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## The Supreme Court of Holland and Zeeland judging cases in the early 18th century

I take this opportunity to introduce you to the Supreme Court of the provinces of Holland, Zeeland and, as its officially said, West-Friesland (which is the upper part of the present province of North-Holland), its constitution and way of working, to discuss some cases and to discuss the role of Roman law in these provinces.

Under the Burgