815: 294-296, pointing out that in terms of the proclamation and judicial decisions, there was no sharing by a flag officer in prizes made by (i) a ship on the station to which he had been sent to command before his arrival there; (ii) a reinforcing squadron before it arrived within the limits of his command and it actually received some or other order from him; (iii) a ship that had been detached by the Admiralty upon a secret service; (iv) a ship operating outside the limits of his station and without his orders; and (v) ships he had left behind to take up another distinct command or after he had been superseded.

309 As pointed out earlier (and see, also, Anon 1848: 294-296), under the perpetual grant of 1665, all non-commissioned captures belonged to the Lord High Admiral and were known as droits of the Admiralty. As a land force was not commissioned to engage in naval operations, a capture at sea by a land force (eg, by a canon shot from land) was considered a non-commissioned capture, the captured property was an Admiralty droit, and the land force had to be content to take its reward from the Admiralty and had no prize interest under any prize act or royal proclamation. However, maritime captures made by a mixed or conjoint naval and military force operating under special orders (as opposed to naval and military forces merely by chance having come together, or troops happening to be on board naval warships at the time of capture) were not included amongst droits of the Admiralty. And as they were not made by an exclusively naval force, they did not become a prize to the captors under the prize acts and proclamations. Rather, they were considered by the Admiralty Court as a prize or booty of war belonging to the Crown to be disposed of at pleasure, as in the case of booty captured by a land force alone. That was the position here, and one that the Crown fully appreciated, hence the special instructions issued as to the division of any prize proceeds.

a certain distance of the Cape, no attack was made on the settlement, but that the naval squadron, while the troops were on board, took enemy prizes in an open and unfortified bay – and hence, at sea – at a great distance from the destined object of attack.

Several legal processes preceded the litigation.

In June 1782 a suit was instituted by the Navy in the Admiralty Court. It claimed the sole interest in one of the prizes³¹⁰ under the [Dutch] Prize Act, 1781, and the proclamation made in terms of it, and prayed that the relevant Dutch ship and her cargo, having been taken by the naval squadron under Commodore Johnstone, be condemned as a lawful prize to the Crown.

On 4 September 1782, in the High Court of Admiralty, Sir James Marriot condemned the ship and cargo as lawful prize. However, he reserved the question of who were the captors on the ground that it could turn out that the Army was entitled (to share) under the secret instructions issued for the Cape expedition.

Later the High Court of Admiralty pronounced for the interest of the Army, in accordance with the spirit of the secret instructions, and decreed that the proceeds of the prize had to be distributed according to those instructions in equal shares.

Soon after the Admiralty Court's decree in September 1782, the prize agents, including John Pasley³¹¹ who had been appointed for the naval interests, caused the Dutch ship and her cargo to be sold. They received various large sums of money, part of which they distributed among the officers and crews of the ships in Johnstone's squadron. The residue remained in the hands of Pasley, to be distributed, according to him, in accordance with the [Dutch] Prize Act, 1781, and the proclamation. One of Johnstone's captains, Rodham Home of HMS *Romney*, Johnstone's flagship, actually sued Pasley in the King's Bench to recover damages from him for his refusal to pay him his share of the residue, a plea that was and remained pending there during the Admiralty proceedings described here.

Johnstone and the other naval officers and seamen in his squadron felt aggrieved by the decision of the Admiralty Court and appealed against its decree to the Court of the Lords Commissioners of Appeals from the Admiralty in Prize Causes.

On 30 June 1786, Lord Camden and two other of the Lords Commissioners considered the sole question, namely whether the Saldanha Bay capture came within the meaning of the [Dutch] Prize Act, 1781, or within the case alluded to by the secret instructions governing the Cape expedition. Their Lordships pronounced the captured ship and her cargo to have been taken "by the conjoint operation" of the naval ships employed on the expedition under the command of Johnstone, and of the Army under General Medows. They therefore condemned the jointly captured ship and the unclaimed part of her cargo "as lawful prize to the King", and not to either

310 Nominally the suit concerned only one of the captured vessels, namely the *Hoogkarspel*, and the litigation is occasionally referred to as that in *The Hoogkarspel*: see, eg, Anon 1848: 296-297.

311 It is not certain whether he was related to Capt (later Adm Sir) Thomas Pasley of HMS *Jupiter*: see again Van Niekerk 2015: at n 96.

or both of the captors. Its sentence was therefore clearly in opposition to the right claimed by the Navy: the prizes were governed by the secret instructions and not by the [Dutch] Prize Act, 1781.

Afterwards, on 3 May 1788, the Lords Commissioners issued a monition – the term for a citation or summons issued by a civil court, such as an Admiralty Court – to the naval prize agent Pasley to bring in an account of the sales of the prize property together with the proceeds of such part of it as might still be in his hands.

3 2 4 The Navy v the Army: The Navy seeks to prohibit the Lords Commissioners of Appeals in Prize Causes

The upshot of this legal maneuvering³¹² was that an application was made to the Court of Common Pleas in the name of Captain Rodham Home for a writ of prohibition to be issued against Earl Camden and the other Lords Commissioners to have their decision in the appeal from the Admiralty Court declared a nullity and so to prevent all further dealings in the Saldanha Bay prize proceeds.

In *Home v Earl Camden & Others*³¹³ the Navy, in the name of Home, prayed a prohibition on the ground that it had never been disputed that it belongs to the common-law courts at Westminster Hall to control the proceedings of all other courts, including the Admiralty Courts, if they transgressed the jurisdictional limits assigned to them.³¹⁴

The Navy argued that the Lords Commissioners of Appeals in Prize Causes did not by law have the authority to take money arising from the sale of prize property that had been finally adjudged to be lawful prize to the Crown in the Admiralty Court, out of the hands of any appointed (naval) agent and to compel the agent to bring it into court; it therefore could not prevent Rodham, and by implication the other naval claimants, from recovering from Pasley his share, or damages for the non-payment of his share.³¹⁵ Its contention in favour of an entitlement to a prohibition was that

312 There is a summary of the proceedings and sentences in the Admiralty Courts by Grose J at 401, 1086 in the King's Bench decision (n 330 below). Further detail will no doubt be found in NA, HCA 32/1835 part 1 (Prize Appeals: Ship: *Hoogsharpel*, master Hermeyer, Dutch, 1798); HCA 32/1835 part 2 (Prize Accounts for ships captured at Saldanha Bay, 1796); and HCA 32/1840 (Prize Appeals: *Hoogskarpel* (Harmeyer), 1795).

313 (1790) 1 H Bl 476, 126 ER 275 (CP); also reported in (1791) 2 *Lawyer's and Magistrate's Magazine* 241-256.

314 See at 515, 296.

315 Although the Navy admitted (at 515, 297) that the general question of whether a ship or goods taken at sea was a lawful prize or not, did not belong to common-law courts but solely to the Admiralty Court, the rights which an act of Parliament – here, specifically the [Dutch] Prize Act, 1781 – conferred in respect of a prize adjudicated by the Admiralty Court was the subject of an action at law and cognizable in the common-law courts. Here, it contended, the Navy had a right founded in the Prize Act and the Lords Commissioners were in the process of depriving it of that right or at least obstructing it in enforcing it.

it was the Navy alone that was entitled to the prizes. The Army was not entitled as it was present and on board the naval vessels only for the reduction of the Cape settlement and not for any other service in the course of the expedition that might be the peculiar and proper business of the naval ships, for instance the capturing of enemy ships and cargoes. The [Dutch] Prize Act, 1781, it argued, applied to captures made prior to any attack on the settlement and not the secret instructions that had been issued for the joint operation and that alone made provision for an equal division between the two forces.³¹⁶

The arguments raised by Lord Camden and the other Lords Commissioners against a prohibition were, first, that here the warships were not the sole captors; secondly, that the [Dutch] Prize Act, 1781, vested the right to a prize in naval ships only when they were the sole captors; and, thirdly, that the Prize Court had a general authority in all cases to distribute the shares of a prize and that the proposition was therefore untrue that they did not by law have the authority to take out of the hands of an agent the money arising from the sale of a prize, given that they did in fact have the right to order such proceeds to be brought into court.³¹⁷

After hearing the initial arguments, Lord Loughborough expressed the Court's desire to hear further arguments on specific points that remained unclear, including the scope of the jurisdiction of the Admiralty Court prior to and after the promulgation of the prize acts.³¹⁸

The Court then considered and responded to the three main arguments raised by the defendant Lords Commissioners³¹⁹ against issuing a prohibition.

316 For the Navy's arguments, see at 490-494, 283-285.

317 For these arguments, see at 484-490, 280-283 and 515, 297.

318 His Lordship explained (at 495-496, 285-286) that he had initially formed the opinion that as the ship and her cargo had been condemned a lawful prize, the [Dutch] Prize Act, 1781, applied so that it was a case of "an unlimited, universal grant of the interest of the crown to the navy". However, the sentence of the Lords Commissioners evidently meant that by reason of the joint operation of the Navy and the Army, the property of the prizes taken rested with neither but in the Crown. However, it was not quite clear whether, as the case stood on the record, the Lords Commissioners had exceeded their power in merely issuing a monition to the agent to bring in the proceeds, so as, at that stage of the proceedings, to afford a ground for a prohibition. Also unclear was whether, given that there were many claimants concerned in appointing the agent, a single claimant should be permitted to object to the agent giving an account of the sales and carrying in the proceeds. Also not settled was the question of what the jurisdiction of Admiralty Court was prior to the prize acts: only to decide whether a capture was legal or not, and not also to determine who was entitled to it (except, that is, to determine disputes between grantees of the Crown), given that the sole ownership of property taken by naval ships was in the Crown? The prize acts had apparently introduced new law: it had vested, by the force of a parliamentary grant, a title to all prizes taken at sea in the Navy. No jurisdiction existing in the Admiralty Court prior to the prize acts could therefore entitle that Court, having decided the issue of the lawfulness of a prize, to decide the question of the property in a prize contrary to terms of that Act.

319 See at 515, 297.

The Court rejected their first and second arguments, namely that the naval vessels were not the sole captors as the Saldanha Bay prizes were taken by a joint service, and that the Navy therefore did not obtain any rights under the [Dutch] Prize Act, 1781. It pointed out³²⁰ that it was not clear from the record that the Army had given any aid, or what aid it had given, in the capture of the enemy ships. The troops were present on board the ships not as soldiers but like passengers, and were not carrying out any operation under the command of their officers. On the facts it had to be assumed that the warships were the sole captors and that, as such, they were entitled to the prizes under the [Dutch] Prize Act, 1781. The Navy was therefore entitled to a prohibition if it could show an act done by the Lords Commissioners contrary to its right.

As to the third argument concerning the scope of the Admiralty Court's jurisdiction in prize matters, the Court thought³²¹ that the High Court of Admiralty had correctly assumed and based its decision on the notion that in the event of any co-operation by another force besides the warships, the matter fell entirely outside of the [Dutch] Prize Act, 1781. Hence it had declared the Saldanha Bay captures not merely lawful prize (to the undisputed captors), but also lawful prize to the Crown by royal prerogative, and accordingly at the Crown's disposal. In terms of the Prize Act, it explained, the naval officers and crew had the sole interest in a prize declared lawfully captured, because the effect of that Act was a parliamentary gift by the Crown of the interest it would have had, or had before, to the officers and crews of capturing warships. The Act operated to transfer the sole interest and property previously in the Crown. However, that only concerned prizes taken at sea. It could also cover certain instances of joint capture by warships and a foreign allied force, or a privateer or a non-commissioned ship. In all these cases, the property of what the warships took had uniformly and repeatedly been adjudged to the officers and crew of the warship: "[t]hey are solely entitled to what they take, not to what they solely take". Co-captors have the right in some cases for a *quantum meruit* for assistance they had given and in other cases they have been held to have a distinct and specific share in the capture. But in no case did that destroy the vested right which warships solely have in the capture they have made. If, say, a warship and a privateer effected a joint capture, both were solely entitled (to their respective shares) and it was not the case that the prize belonged to neither (but to the Crown) merely because of their joint capture.

In the present case, the Court explained,³²² there was a joint expedition by sea and land forces and a capture of enemy ships on (as was always supposed) the high seas. It was not a case of the reduction of a part of the enemy's territory where the property taken could be on land, or in port and where, because it could be difficult to

320 See at 516-517, 297-298.

321 See at 517-519, 298-299.

322 See at 519-520, 299.

determine which of the sea or land force contributed and to what extent, instructions were usually given for the distribution of such prize or booty as may be taken. However, such instructions never intended giving to any subject the prizes taken on the high seas by warships. A parliamentary grant (in terms of the Prize Act) could not be controlled by the effect of a grant under the King's sign manual (in terms of such instructions). The Crown had no property to grant by instructions as it had parted with it all in terms of the Prize Act. A marine prize – ships taken on the high seas, and not as booty as result of the reduction of a territory – was subject to the Prize Act and belonged solely to the warship.

Thus, the Court continued,³²³ while the co-operation of the Army could give it a right to share, that could not totally destroy or annul the right of the Navy. An interest in a prize taken at sea (and covered by the Prize Act) could be shared or distributed, but could not be taken away; an interest vested after the adjudication of a lawful prize, in consequence of a parliamentary grant (in the form of the Prize Act), could not be annulled or destroyed. It was not the case that warships had a vested right only if they were the sole captors and hence no such right where any assistance was given, but that where as captors they had a vested right, it was subject to such a claim for assistance as any other party could make. It did not appear that any assistance had been given by any other force so as to make it a joint operation. And an interpretation of the Admiralty Court's sentence did not contradict this.³²⁴

As to the Lords Commissioners' monition directed to the prize agent to bring in the residue of the prize proceeds in his hands, the Court explained³²⁵ that such a monition was a very usual one for an Admiralty Court, including the Court of Prize Appeals, to make where the subject of a suit was not deemed to be a legal prize and where it was accordingly not vested in the captors and restitution had to be made. However, here the prize had been declared lawful and a legal right had vested. The intention of the [Dutch] Prize Act, 1781, was obvious: if once a prize had been adjudged by the Admiralty Court, the distribution of the interest in that prize had to be managed as was the distribution of any other legal, vested right according to the laws of the land, namely by an action in a court of law. The clear direction of the Prize Act, it seemed to the Court,³²⁶ was that prize money had to remain in the hands of the prize agent, who was liable to the actions of those who had a legal right in it. And against the primary interest of those persons, the money was not to be taken out of the agent's hands by an order of the Admiralty Court.

323 See at 520-521, 299-300.

324 See at 521-522, 300. As adjudged by the Admiralty Court, the warships had reduced the prize and it was adjudged to have been lawfully taken by warships having military troops on board. As such the Army became entitled to come in for a participation under the Prize Act and the Proclamation, but that did not prevent a right from vesting in the Navy. The premise assumed by the sentence of the Admiralty Court did not appear to form any conclusion that the Navy was not entitled.

325 See at 522-523, 300-301.

326 See at 524-525, 301.

Thus, the Court concluded,³²⁷ if it were taken that according to the sentence of the Admiralty Court there was no vested right in the officers and crew of the warships, nor any in the Army, but only in Crown in its prerogative, the Crown could dispose of that interest to such uses as it thought fit. The monition it issued was perfectly consistent with such a construction. However, it was inconsistent with the well-founded notion that under the Prize Act, after the adjudication of a lawful prize, the plaintiff here and all other officers and crews of the warships involved had a vested legal right. Then the effect of the monition was directly in prejudice of the right of action of all others concerned and it interfered with the legal duty imposed on the agent in the case of captures at sea. The earlier proceedings in the Admiralty Courts prevented the plaintiff and other naval claimants from recovering a legal, vested right and subjected all others interested in the actions of the agents³²⁸ to the decision of the Admiralty Court. In contrast, the Court's construction of the Prize Act was that all those rights had to be enforced in common-law courts and did not belong to prize courts.

Therefore, upon the face of his declaration, the plaintiff Home and hence the Navy had a legal, vested right in the subject of the Lords Commissioners' monition, and an Admiralty Court could not deprive him of that right, could not do anything prejudicial to that right, and could not prevent or obstruct the plaintiff in the recovery of that right.

Therefore, on 23 June 1790, the Court of Common Pleas gave judgment for the plaintiff in prohibition to the Court of the Lords Commissioners of Prize Appeals because its monition was contrary to the legal, vested right of the officers and crews of the squadron.³²⁹

3 2 5 The Navy v the Army: The Lords Commissioners of Appeals in Prize Causes go on appeal

Not surprisingly, the Lords Commissioners of Appeals in Prize Causes were not happy with this curtailment of their jurisdiction and went on appeal to the King's Bench.

In *Lord Camden & Others v Home*³³⁰ the judgment below was reversed on 11 November 1791.³³¹

The King's Bench held that, notwithstanding any of prize acts, the Prize Court – the Admiralty Court exercising its prize jurisdiction – and the Lords Commissioners

327 See at 525-526, 301-302.

328 Including the Greenwich Hospital which was entitled to its share of the naval capture: see, further, n 347 below.

329 See at 526, 302.

330 (1791) 4 TR 382, 100 ER 1076 (KB).

331 See at 384, 1077 for the arguments against a prohibition, and at 389, 1080 for the arguments in favour of a prohibition.

of Prize Appeals had sole and exclusive jurisdiction over questions of prize and its incidents, that is, the question whether there was or was not a lawful prize and also the question of who were the captors. If it pronounced a sentence of condemnation, adjudging also who were the captors, the common-law courts could not examine the justice or propriety of its sentence, even though they would perhaps have put a different construction on the prize acts. Likewise, those courts had the power to enforce their decrees. Accordingly, the King's Bench refused to grant a prohibition where the Lords Commissioners had after a sentence issued a monition to a navy agent, employed by persons supposed to be entitled to the prize, requiring him to bring the proceeds of the prize into court to be distributed among persons declared entitled to it by their sentence.

The gist of the several judgments delivered in the King's Bench may be considered very briefly.³³²

As to the scope of the jurisdiction of Admiralty Courts in prize matters, the Court was clear that prize courts alone had jurisdiction over and were the sole judges of questions of prize. That included not only the question of whether or not a prize was lawful, but also that of the identity of the captors of the prizes they were called to adjudicate upon. Likewise, the manner in which prize proceeds were to be divided among those who were declared to be captors, had to be determined by those courts.³³³ And, even more broadly, they also had such jurisdiction over all matters that arose incidentally in construing statutes or proclamations – such as the prize acts – in order to form an opinion on any of these questions of prize.

332 Lord Kenyon CJ at 393-395, 1082-1083; Ashhurst J at 395-396, 1083; Buller J at 396-400, 1083-1085; Grose J at 400-401, 1085-1086.

333 Some years before, in *Parker v Toulmin* (1786) 1 Cox 264, 29 ER 1159, the question of which court had jurisdiction over the distribution of a prize had arisen in the Court of Equity, sitting at Lincoln Inn Hall, before Sir Lloyd Kenyon MR. A claim had been brought by the executors of the late Sir Hyde Parker against Toulmin (the son of a prize agent) for his one-eighth share in the proceeds from two Dutch vessels captured as prizes during the Anglo-Dutch War. The question was whether the capturing sloop, having been ordered around from Portsmouth to Dublin on a special assignment, was, at the time of the capture, one of the squadron under the flag of Parker, commanding at Portsmouth. Parker argued that the question of the lawfulness or otherwise of a capture unquestionably belonged exclusively to the Prize Court. However, once condemned, common-law courts had concurrent jurisdiction with prize courts in determining the distribution of the shares in prize proceeds in terms of applicable statutes and proclamations. He referred, *inter alia*, to a positive opinion to that effect of Lord Mansfield in *Sutton v Johnstone*. Toulmin thought the cases referred to were distinguishable as they related merely to the distribution of prize money amongst individuals of a ship to which the prize had been condemned, whereas here it was necessary that the prize should be condemned to the capturing sloop “as one of the squadron” under Parker before he could be entitled to his one-eighth. Prize courts, he thought, had exclusive jurisdiction over the question prize or no prize, as well as all its consequences. The Court thought there was great weight in Toulmin's distinction, but would not determine this doubtful question, and merely granted the parties leave to proceed in a court of law if they thought fit.

This being so, there could be no objection to, nor interference by a common-law court with, the Lords Commissioners' sentence itself. Here they interpreted the [Dutch] Prize Act, 1781, and concluded that the case did not come within it.³³⁴ That decision was unchallengeable, even if a common-law court thought it an incorrect interpretation of the legislation.³³⁵

The underlying decision was that this was a joint capture by the Navy and the Army and that the prize taken was a good and lawful prize to the Crown. In consequence, persons claiming under the Prize Act had no right; it was not a case provided for by the Act but one falling within the secret instructions. The sentence was therefore clearly in opposition to the right claimed by the Navy. The decision that it was an instance of a joint capture by the Navy and the Army was one on the facts. That result, too, was unchallengeable, even if a common-law court thought it was an incorrect conclusion on the facts.³³⁶

If the Lords Commissioners had jurisdiction, even if they had made a mistake in their judgment, no grounds for prohibition existed, but at most a ground for appeal.³³⁷

There could likewise be no objection that by issuing the monition, the Prize Court had exceeded its jurisdiction as it was a necessary consequence of the earlier sentence. A prize court had the power to enforce its decrees. The only possible objection was that it had erroneously granted a monition to a person in possession of the proceeds to bring them into court to answer the several claims that could be made; the objection was that the monition was wrong because the proceeds of the prize were already in the hands of a duly appointed naval agent. Indeed, if the naval officers were the only persons entitled to the prize proceeds, this objection would have had considerable force. But it appeared from the sentence of the Lords Commissioners that other persons were interested besides those by whom the agent had been appointed. Being a joint capture, the Army was equally entitled to appoint an agent or to concur in the appointment of one; the Navy was not entitled to the whole of the proceeds and it could not contend that its agent ought to be entrusted with all the proceeds of the prizes. Therefore there was no reason why the proceeds should not be taken out of the possession of the naval agent and put under control of

334 Even if it did, the Crown had the right under the Prize Act to distribute captured prizes in such proportions as it may declare by proclamation. Here it declared in secret instructions, which had the effect of a proclamation, that in the event of a joint capture by the Navy and the Army the prizes taken by them should be distributed in a manner different from that insisted on by the Navy.

335 The King's Bench did not think so. The Prize Act attached only to captures by ships. All its provisions concerned captures of that description and they did not extend to joint captures by the Navy and the Army. That may well have been an omission, but the position was nevertheless clear.

336 Whether the capture here was one by the Navy only, or a joint capture by the Navy and the Army, was a question of fact, of which prize courts were the proper judges; their conclusion could not be contested.

337 The ground upon which the Court of Common Pleas had proceeded was that it thought the Lords Commissioners had misconstrued the Prize Act, and for that reason it granted a prohibition. However a common-law court could in the view of the King's Bench not examine that question.

those who would take care of the interests of all the parties concerned. Prize courts were trustees for both the Navy and the Army and it was proper, for the interest of all, that the proceeds should be brought into court until the several claims could be adjusted.

Accordingly the monition to bring the proceeds into court had been properly issued, was not in excess of the Prize Court's jurisdiction, and therefore a prohibition ought to be refused in this case. The King's Bench therefore reversed the judgment of the Court of Common Pleas below that had granted a prohibition.

3 2 6 The Navy v the Army: The Navy goes to the House of Lords

Aggrieved by the decision of the King's Bench, which had in effect obliged their agent, Pasley, to give an account of the proceeds of the Saldanha Bay prizes and to bring the remainder into court and under control of the Prize Court for distribution to the Army too, the Navy took the matter to the House of Lords.

In *Home v Earl Camden & Others*³³⁸ the question posed to the judges was whether the Navy's declaration founding its appeal was sufficient in law to bar the Lords Commissioners from proceeding against naval agent Pasley to compel him to bring in the proceeds of the sale of the Saldanha Bay prizes. It held in the negative.

On 22 June 1795 the House of Lords accordingly affirmed the judgment of the Court of King's Bench that had refused a prohibition, albeit not on the same considerations. It focused, rather, on the requirements for a prohibition to be issued.

First, it observed that a clear ground of prohibition was that a court had exceeded its jurisdiction. An essential part of the jurisdiction of a prize court was that it has power and jurisdiction to ensure that the proceeds of a lawfully declared prize came into the hands of those it had declared entitled to it as captors. It was not true that after its sentence, a prize court becomes *functus officio* and that anything it subsequently did would exceed its jurisdiction. In short, the monition here was not issued in excess of its jurisdiction.

Less clear, though, was whether an injustice to a litigant, while proceeding within its jurisdiction, by refusing the litigant a benefit allowed by the common law or a statute, was a matter for prohibition (so that the law could be uniformly interpreted in all courts) or for appeal (on the basis that it was rather a matter of error). But the House then did not answer the question whether the injustice here, allegedly because of a misinterpretation of a statute (the Prize Act) by an inferior court (the Prize Court),³³⁹ the consideration of which arose incidentally in the course of proceeding which were admittedly within its jurisdiction (prize proceedings), could be a ground

338 (1795) 6 Bro PC 203, 2 ER 1028 (HL) (which contains a record of the earlier proceedings in the Court of Common Pleas and the arguments in the House) and (1795) 2 H Bl 533, 126 ER 687 (HL) (which contains the judgment of the House).

for prohibition, or whether it was not rather a matter of appeal. It thought that clearly in such a case a prohibition will not lie, unless it was made apparent to the superior court that the party applying for the prohibition (the Navy) had in the course of the proceedings in the inferior court alleged grounds for a contrary interpretation of the statute on which it applies for a prohibition and that the inferior court had proceeded notwithstanding such allegation. And here that was not made apparent.³⁴⁰

Secondly, and more directly concerned with prize law, the House of Lords thought that prior to the ultimate adjudication by a prize court, no right vested by any of the prize acts in the captor of an enemy ship and cargo during war. Pending final adjudication, the ship and goods remained in the custody and protection of the prize court, in the interest of all those concerned in the capture.³⁴¹ It was simply inconsistent with the plan of the prize acts that interest and property can vest in the captors at any time before the final adjudication in a prize court of appeal.³⁴²

Therefore, the Court of the Lords Commissioners of Appeals in Prize Causes' issuing of a monition to prize agents to bring in the proceeds of a ship and her cargo which had been sold after a sentence of condemnation as a lawful prize, but from which sentence there was an appeal (on a subject distinct from the question whether

339 The basis of the Navy's application for a prohibition to restrain the Prize Court from issuing process was a supposed contravention of the prize acts then in force, which it had misinterpreted. But the Navy had not established that the Prize Court had contravened the prize acts, either directly or indirectly or by misinterpreting them.

340 Put differently, even if the Navy had established that the Prize Court had misinterpreted the Prize Act – which it arguably had not done – it would have had to show that it had argued for an alternative interpretation before the Prize Court which the latter had rejected. And that it had not done.

341 Thus, if it was correct that no interest or property vested in the Navy as captor until the final adjudication by the Lords Commissioners, it followed that the naval agent Pasley's proceeding to sell and distribute part of the proceeds after the sentence in the Admiralty Court must have been without authority or at least not under the authority of the Prize Court. If under its authority by common assent and practice, then the agent at least remained accountable to that Court. Although an agent may be appointed before, he has strictly speaking nothing to do until after the final adjudication.

342 Throughout the litigation, it was agreed that the [Dutch] Prize Act, 1781, involved a parliamentary grant by the Crown to the captors of its interest in captures made by the warships. The Navy had the sole interest and property in prizes so captured. It was not clearly stated when this sole interest and property vested, the only reference being to property "finally adjudged lawful prize to his majesty". There was no definite point, but it lay somewhere between the original sentence of condemnation in the Prize Court in which the ship was first libelled, and the final sentence of condemnation in the Court of Appeal in Prize Causes. Disputes by joint captors could be raised only after the initial condemnation as a lawful prize. The effect of an appeal was to suspend the force of the sentence, not necessarily delaying or staying an execution. But from the moment of an appeal being interposed, the sentence was no longer final but liable to be reversed in part or in whole. Vesting clearly cannot be as soon as a prize had been declared lawful but while the court reserved the issue of who was the captor. And even if the sentence declared the prize lawful and determined who the captor was, vesting was possible only if there was no appeal.

there was a prize or not, which, it was not disputed, was the case here), was not ground for a prohibition to be issued to that Court. The monition, after all, neither interfered with nor defeated any vested rights.

Further, here the Navy had based its appeal on its position as sole captor and only beneficiary of the prize proceeds under the Prize Act. But this was directly contrary to the Prize Court's sentence of condemnation, which could not be contested in a common-law court, and was therefore inadmissible, ill pleaded and rejectable. The same went for its allegation that under the Prize Act navy agents had the entire disposition of a prize. If the Navy were not the sole captor, or not a captor at all, it could not have the only, or any, claim to the prize proceeds.

But who were the captors here? That was determinable from the Prize Court's sentence (and not from the Navy's declaration) as it was a "matter of adjudication by a court of exclusive jurisdiction".³⁴³ Clearly the sentence was not an adjudication that the Navy was the sole captor of the Dutch ships. It may be that the Navy was a joint captor (but that was irrelevant and of no assistance in this cause) for even as a joint captor the Navy could never have the sole interest and property in the prizes and a navy agent could not have sole control of the proceeds. The prize acts have simply not provided for cases of joint captures, and in any event apply only to purely naval captures. It was perfectly impossible to found a right of sole agency upon a joint capture; and impossible to frame a joint agency under the prize acts which could be effectual.

In consequence, the Lords Commissioners' monition had to issue of necessity to execute its sentence, in so far as it determined that the Navy was a joint, or at least not the sole, captor.

In passing, the House, *per* Eyre J CJ, made an interesting and telling observation.³⁴⁴ It had become apparent during the course of argument that it was the sentence of the Lords Commissioners of Prize Appeals, and not their monition, which was the real cause for complaint in this matter. The Navy's complaint in the common-law courts was not that the sentence was wrong, "which indeed the temporal court had no jurisdiction to correct if it were wrong", nor indeed that the sentence was in excess of its jurisdiction or any other ground for prohibiting the Prize Court to carry it into execution. Its complaint was that the Lords Commissioners could not take the prize proceeds out of the navy agent's hands, and that was untenable.

In short, the Navy should, but could not, have appealed the decision of the Lords Commissioners holding that it was a joint, and therefore not the sole, captor. Instead its only option, to contest that body's jurisdiction in the common-law courts, was, after litigation lasting thirteen years,³⁴⁵ doomed to failure.

343 See at 545, 693-694.

344 See (1795) 6 Bro PC 203, 2 ER 1028 (HL) at 204, 1029; and (1795) 2 H Bl 533, 126 ER 687 (HL) at 546, 694.

345 From Jun 1782 to Jun 1795.

The prize proceeds derived from the Saldanha Bay prizes were shared between the Navy and the Army, as provided for in the royal instructions issued for the Cape expedition.

A royal warrant of 20 May 1796 to the registrar of the Court of Appeals for Prize Causes directed that the proceeds of the Saldanha Bay prizes had to be divided between the Navy and the Army employed by that expedition.³⁴⁶

The Army got its share³⁴⁷ and the appropriate notices were given by the Army Agent for the Saldanha Bay Prize Money for the payment of individual shares.³⁴⁸ The initial division of prize proceeds by the naval agent to the Navy only,³⁴⁹ had to be revised. Appropriate notices were given.³⁵⁰

The principle established by the *Hoogkarspel* litigation was followed in later decisions:³⁵¹ captures made by a conjunct naval and military expedition, although still within the jurisdiction of prize courts for purposes of condemnation, fell outside

346 See *Lumley v Sutton* at n 362 below.

347 Just as the Greenwich Hospital was entitled to a share in all naval prizes (Anon 1848: 297), so was the Royal Hospital in Chelsea entitled to share in military booty and prizes, including the Army's share of the Saldanha Bay prizes: see further NA, WO 164/480 (Saldanha Bay, 1781, Royal Hospital Chelsea: Prize Records). The various payments to the military regiments involved are reflected in WO 164/22-29 and /479 (Saldanha Bay, 1781 (Dutch East India ships captured)).

348 Thus, in (14-18 Jun 1796) no 13902, *London Gazette* at 583, notice was given that the Crown had directed that money arising from sale of the Saldanha Bay prizes should be divided between the land forces under command of Genl Medows and the sea forces under the late Commodore Johnstone, who were present at their capture on 21 Jul 1781, according to the numbers mustered in each service. The agent for the Army indicated that he would immediately proceed to make a distribution of the greatest part of the sum in his hands, and that he intended to make a second payment from the remainder and the interest that may be recovered. He accordingly gave notice that he would pay a proportion of that prize money, equal to one years' pay for each rank, in pursuance of the royal instructions, at the places and times and in the order specified in the notice.

349 See again at n 311 above. As alluded to earlier, such division and payment prior to the final adjudication was probably unauthorised: see n 341 above.

350 Thus, in (19-23 Jul 1796) no 13914 *London Gazette* at 705, notice was given that the Crown had directed that the money arising from the sale of the Saldanha Bay prizes, captured in there on 21 Jul 1781 by a squadron under Commodore Johnstone and finally adjudged by the House of Lord to the Crown "*Jure Coronae*", should be divided between the said squadron and the Army under Genl Medows, according to the numbers mustered in each service, deducting from the share of the said squadron the sum of £68 000 received by their agents for distribution in the year 1785. Notice was given to captains, officers and seamen actually on board the squadron under Johnstone on 21 Jul 1781, that their respective shares of the remainder of the sum granted them by the Crown would be paid to them, or their attorney, by John Pasley, the surviving agent for that squadron, at places and on dates specified in the notice.

351 See, eg, the case arising from the capture of French ships at the surrender of Mauritius in 1810 to Adm Bertie and Genl Abercrombie (*La Bellone* (1818) 2 Dods 343, 165 ER 1508), and the case of booty arising from the surrender of Genoa to combined sea and land forces under Adm Pellew and Genl Bentinck (*Genoa & Dependencies, In re Greenwich Hospital Claim* (1820) 2 Dods 444, 165 ER 1541).

the prize acts which were concerned only with maritime captures by purely naval forces; they did not belong to or enure to the benefit of either or both of the captor forces, but was prize or booty solely at the disposition of the Crown.³⁵²

But, of course, it applied only to conjoint forces, and hence the Army's mere presence at a sea battle without any contribution of actual and material assistance did not entitle it to a share in the prizes taken by the Navy, as subsequently happened in Saldanha Bay in 1796.³⁵³

3 2 7 A seaman's claim for his share of the Saldanha Bay prize proceeds

It was not only the Navy itself that turned to the courts to claim its share of the Saldanha Bay prize proceeds. Ordinary seamen, too, were compelled to litigate to obtain their share of the Navy's share.

On the Cape expedition, one Macdonald was a sailor on board HMS *Romney*, Johnstone's flagship under the command of Captain Rodham Home. In November 1789, already some eight years after the captures at Saldanha Bay, he issued a note giving authority to one Abraham Joseph or the latter's order to receive, from the vessel's prize agent, his share of the prize money allocated to the *Romney* for the prizes captured by the fleet under Johnstone. Such notes served to authorise third parties to receive (at a future date) a sailor's wages or his share of the prize money in exchange for the (immediate) payment of a (lesser) consideration. The agent in question was none other than John Pasley.

The prize money – payable to Macdonald in four instalments, namely £3 4s, 4s, £2 15s 6d, and £3 2s 6d – had been paid to one Grant as the indorsee of this note, except for the first instalment. In *Macdonald v Pasley*³⁵⁴ Macdonald sued Pasley for the full amount while Grant at same time claimed the still unpaid £3 4s as being due to himself.

Macdonald's argument, in short, was that payments to Grant could not discharge Pasley since the note and power of attorney on which they had been made did not comply with the directions of statutes passed to protect sailors and marines "from imposition".³⁵⁵ His note was altogether "a less solemn instrument". Pasley simply replied that he was ready to pay into court the £3 4s for the benefit of those to whom it belonged and he requested that all further proceedings on the action should be stayed.

352 See again Anon 1848: 296-297, 319-322.

353 See *The Dordrecht* (1799) 2 C Rob 55, 165 ER 237 and, generally, Van Niekerk 2005.

354 (1797) 1 Bos & Pul 161, 126 ER 386 (Ct of CP).

355 Namely, *inter alia*, that the note had to be revocable, signed and attested before the captain or another naval official, and had to identify the (residence and profession of the) person in whose favour it had been made.

Eyre CJ dismissed the summary claim on a technicality. The problem here was that Macdonald did not merely claim the £3 4s, but the full amount. His contention, it seemed, was that all the money Pasley had paid to Grant had been paid wrongly. It seemed likely that by prescribing the nature of the power of authority under which such payments could be made, the Legislature had intended “that the agent should not be discharged by any thing less than a power of attorney”. But here the Court could not interfere and grant the summary claim as Pasley’s defence was not appropriate to the claim.

The decision illustrates the unsatisfactory and dilatory way in which prize money was paid. Some sixteen years after the prizes were taken, the final payment of prize shares was still litigated and even then not finalised.³⁵⁶

3 2 8 Sutton and Lumley contest a captain’s share of the Saldanha Bay prize proceeds

Although Captain Evelyn Sutton was cleared by his court martial in December 1783,³⁵⁷ he ultimately failed in his claim to recover damages from his former commander Johnstone when the House of Lords ruled in the latter’s favour in May 1787.³⁵⁸

However, he had a further ball in his cannon: a claim against his successor on the *Isis*, Thomas Lumley, for the captain’s share of the Saldanha Bay prizes.³⁵⁹

It will be remembered that after the battle of Porto Praya, Johnstone had on 21 April 1781 suspended Sutton, had him kept under arrest on the *Isis* and appointed the Hon Thomas Lumley, commander of the *Oporto*, in his place as captain until Sutton could be court-martialled. In 1785, Lady Scarborough, the administratrix of the late Captain Lumley,³⁶⁰ brought an action for his share of the prize money against the relevant prize agents in the Chancery Court. Matters remained unresolved there, but on the interpleader filed by the prize agents concerned, the Court directed that an action should be brought to determine which of Lumley’s representatives or Sutton was in law entitled to the share.³⁶¹

356 See, further, Cooper 1922: 37.

357 See Van Niekerk 2015: par 3 1 2.

358 See *idem*: par 3 1 6.

359 There is a reference to this litigation in the Exchequer Chamber’s judgment in *Sutton v Johnstone* (see *idem*: n 214). Although Sutton had claimed damages from Johnstone also for having lost his right to a share in the Saldanha Bay prize proceeds, the Court there chose not to give an opinion on whether Sutton had established his loss as the right to the prize money was still in litigation between him and others not party before it.

360 Lumley had died in action in the East Indies in Sep 1782.

361 This is mentioned in *Lumley v Sutton* at 225-226, 1359, referring to her Ladyship as since deceased.

A special case was reserved for opinion of the Court of the King's Bench and in *Lumley v Sutton*³⁶² therefore, the issue was whether Lumley or Sutton was entitled to the captain's share of the prize money awarded to the *Isis*, an amount of £1416 13s 4d.

Further relevant to the issue before the Court was the fact that in terms of the Royal Proclamation of 27 December 1780, all captured and condemned prizes had to be distributed among the captors "for the entire benefit and encouragement of our flag-officers, captains, commanders, and other commissioned officers in our pay; and of the seamen, marines, and soldiers on board our said ships and vessels at the time of the capture". For this purpose, the commanders of ships involved in captures had to transmit to the Commissioners of the Navy a list of the names of all officers, seamen and others who were actually on board at the time of an enemy capture. Captain Lumley had transmitted "a book or prize list" to the Commissioners of the Navy, signed by himself as "acting captain". This list contained the names and quality of all the crew on board the *Isis* at the time of the Saldanha Bay capture. The list itself did not contain Lumley's name, but that of Sutton was included as "captain". This information was to some extent contradicted by entries in other lists pertaining to the *Isis*.³⁶³ Further, Sutton's suspension was with full pay³⁶⁴ and neither Lumley nor his representative ever received any additional pay for his services on board the higher-rated *Isis*, which lasted until he was succeeded, and the suspended Sutton was superseded, by another commander on 2 June 1782. The argument on behalf of Lumley was that Sutton was suspended and not the commanding officer or captain of the *Isis*, managing her at the time of the capture. His merely being on board at the time was insufficient; one had to actually be acting as captain as well. He was therefore not entitled to a share of the prize money. At the time of the capture Lumley was actually in command and fully responsible and he was the one entitled to the benefits that belonged to that position, even if he had no actual commission then. His position depended on the Proclamation, not on any returns made to the Navy. Further, Lumley could not claim any share of the prize as captain of the *Oporto* as he was not actually on board her at the time of the capture, and it would be unfair if he were not entitled to share as captain of the *Isis* for then he would loose out on the prize money altogether.³⁶⁵

362 (1799) 8 TR 223, 101 ER 1357 (KB). See, further, Prendergast 1852: 304-305. The Lumley here was the Hon SH Lumley, the Hon Capt Thomas Lumley's administrator *de bonis non*.

363 In her pay book, signed by the commander who had succeeded Lumley, Sutton's name was included as the captain of the *Isis* from 28 Aug 1780 until 2 Jun 1782, during which time Lumley's name was in the list of supernumeraries for wages and victuals and after which time, from 2 Jun until 3 Sep 1782, Lumley was entered as captain. Similar entries were made in the muster book of the *Isis* delivered to Commissioners and also in the purser's muster book.

364 He received his pay as captain of the *Isis* from the date of his commission until the day of his court-martial acquittal, 11 Dec 1783, and had the usual allowances for servants during that period as captain of the *Isis*.

365 The point was furthermore made that the principle on which *Johnstone v Margetson* had been decided (see par 3 2 2 above) was also applicable here.

Sutton, again, contended that he met every description of the person entitled to the prize money. At the time of the capture, he was (still) captain of the *Isis* and, as confirmed by the returns Lumley had made, the commissioned (his commission was only revoked subsequently) officer in the pay of the naval service. Also, he was on board, even if arrested and suspended. The effect of his suspension, which fell short of his removal, from office, could not deprive him of the advantages belonging to the position as captain, especially given that he was afterwards acquitted by a court martial. As for Lumley, his position was the same as that of a passenger on board and he was merely entitled as such to a smaller share.

On 23 April 1799, the Court of King's Bench determined that the captain of a ship, actually on board at the time of the capture, was entitled to the prize money, even though he was under arrest at the time and even though another officer had been sent to command the ship. The Court accordingly directed that the fund, held by the prize agents, be transferred to Sutton.

At the outset the Court³⁶⁶ made it clear that it was not relevant to its decision which of Lumley or Sutton was more worthy to receive the prize money in dispute; they were both officers of great merit and distinction and Sutton had indeed been honourably acquitted by his court martial.

Relevant was the description in the applicable Proclamation of those entitled to claim a share of a prize. And, on the facts, Sutton qualified in every respect with the description of the person entitled to share in the prize money as a captain: he was the captain in naval pay of, and on board, the *Isis* at the time of the capture.

From the relevant description it appeared that a claim to prize money did not depend on the actual exertions of the captor. It could not be argued that every temporary absence of the captain from the deck – for instance for illness or disability or, as here, arrest – would deprive him of the profits of a captor. Here, at the time of the capture, Sutton had been suspended, but not yet superseded or absolutely dismissed from his ship. All the evidence showed that he was, and had remained, the rated captain of the *Isis*, and he was actually on board, even if not on deck giving orders, at the relevant time.³⁶⁷ He remained entitled to his pay as captain during his arrest, and he must therefore also have continued to be entitled to all other benefits and emoluments of that rank, even though he may have had no opportunity of exercising his power.

³⁶⁶ *Per* Lord Kenyon CJ at 228-230, 1360-1361; Grose J at 230, 1361; Lawrence J at 230, 1361.

³⁶⁷ The Court distinguished *Wemys v Linzee & Another* (1780) 1 Dougl 324, 99 ER 209. There the captain of marines, who happened to be onboard a warship when she took a prize but did not belong to her compliment, was held entitled to share only as a passenger. Lord Mansfield thought (at 327, 211) that being “on board” meant belonging to the ship; being accidentally or physically on board was not sufficient. The action there was against Linzee, one of two defendant prize agents, and concerned a prize captured by the warship *Surprize* under Capt George Linzee, his brother. By some quirk of historical fate, the person Johnstone appointed in the place of Lumley as commander of the *Oporto* was the very same George Linzee (on occasion also referred to as Lindsay).

As for Lumley, during the period of Sutton's suspension, he was always identified and considered himself as a mere supernumerary, acting captain, and was as such not entitled to all the advantages to which the actual captain of a ship was entitled.³⁶⁸

It appears that the Court's sympathy lay with Sutton. It thought that even though the hardship of the case was not a factor to be considered, nevertheless, having been honourably acquitted by his court martial – and, having been unable to recover damages from Johnstone – it would be “most unjust” to deprive Sutton of his share of the prize money.³⁶⁹

3 2 9 Sutton's further and final claim for other shares received by Lumley

Still Sutton continued his quest for a further share of the Saldanha Bay prize money. This time it was the prize money for the capture of the *Held Woltemade* and the insurance payout for the two prizes that had been lost en route back to England. The proceeds from this prize and the insurance monies had been paid by the appointed prize agent to Lumley or his legal representative in his capacity as commander of the *Isis*.

In *Sutton v Earl of Scarborough*,³⁷⁰ then, Sutton claimed the amounts involved, and some others,³⁷¹ from Lumley's personal representative, the Earl of Scarborough.³⁷²

The latter's plea was based on the Statute of Limitations. If Sutton did have any cause of action, that had accrued more than six years before he had served process.

On 29 July 1803 the Court³⁷³ overruled Sutton's objections as to its form, and held that the defendant's plea was good.

Thus ended³⁷⁴ the litigation concerning the Saldanha Bay prize proceeds, some twenty-two years after the capture of the Dutch prizes there. Appropriately it ended

368 In *Waterhouse v King* (1802) 2 East 507, 102 ER 463 at 521, 469, Lawrence J distinguished *Lumley v Sutton* as Lumley was (not commissioned as a second commander but) clearly a supernumerary or occasional officer, neither rated, paid nor returned as captain of the ship nor had any allowance of servants (see also at 522, 469 *per* Le Blanc J).

369 See also Anon 1848: 328-329 who has it that Lumley was entitled only to the share of a supernumerary.

370 (1803) 9 Ves Jun 71, 32 ER 528. See also the earlier proceedings in *Sutton v Earl of Scarborough* (1789) 2 Ves Jun Suppl 145, 34 ER 1031. It must be assumed that the ship called the *Helivelmont* (!) in the judgment refers to the *Held Woltemade*.

371 In Feb 1782, the *Isis* and some other ships captured the French ship *Laureston* and again the proceeds of this capture were distributed and a considerable sum paid by the prize agent to or on account of Lumley as the captain of the *Isis*.

372 See at n 360 above for Lady Scarborough's earlier involvement in Lumley's affairs. It appears from the judgment that the decision in *Lumley v Sutton*, calling money out of the hands of the general prize agents, did not mean that if money was in the hands of Capt Lumley or his agents, that would likewise have been taken from them. Thus, the earlier decision entitling Sutton was effective only as regards money not yet paid over to Lumley but still in the hands of prize agents.

373 *Per* Eldon LC at 75-76, 529-530.

374 Or maybe not: there is mention in *Sutton v Earl of Scarborough* of another suit being pending, but I could find no trace of it in the law reports.

because of the passage of an extended period of time. And one cannot help but feeling some satisfaction on behalf of the late Captain Lumley, who through no fault of his own, would otherwise have lost out quite badly.

3 3 Legal consequences at the Cape

3 3 1 Introduction

As recounted earlier,³⁷⁵ the commanders of the Dutch Indiamen captured by the British in Saldanha Bay – Gerrit Harmeier of the *Hoogkarspel*, who was also the flag officer of the return fleet, Alex Landt of the *Honkoop*, Dirk Corneliszoon Plokker of the *Paarl*, and Hendrik Steedsel of the *Dankbaarheid* – and of the one that had been destroyed there before she could be captured – Justus van Gennep of the *Middelburg* – arrived back in Cape Town where they tried to explain to the local authorities what had happened. However, they, like the governor, came in for severe criticism from the Company structures in both Batavia and the Netherlands.

Their conduct was immediately condemned. It was thought that they had been surprised by the enemy through their own neglect³⁷⁶ and had failed to obey their orders to destroy their vessels or at least render them unnavigable rather than letting them fall into enemy hands. Clearly they would have to face some disciplinary and possibly criminal sanction.³⁷⁷

The Lords Seventeen in Amsterdam, who could not from reports determine in what manner and to what extent the commanders had failed in their duties,³⁷⁸ merely expressed the hope that the investigation the Cape authorities had ordered from the fiscal, would be conducted with the necessary rigour, given that in these matters neglect could amount to a criminal offence.³⁷⁹

375 Van Niekerk 2015: 420–421.

376 See Jeffreys *Kaapse Archiefstukken 1782 Deel 2*: 174–175 (Incoming Secret Letters, letter from the Lords Seventeen, dated 2 Nov 1781, received at the Cape 6 May 1782, referring to the fact that “zich door een schandelyk versuijm hebben laten verrasschen”).

377 *Idem 1783 Deel 1*: 354 (Incoming Letters, letter from the Council in Batavia, dated 18 Oct 1782, received at the Cape 23 Feb 1783, referring to possible action concerning “de fataliteit” by the Lords Seventeen “tegens de scheeps overheeden over pligt versuim”).

378 *Idem 1783 Deel 1*: 391–393 (Incoming Letters, letter from the Lords Seventeen, dated 7 Dec 1782, received at the Cape 8 Aug 1783, expressing uncertainty about whether those in charge of the ships had “hun pligt hebben betracht of zij aan uwe order hebben voldaan, off zij in staat zijn geweest, om zich tegens den Vijand te verweeren, en of zoo zij door overmagt tot het verlaaten hunner Scheepen zijn gedwongen, zij geen meerder zorg hadden kunnen draagen, dat de Vijand van die kostbaare Bodems en ladingen geen genot had”).

379 *Idem 1783 Deel 1*: 391–393 (Incoming Letters, letter from the Lords Seventeen, dated 7 Dec 1782, received at the Cape 8 Aug 1783: “zal na alle rigeur zijn gedaan, terwijl in zaaken van dien aart onachtzaamheid zelfs een misdaad is”).

An idea of the gravity of such offences may be gathered from an instruction, issued during the Fourth Anglo-Dutch War by the Lords Seventeen and sent to the Cape to provide for the reward and encouragement of those engaged in enemy action.³⁸⁰ Various rewards were promised³⁸¹ but severe penalties, including death, were also prescribed for those who failed in their duty: “alle trouwloosheeden, lafhartigheeden, of wandevoiren, na vereisch van zaken en goede Krygstugt, zelfs met de dood door hen by vonnis van een Krygsraad zullen worden gestraft.”

3 3 2 The criminal investigation at the Cape

The local government at the Cape had indeed taken immediate steps to have the captains' conduct prior to and during the battle of Saldanha Bay on 21 July 1781 investigated.

On 3 August 1781, the Council of Policy decided to place copies of the commanders' official instructions, correspondence between them and the authorities, and their reports in the hands of the independent fiscal, Willem Cornelis Boers. He was instructed to determine precisely whether and to what extent they had performed their duties properly and had complied with their orders when they abandoned their ships.³⁸² If he were to find that they had not, the fiscal was further instructed to take action against them in the Court of Justice.³⁸³

The highest local court at the Cape,³⁸⁴ the Council of Justice (“Raad van Justitie”), had inherent civil and criminal jurisdiction. It served as the appeal court for lower courts which had jurisdiction only in civil matters, and it was therefore the only criminal court in the settlement.³⁸⁵ After hearing the evidence in a case, the

380 The order was given in Jul 1781, but was apparently received at the Cape only in Dec 1782(!): see *idem* 1782 *Deel* 2: 102-103 (appendices to the Council of Policy Resolution, 2 Dec 1782, referring to a printed “Ordre, g'arresteert door de Extraordinaire Vergadering van Seventienen, gehouden binnen 's Gravenhagen, den 12 July 1781, om te reguleeren de belooningen in cas van Actie, zo voor 't Volk in't algemeen als ieder in 't byzonder”).

381 Eg, so many months' salary, or Dutch *fx*, according to the rank of the performer, and according to the type of action performed (the capture of an enemy warship, the recapture of a Company ship, the destruction of an enemy fireship, the taking down of a flag from an enemy warship, the capture of an armed privateer, the stranding or setting alight of (an enemy) warship or privateer, or extraordinary services).

382 See *idem* 1781: 113 (Council of Policy Resolution, 3 Aug 1781, instructing Boers “exact onderzoek te doen of en in hoe verre de ... Scheeps-Overheeden hun pligt behoorlijk hebben opgevolgd, en naargekomen zijn”).

383 *Ibid* (“dezelve voor den Raad van Justitie deeses Gouvernements te actioneeren”).

384 On the legal structures at the Cape of Good Hope at the end of the eighteenth century, see, eg, Hahlo & Kahn 1960: 200-203; Visagie 1969: 40-62; and Hahlo & Kahn 1973: 543, 566-575.

385 It was established in 1656 as a specially composed Council of Policy (“Raad van Politie”) in judicial matters. After reorganisation in 1685, the Court was pronounced formally separate from the Council although gubernatorial approval was retained; from 1734 it operated under the chairmanship of the second-in-command (“secunde”) rather than the governor himself; and from 1785 it was enlarged from eleven members and then consisted of thirteen members (the secunde as chairman, six company officials, and six burgher councillors).

Court deliberated behind closed doors (*foribus clausus*) and then gave its judgment. Comprised of legally untrained members, and with no proper instructions ever having been compiled for its operation, the Court's decisions and sentences were and remained subject to approval by the governor before any effect was given to them. Only its actual judgments and sentences were recorded, without any reasons.

Although it acted in the name of the States General in the Netherlands, the Court, it should be stressed, was a Company court, its local judicial arm, and not a Dutch court operating abroad.³⁸⁶ It was also a military court³⁸⁷ and adjudicated and punished not only crimes committed in the settlement, but also misconduct on Company ships.³⁸⁸

Appeals from the Cape Court of Justice lay to the Court of Justice in Batavia as a matter of right. An appeal had to be noted within ten days and prosecuted within one year and involved great expense and delay in that security had to be provided and proceedings had to be sent there. The Batavian Court did not have the power to review decisions rendered at the Cape or elsewhere.³⁸⁹

Criminal investigation and prosecution at the Cape at this time³⁹⁰ were in the hands of the fiscal, a high-ranking local Company official second only to the governor with wide powers that were open to abuse. Appointed by and directly responsible to the directorate of the Dutch East India Company (DEIC) in the Netherlands, rather than to the local governor, the fiscal had no formal instructions that he had to follow apart from the fact that he had to protect the interests of the Company locally by the enforcement of laws before the Court of Justice.³⁹¹

The fiscal acted as criminal investigator. He was obliged to investigate all alleged crimes, to gather evidence and take down sworn depositions from witnesses, and, where justified, he had to lay a complaint before the Court of Justice. The Court

386 See Ward 2009: 256.

387 *Idem*: 155.

388 Initially, and prior to the Court being established in 1656, the Council, serving as a court, dealt with disputes on board visiting ships: see Hahlo & Kahn 1973: 568 n 14; Ward 2009: 69, referring to the Court of Justice in Batavia.

389 The Batavian Council of Justice ("Raad van Justitie"), established in 1626, was both the superior local court and an appeal court, the highest in the empire, for local cases and those coming from elsewhere. For criminal cases (otherwise than for Dutch citizens in civil matters), it was the final court and there was no further resort to courts (such as the "Hoge Raad") in the Netherlands. See, further, La Bree 1951: 81 (the Court of Justice in Batavia heard appeals "[t]egen de vonnissen van de Companie-rechters der buitencomptoiren") and 82; Ward 2009: 17, 69, 71.

390 See, further, Botha 1915: 319-327; Botha 1918: 399-406.

391 He had a seat on the Council of Policy, but after 1685 was made independent of the governor and the Council and directly responsible to the Lords Seventeen. Henceforth he was known as the "independent fiscal". However, his wide and arbitrary powers lead to abuses and to his again being placed under control of the governor in 1793. Botha 1918: 400 n 3 explains that the fiscal or butcher bird (*lanius collaris*) was named after the Company fiscal who was feared by the colonists as that bird was feared by smaller birds.

then determined whether or not to allow a prosecution and to hear the case and, where necessary, to order an arrest. The fiscal then also acted as public prosecutor and until this privilege was abolished in 1793, he received one-third of all fines imposed or property confiscated as a result of his prosecution of crimes – one-third went to the treasury and another third to the informer. The fact that in petty cases he passed sentence and imposed penalties and fines himself, resulted in further abuses.

Apart from his judicial functions, the fiscal also had important duties concerning ships arriving at or departing from the Cape as he had to render accounts of all such ships' cargoes.³⁹²

Independent fiscal Boers³⁹³ reported soon after he had been instructed to do so. On 9 October 1781 the Council of Policy considered his petition regarding the possible prosecution of the Saldanha Bay commanders.³⁹⁴

It appeared to Boers that some of them had either not fully or not at all observed their written instructions (“dat Sommige van deselve Overheeden, maar gedeeltelijk en anderen in ’t geheel niet hebben geobserveerd gehad, dat geen, het welk aan henl: bij dezelve Schrifteijke Instructie is voorgeschreeven geworden”). However,

392 See *idem*: 402.

393 Willem Cornelis Boers (1744-1803), a doctor of laws from the University of Utrecht, was appointed senior merchant and independent fiscal (“Oppercoopman en Independent Fiscaal”) at the Cape in Jul 1773; he arrived in Dec 1774. His appointment may well have been due to family connections. His uncle, Frederik Willem Boers, was advocate general (“Eerste Advocaat”) of the DEIC and a director of the Amsterdam Chamber. Pieter Boers, bailiff of Catwijk, may have been family too, for WC sent him the sum of Rds1 200 in 1783 (see Jeffreys *Kaapse Archiefstukken 1783 Deel I*: 490). Although a member of the Council of Policy and the Court of Justice, President of the Orphan Chamber, and the right-hand man of Governor Van Plettenberg, it was the uncontrolled judicial and quasi-judicial powers he exercised as fiscal that made Boers the most hated Company official at the Cape, both by other officials and by burghers. In May 1799, the Cape Patriots in their petition to the Lords Seventeen concerning local malpractices, alluded to his corrupt private commercial dealings with foreigners and visiting ships and his ill-treatment of locals. In Jan 1779, eg, he illegally banished a burgher, CH Buytendag, by having him brutally arrested and incarcerated on the *Honkoop* which was ready to sail for Batavia. He belatedly defended himself against the accusations in Feb 1781, but also requested to be discharged from his office. This was granted subject to security of Rds5 000 being provided in view of the charges against him (“wegens de beschuldigingen, welke tegens hem door de Caabsche Burgers zyn gedaan”). These were subsequently withdrawn. He left the settlement in Apr 1783 and was succeeded as fiscal by Jan Jacob Serrurier, the first locally-born appointee to the office. See Booyens 1968: 86-87; Ward 2009: 296; Jeffreys *Kaapse Archiefstukken 1783 Deel I*: 116-117 (Council of Policy Resolution, 6 Apr 1783); *idem* 1783 *Deel I*: 294 (Dagregister, 9 Apr 1783); *idem* 1783 *Deel I*: 395 (Incoming Letters, letter from the Lords Seventeen, dated 7 Dec 1782, received at the Cape 8 Aug 1783).

394 See *idem* 1781: 141-143 (Council of Policy Resolution, 9 Oct 1781). Some of his interrogations are contained in the Cape Archives, CJ 416 (Criminele Proces Stukken: Ondervraging van G Harmeijer, 6 Dec 1781, 635-636); CJ 416 (Criminele Proces Stukken: Ondervraging van A van Ebelshout 12 Dec 1781, 653, 665, 685, 708); CJ 417 (Criminele Proces Stukken, 10 Sep 1781, 191-202); CJ 417 (Criminele Proces Stukken, 15 Sep 1781, 246): see, also, Sleight 2007: 464 n 417-418 and 465 n 420.

the commander of the *Middelburg* not only complied fully (“niet alleen compleetlijk is voldaan geworden”) with the strict letter of those instructions, but had even afterwards prevented her capture by setting her alight in such way that she had burnt down completely (“dat het zelve tot aan het Water toe is afgebrand”).

As far as the defaulters were concerned, Boers proposed to have them prosecuted as the Council had earlier, on 3 August, instructed him. Given the fact that the captain of the *Middelburg* had gone beyond any instructions by setting her alight, Boers did not consider himself competent, given the broad scope of his instructions to inquire into all the commanders’ conduct generally and without distinction, to make any finding as to his conduct and to excuse him on his own authority of any further investigation (“dezelve eigener autoriteit van alle verdere perquisitie bevrijd te laten”). He therefore requested further instructions, specifically whether the Council considered that the officers of the *Middelburg* had, by setting fire to that ship, complied fully and whether it approved of their conduct, or whether it disapproved, in which case the matter would be left to the Court of Justice.³⁹⁵

The Council decided that by setting fire to the hull of the *Middelburg*, her captain and officers had complied with the spirit and intention of the orders given to the flag officer of the ships in Saldanha Bay, which were all aimed at preventing the ships or their cargoes falling into enemy hands.³⁹⁶ Accordingly, the captain and officers of the *Middelburg* were not to be prosecuted (“niet actionabel zijn”) in the present matter.³⁹⁷

3 3 3 The criminal prosecution and sentences of the Dutch captains

In April 1782, Governor Van Plettenberg could report to Amsterdam, and shortly after to Batavia,³⁹⁸ that the proceedings the fiscal had brought before the Court of Justice had been completed (“dat de door ged’e Fiscaal ge-entameerde Procedures zeedert bij den Raad van Justitie alhier zijn getermineerd”).

395 It seems that according to the fiscal’s interpretation of the instructions, they never pertinently ordered or authorised the destruction of the ships themselves. In short, did the order to prevent loss by capture authorise self-destruction to prevent loss by capture?

396 By setting fire to the *Middelburg*, it was ensured that she would not only not be sailed away by the enemy, but also that they would not be able to take any of her cargo for their own benefit (“is geëffectueerd, dat dien Bodem, niet alleen niet door den Vijand heeft kunnen werden weggevoerd, maar dat denselven zig ook niets van de Lading heeft kunnen ten nutte maken”: *idem* 1781: 141-143 (Council of Policy Resolution, 9 Oct 1781).

397 It was not a case that they were prosecuted but found not guilty, as may appear from *idem* 1782 *Deel 1*: 164 (Council of Policy Resolution, 7 May 1782, which has it that all the captains were found guilty, except Van Gennep of the *Middelburg*).

398 See *idem* 1782 *Deel 1*: 487 (Outgoing Letters, letter to the Lords Seventeen, dated 28 Apr 1782); *idem* 1782 *Deel 1*: 496 (Outgoing Letters, letter to the Council in Batavia, dated 17 May 1782).

By its sentence of 25 April 1782, the Court suspended captains Harmeier and Landt with the forfeiture of all the salary due to them (“bij Vonisse des Raads van Justitie zijn gesuspendeert in Ampt en Qualiteit met verbeurd verklaring hunner bij d'E Com'ie te goed hebbende gagie en praemie”), while captains Plokker and Steedsel were sentenced to the forfeiture of their salaries from the date when they had abandoned their ships (“verclaard dezelve zeedert den 21 Jul ... [1781], ... geen gagie bij d'E Comp te hebben gewonnen”). All four were also held to bear the costs of the proceedings against them (“met Condemnatie van alle Vier de gedaagdens in de het Voorm Proces gevallene Costen”).³⁹⁹

Amsterdam subsequently requested clarification⁴⁰⁰ on the period of Landt's suspension as no period had been stipulated in the sentence (or at least not mentioned in the earlier correspondence from the Cape). Hoping that it was not the intention of the Court to have it extend beyond Landt's arrival in the Netherlands, the Lords Seventeen declared that his suspension had ceased (“was gecesseerd”) but that the remainder of his sentence (“dispositie”) was to remain in force as a whole.

And, indeed, the sentences as we have them described, are not clear.⁴⁰¹ It seems that two of the captains of the captured Indiamen were (at least temporarily) suspended, as opposed to stripped of their rank, and that all forfeited their salaries in a differing extent.⁴⁰²

3 3 4 The fate of Captain Pietersz of the *Snelheid*

It will be remembered that the hookers with the sails and ropes of the Indiamen on them had been abandoned by their captains and crews in Saldanha Bay, allowing the British to sail their captured prizes home.⁴⁰³

Having prosecuted the captains of the captured Indiamen before the Court of Justice, fiscal Boers had no choice but to prosecute the captain of one of the hookers too for what was termed criminal neglect.⁴⁰⁴

The captain of the *Snelheid*, Roeloff Pietersz,⁴⁰⁵ was likewise found guilty by the Court of Justice for failing to execute his specific orders to burn his vessel. He had had ample opportunity to do so, as she was anchored much further inside the Bay.

399 *Idem* 1782 *Deel 1*: 164-165 (Council of Policy Resolution, 7 May 1792).

400 *Idem* 1783 *Deel 1*: 394 (Incoming Letters, letter from the Lords Seventeen, dated 7 Dec 1782, received at the Cape 8 Aug 1783).

401 Unfortunately the Court's sentence of 25 April 1782 could not be traced in the Cape Archives.

402 Leibbrandt *Precis*: 565 (Memorial 51 of 1782) has it that Harmeier and Landt were suspended from their office and rank, with the forfeiture of all the pay and premiums still to their credit, while Steedsel was declared as having earned no pay since 21 Jul 1781; but see, eg, Jeffreys *Kaapse Argiefstukken* 1782 *Deel 1*: 164, which has it that all four were stripped of their rank.

403 See, again, Van Niekerk 2015: n 87.

404 See Leibbrandt *Precis*: 793-794 (Council letter, dated 14 Jun 1786, 675-676).

405 From Amsterdam, Pieterszoon (also Pieterse, Pietersen) married Rachel Susanna Geere in Dec 1772; the couple had a daughter (b 1774) and a son (b 1778): see De Villiers & Pama 1966: 697.

And had he done so, the British would have been unable to sail their unrigged prizes away and may have abandoned them.

Pietersz was stripped of his rank, made to forfeit the pay still due to him, condemned to bear the costs of his prosecution, and declared unfit to be employed by the Company again.⁴⁰⁶

However, he was not satisfied and lodged an appeal to the Court of Justice in Batavia. He applied for and received permission from the Cape authorities to depart with a ship in the roadstead for Batavia with his wife and two children (“zijne huisvrouw en twee kinderen”).⁴⁰⁷ The Cape authorities informed Batavia, as it was apparently obliged to do, of Pietersz’s departure.⁴⁰⁸

The Court of Justice in Batavia allowed the appeal and Pieterzs was restored to his rank and received his pay.⁴⁰⁹ Sadly, it appears, Pietersz died shortly after this success and before he could return to the Cape.⁴¹⁰

3 3 5 The fate of the captains

What, then, became of the captains of the six Indiamen captured or destroyed at the Cape in 1781?⁴¹¹

The four who were later, in April 1782, found guilty and forfeiting their salaries – Harmeyer of the *Hoogkarspel*, Landt of the *Honkoop*, Plokker of the *Paarl*, and Steedsel of the *Dankbaarheid* – soon complained that after the unexpected loss of their vessels and their difficult return to the Cape, they were unable to support themselves. Pointing to their many years’ of faithful service, they therefore requested to receive the monthly subsistence (“kostgelden en andere Emolumenten”) usually granted to Company servants of their rank who had to stay over at the Cape. However, the

406 See Leibbrandt *Precis*: 793-794 (Council letter, dated 14 Jun 1786, 676).

407 See Jeffreys *Kaapse Archiefstukken 1782 Deel 1*: 294 (Council of Policy Resolution, 10 Dec 1782, referring to his request to depart “tot voortsetting van het Appel door hem geïnterjecteerd, op ende jeegens Seeker vonnis, bij den raad van Justitie deeses Gouvernements, ten laste van hem supp’lt geveld”). He subsequently received more specific permission to depart for Batavia on the Prussian ship *Berlin*: see *idem* 1783 *Deel 1*: 18 (Council of Policy Resolution, 28 Jan 1783).

408 See *idem* 1783 *Deel 1*: 455 (Outgoing Letters, letter to the Council at Batavia, dated 13 Feb 1783, referring to its obligatory notice (“Pligtschuldige kennisse”) of his appeal to the “Raad van Justitie des Casteels Batavia” and his departure “ten einde het zelve in Persoon te prosequeeren”).

409 See Leibbrandt *Precis*: 793-794 (Council letter, dated 14 Jun 1786, 676). The Batavian authorities notified the Cape on 24 Feb 1784 that in consequence of a written request from the Court of Justice there, based on its verdict of 10 Dec 1783, they had determined to let Pietersz’s pay continue from the day on which it had been withheld. He had also been restored to his former rank. As regards the costs he had paid and for the recovery of which the necessary orders had been issued, Pietersz was referred to (the since repatriated) fiscal Boers, or to his agents at the Cape.

410 *Ibid*, where it is observed that the Cape had not yet received a copy of the Batavian Court’s sentence, nor had Pietersz made an appearance here since; private information received stated that he had died in Batavia.

411 Unfortunately I could not obtain a copy of Jaap R Bruijn *Commanders of Dutch East India Ships in the Eighteenth Century* (2011). No doubt it would have provided much additional information.

Council of Policy pointed out, criminal proceedings had already commenced against them and that it could not concede to their request.⁴¹²

In another request, some time later, the former commanders pointed out that they had been stranded at the Cape for nine months, had spent the little money they had had, and that they had nothing left with which to maintain themselves or their families and had now also forfeited the salaries due to them. They therefore asked permission to return home in a foreign ship as there was no immediate opportunity to do so in a Company vessel. This request the Council granted.⁴¹³

Later Harmeier, Steedsel and Plokker asked to return home in a specific ship – the “keijzerlijk particulier Schip *Les Etats de Flandres*” – on which they had found a passage and to take with them their chests of cargo – “de gepermitteerde kisten van alle Opper en deks Officieren” – that had been landed from their vessels before they were sent to Saldanha Bay, as well as their offloaded personal belongings (“hier meede ontschepte voetsCasjes”).

Harmeijer also requested to be allowed to take his young son, Coenraad, who had been a trainee sailor on his ship, with him, while Plokker sought permission to be accompanied by his brother Simon, who was the third officer on the *Honkoop*, as well as the young sailor Huyg Jacobsz, of the *Paarl*. Also, as he had a power of attorney from the carpenter on his ship, Ulve Hendricksz, he requested to take the latter’s chest with him to Europe.

The Council gave its permission to these requests, subject to several conditions. For instance, Coenraad Harmeier’s salary was terminated (“wiens gagie als jongmattroos à f7:–p’r maand, over sulx van dato deeses zal moeten Cesseeren”); the chests had to be sealed with the Company’s seal, and had to be delivered “op het Oost-Indische Huijs der Camers” to which the returning ships belonged so that their contents could be checked against the invoices issued on their shipment and the relevant duties could be levied. To ensure compliance with these conditions, the captains had to provide security in varying amounts, that would be forfeited should they “in gebreekn mogten blyven” to comply promptly and precisely with their obligations.⁴¹⁴

412 See Jeffreys *Kaapse Archiefstukken 1782 Deel 1*: 57-58 (Council of Policy Resolution, 12 Feb 1782, referring to Boers’s declaration “dat de aan zyn E geinjungeerde procedures teegens de Suppl’ten reeds voor den Raad van Justitie alhier waren Litispendeerende, en hy Heer Fiscaal eerstdaags van Eysch en Conclusie teegens dezelve stond te dienen”); Leibbrandt *Precis*: 564 (Memorial 12 of 1782).

413 See Jeffreys *Kaapse Archiefstukken 1782 Deel 1*: 164-165 (Council of Policy Resolution, 7 May 1792); Leibbrandt *Precis*: 565 (Memorial 51 of 1782).

414 See Jeffreys *Kaapse Archiefstukken 1782 Deel 1*: 296-298 (Council of Policy Resolution, 17 Dec 1782); *idem* 1782 *Deel 1*: 304-305 (Council of Policy Resolution, 27 Dec 1782); *idem* 1782 *Deel 1*: 535-536 (Outgoing Letters, register of letters, where there is a reference to Plokker’s request); Leibbrandt *Precis*: 566 (Memorial 111 of 1782); *idem*: 922 (Memorial 111 of 1782). It is possible that Simon Plokker left with his brother and later returned, or never left the Cape, for there is a record of a testament of one Simon Plokker, a seaman, in Mar 1785: see Cape Archives, CJ 2639/01/34, 159-162 and CJ 463 ref 35, 163-164.

Landt requested and received permission⁴¹⁵ to return to Europe with his son Christiaan, a young sailor on his ship, on board the Portuguese ship *Senhor de Bonfim e Sancta Maria* that had been chartered by the Cape authorities to convey some of the cargo stranded here back to the Netherlands.⁴¹⁶ Captain Vrolijk of the *Held Woltemade*, who was taken prisoner of war by the British when his ship was taken capture, was placed out of Company service as from that date. He was eventually repatriated to the Netherlands.⁴¹⁷

Lastly, there was Captain Van Gennep of the *Middelburg*, the only of the commanders to emerge from the events at Saldanha Bay with his reputation intact. Aged thirty-six, he stayed on at the Cape and within a few months, in September 1781, he married a local woman, Elizabeth Johanna van Schoor. Two sons were born from the union.⁴¹⁸ Like the others, he obtained permission to receive his private-trade goods and to sell it locally at auction, against an undertaking to pay the relevant duties into the local fiscus.⁴¹⁹

Van Gennep's expertise was soon called upon. He was provisionally put in command of a Danish ship whose captain had been placed under arrest when he ignored an order prohibiting her from departing from the Cape.⁴²⁰ Shortly after, in February 1782, he was appointed, as quartermaster ("equipagiemeester") and harbourmaster, in charge of the naval establishment, after the incumbent Damiën Hugo Staring had returned to the Netherlands.⁴²¹ The Lords Seventeen in Amsterdam later approved this appointment, allowing him to retain the rank of captain.⁴²² In that capacity he was involved with the survey of Company and other passing ships and reporting on their condition to the governor.⁴²³ Ironically, in November 1783, when

415 See Jeffreys *Kaapse Archiefstukken 1782 Deel 1*: 164-165 (Council of Policy Resolution, 7 May 1792); *idem* 1782 *Deel 1*: 502 (Outgoing Letters, letter to the Lords Seventeen, dated 28 May 1782); Moree, Perry: 48.

416 See again Van Niekerk 2015: at n 137.

417 See "De brief uit Surhuizum die nooit aankwam (1779), Deel 2" (Apr 2014), available on the website *Stamboompagina Sake Wagenaar* at <http://www.sakewagenaar.nl> (accessed 8 Jan 2015).

418 Van Gennep was born 28 Nov 1744 in Gorinchem: see De Villiers & Pama 1966: 240; <http://www.geni.com> and <http://geneagraphic.com> (both accessed 1 Apr 2015). His and his wife's joint testament, drawn up in Jan 1782, is in the Cape Archives, CJ 2636/01/3; see also CJ 2640/01/17, 77-85 for a testament dated 1786.

419 Jeffreys *Kaapse Archiefstukken 1782 Deel 1*: 97-98 (Council of Policy Resolution, 5 Mar 1782); Leibbrandt *Precis*: 483 (Memorial 23 of 1782).

420 Jeffreys *Kaapse Archiefstukken 1782 Deel 1*: 28 (Council of Policy Resolution, 13 Jan 1782).

421 *Idem* 1782 *Deel 1*: 56 (Council of Policy Resolution, 12 Feb 1782); Theal 1888: 239, 257.

422 Jeffreys *Kaapse Archiefstukken 1783 Deel 1*: 395 (Incoming Letters, letter from the Lords Seventeen, dated 7 Dec 1782, received at the Cape 8 Aug 1783, stating "hebbende wij aan denzelven de qualiteit van captain toegevoegd, doch sonder vermeerdering van gagie").

423 *Idem* 1782 *Deel 1*: 182-183 (Council of Policy Resolution, 28 May 1782); *idem* 1782 *Deel 1*: 306-307 (Council of Policy Resolution, 31 Dec 1782); *idem* 1782 *Deel 2*: 149-150 (Memorials and Reports to the Council, Nov 1782); *idem* 1783 *Deel 1*: 178-180 (Council of Policy Resolution, 12 Aug 1783).

the Fourth Anglo-Dutch War was already over, he recommended that the English ship the *Content*, in such a bad state of repairs that she was in danger of sinking in the roadstead, should be permitted to proceed for repairs to Saldanha Bay, which he suggested was the most fit and proper place for that purpose.⁴²⁴

Van Gennep returned to the Netherlands in 1786 and died in Rotterdam in 1801.⁴²⁵

4 Epilogue

Thus ended the affair at Saldanha Bay in July 1781. For most of the participants, whether victors or vanquished, there was little immediate or even ultimate gratification. Dilatory legal processes postponed such personal satisfaction or such financial advantage as could be attained for so long as to render them empty.

Nevertheless, even if the judicial proceedings that resulted did not immediately or even ultimately alter the applicable law in any significant and lasting manner, they do enable us, more than 230 years later, to add some new perspectives to the bare bones of an already fascinating episode in the history of the Cape of Good Hope.

Abstract

Commodore Johnstone's secret mission to the Cape of Good Hope in 1781 had a surprisingly large number of legal consequences, not only in England but also at the Cape. In the main they concerned two matters, namely naval law, more specifically intra-naval immunity, and prize law, more specifically, the question of joint captures. These matters are considered in two parts, of which the first appeared in (2015) 21(2) *Fundamina* 392-456.

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424 *Idem* 1783 *Deel 1*: 230-231 (Council of Policy Resolution, 18 Nov 1783).

425 See Schutte 1982: 188 n 25; Schutte 2003: 179n; Theal 1888: 257-258. For the liquidation and distribution account drawn up after his death, see Cape Archives, MOOC 13/1/31/01/2, MOOC 13/1/01/16 (Justinus van Gennep: Liquidation and distribution account (1802), (1803)).

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Van Dongen, EGD *Contributory Negligence – A Historical and Comparative Study*

(Brill, Leiden/Boston, 2014, 476pp (including preface and indices)
ISBN 9789004278714, £133.00 (Amazon UK))

This interesting study is concerned with one of those perennial problems of the civilian tradition, namely the rise of “contributory negligence” in cases of delict. Van Dongen traces the history of this notion from Roman to contemporary law. The book is divided into six chapters. Chapter 1 contains an introduction in which the main topic of study, the method adopted and the structure are all set out. Diachronic studies of an aspect of legal history are tricky and the method and scope sections are well worth reading. The author does a good job of limiting and justifying the choices made further on in the volume. It is particularly interesting to see the comments about Roman law and how one should not merely see it as the starting point in a long line of development.

Chapter 2 is devoted to Roman law. The author sets out the main texts and their interpretations (many from the realm of Aquilian liability) and addresses the absence of any notion of contributory negligence as such in Roman law. This is a very useful chapter to anyone interested in Aquilian liability more generally and the author gives a good account of the primary and secondary literature.

Chapter 3 tackles the second life of contributory negligence in the medieval *ius commune*. Of all the chapters in the book, this is perhaps the strongest and contains the most valuable material. It is interesting to note that the author has gone beyond the printed works and has also investigated manuscripts, a welcome change to many works on medieval learned law. The author’s account of the complexities of this topic in medieval learned law is both useful and clear. A chapter such as this also demonstrates why it is so important, from the perspective of modern law, also to give proper attention to the medieval legal developments in their own right.

Chapter 4 is concerned with the early modern period. Here we find various subdivisions such as Legal Humanism, Roman-Dutch law, the *Usus Modernus* and the Northern Natural Law School. The author proceeds to investigate each of these “schools” and their contribution to the development of the topic. One slight criticism here is that the author is perhaps too accepting of the labels of the different “schools” and their contribution to modern law. Thus, for example, separating Roman-Dutch law out from Humanism and the *Usus Modernus* is perhaps somewhat of a falsehood, since many of the main Dutch jurists of this period were in fact both (or either). Nonetheless, there are some interesting points arising from this discussion, especially in relation to Roman-Dutch law, and the reader would be well advised to spend some time on them. I did wonder, though, whether there could also be an economic angle here to be explored perhaps in further works on the topic, especially given the importance of mercantile commerce in the Dutch Republic.

Chapter 5 is devoted to contemporary law (mainly France and the Netherlands) while chapter 6 deals with conclusions. All and all, this is an interesting study filled with many nuggets of insight. The author is to be commended for producing such a clear work on a difficult topic. The writing is of the highest quality and the arguments are persuasive. This then brings me to the one and only negative point in this review – the price. Once again, Brill has managed to make a very useful book virtually unaffordable to anyone other than a research library. It is incomprehensible that a Press that has jettisoned all forms of proofing and copy-editing (and therefore quality control) over their output can justify a price at this level. The same book of the same size would have cost much less through some of the Presses that still retain proofing and copy-editing. This is lamentable. Authors do not have the skills to copy edit a book. It is a professional skill that costs money (as the acknowledgements to this book make clear). The Press runs a very great risk of pricing itself out of the market to those who do not have the institutional funding for this kind of endeavour. This “stack ‘em high and sell ‘em dear” insanity has to stop.

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Kaius Tuori *Lawyers and Savages. Ancient History and Legal Realism in the Making of Legal Anthropology*

(Routledge, New York, 2015, pp viii and 224,
Hbk 978-0-415-73701-2 (\$ 101.04) and ebk 978-1-317-81620-1 (\$ 54,95))

Tuori has the good fortune to have had the opportunity to study history, law and anthropology, which has equipped him to dive into the *nouvelle vague* of interdisciplinary research. In consequence, his latest book analyses the rise and fall of legal primitivism following the work of pioneers in a wide variety of disciplines. Focusing on the trilogy of sex, greed and violence, the narrative takes us from the Americas to Australia, Greenland, Africa and further. Greed is represented by the paradigmatic variations played on the theme of the development of ownership of land and contract; sex stands for the *Dichtung und Wahrheit* spun around matriarchy, promiscuity, polygamy and the “civilised” monogamy, while violence hovers in vendetta, feud, honour killings and blood revenge. Within the tales about these themes the reader meets old friends like the brothers Grimm, von Savigny, von Jhering, Fustel de Coulanges, Maine and Schiller, but is also introduced to a sparkling variety of new authorities such as Martius, Lonröt, Bachofen, Malinowski, Boas, Llewellyn and Gluckman to name but a few.

The subtext of the book is continuity and change of beliefs and the theories built upon them. Continuity is epitomised by the fundamental credo of progress. This thesis had already formed part of the cultural heritage of the young Cicero (*De inventione* 1 2) and was resurrected by humanism and developed into a cornerstone of religion and communism. Tuori sets out how new discoveries during the nineteenth century gave new impetus to evolutionism and led to the development of grand theories. As Gulag, Auschwitz and Hiroshima unmasked both evolution and civilisation, the bell tolled for universal grand theory. Relativism became the foundation of pluralism and the only remaining universal absolute is Human Rights.

BOOK REVIEW

Tuori states at the outset that his objectives are to unveil the influence of the Western legal tradition in general and American legal realism in particular, on legal anthropology and primitivism and the reciprocal relationship between colonialism and anthropological research. In fact, he unravels a tapestry of theories and paradigms and shows the hegemony of Western beliefs in the human sciences; that prejudices are also beliefs; and that the *Zeitgeist* plays an important role.

In conclusion, a fascinating work addressing multiple facets of a variety of disciplines, which was made possible by the erudition of the author and his wide knowledge, and which enables him to write with authority on topics ranging from *mancipatio* to the burkha-cases. Tuori convincingly shows the relevance of a classical education, which empowers a person to ask new questions, making new associations, and – most importantly – original thought on matters touching the essence of human sciences.

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IN MEMORIAM: PROFESSOR HJ ERASMUS

10 January 1935 – 15 June 2016



Prof Hennie Erasmus

It is with great sadness that we heard of the passing away of Hendrik Jacobus Erasmus on 15 June 2016, an esteemed member of the Editorial Board of *Fundamina* and a frequent contributor of legal historical contributions to this legal journal.

Hennie Erasmus was a man of many talents. He had a formidable reputation as academic, as author, as judge, and as historian. He was born on 10 January 1935 in Ladysmith, Natal. After matriculation at the Kroonstad High School in 1952, he obtained the degrees BA and MA (both *cum laude*) from the University of the Free State, followed by an LLB from the University of South Africa and a DLitt et Phil (*cum laude*) from Leiden.

His academic career involved both Classics and the Law. After earlier appointments as Professor of Latin at the University of the Free State, and Professor of Classics at the University of Port Elizabeth, Hennie was appointed as Professor of Law at the University of South Africa in 1974. Between 1974 and 1976 Stellenbosch University took the brave step of appointing three *ultramontani* (or more correctly, north of the Hex River mountain) as Professors of Law, with Hennie Erasmus undoubtedly the most illustrious of the three. Hennie Erasmus, his wife Maureen and their three children, Nico, Hannchen and Christian, were firmly rooted in Stellenbosch and Hennie made substantial contributions to the Law Faculty. He served the Faculty with great distinction for almost two decades, including positions as Dean, during which period he was instrumental in securing the HF Oppenheimer Chair in Human Rights Law for the Faculty sponsored by Anglo American, and as Visiting Professor at the University of Florida in the United States, until his retirement in 1995. Many thousands of students attended his classes on the law of civil procedure and of succession, all of whom had great affection and appreciation for Hennie both as teacher and as role model. His colleagues shared these sentiments as is evidenced by a tribute on the faculty's website which stated among other things: "Hennie Erasmus personified the values of collegiality, modesty and excellence."

Hennie Erasmus was the leading expert on the law of civil procedure in his day. He authored (and co-authored) standard works in the field, such as *Jones and Buckle – The Civil Practice of the Magistrates' Courts in South Africa* and his *magnum opus*, *Superior Court Practice*. The latter work is still cited in practice simply as "*Erasmus*" – even though Hennie has handed over the reins to younger authors many years ago. In addition, he contributed numerous articles to law journals over the years and contributed significantly to law reform as member of and special consultant to the Rules Board for Courts of Law, and as a member of its Civil Justice Reform Committee.

His most recent articles on civil procedure are "Judicial case management and the adversarial mindset – the New Namibian rules of court" and "Judicial review of inferior court proceedings – or, the ghost of the prerogative writs in South African law" published in the 2015 numbers of the *Journal of South African Law* (TSAR). His articles in *Fundamina* include among others: "The beginnings of a mixed system; or, advocates at the Cape Bar during the early nineteenth century" (2015); "Circuit courts in the Cape Colony during the nineteenth century: Hazards and achievements" (2013); "Land 'Jobbing' by British Officials in the Orange River Sovereignty" (2011); and "Title to land and loss of land in the Griqua Captaincy of Philippolis, 1826-1861" (2010). An erudite article with the title "Natural law: Voet's criticism of De Groot" is published in this volume of *Fundamina*. He also contributed an important chapter to the volume of essays published in *A Man of Principle: The Life and Legacy of JC de Wet* with the title "Die Koopkontrak en Aediliese Aksies" (2013). Most recently he co-authored a book titled *Employment*

Relations Management Back to Basics: A South African Perspective published by LexisNexis in 2015. All of these contributions were thoroughly researched and written in Hennie's characteristic lucid and concise style.

After his retirement as professor and a stint at the Cape Bar, Hennie's legal career entered a new dimension with his appointment as a judge of the Western Cape High Court with effect from 1 May 2002. As a judge he commanded wide respect, as exemplified by a recent letter to *Die Burger* by a former student, a State advocate, who described Hennie as “n ware heer” wat “ binne en buite die die hof presies dieselfde mens was, altyd hoflik, vriendelik en nederig”.

Hennie Erasmus retired from the Bench in 2010 after reaching the statutory retirement age of 75, but for him retirement simply meant shifting to another gear, because he did not believe in becoming idle. He conducted the odd private arbitration, but more importantly, he re-kindled his links with the Law Faculty of Stellenbosch by accepting appointments as extraordinary professor and research fellow in the Department of Private Law. This afforded him the opportunity to revive his interest in legal history, and especially the early history of legal practice in South Africa. This resulted in an impressive list of articles in academic journals such as *Fundamina* as mentioned above and the splendid article in the *South African Journal of Cultural History* (2012) titled “The Underwood & Underwood stereographs of the Anglo-Boer War, 1899-1902”.

This tribute would be incomplete without mention of his wife Maureen. Hennie and Maureen met when they were in standard 7 at school in Kroonstad in the Free State. They have been married for fifty eight years and throughout this time Maureen was Hennie's loyal life partner and pillar of strength.

To Hennie, the Classical scholar, we say, as did the Roman poet Catullus to his late brother:

Atque in perpetuum frater ave atque vale – And forever, brother, hail and farewell.

Ben Griesel, former Judge of the Western Cape High Court, and
Cornie van der Merwe, Senior Research Fellow,
University of Stellenbosch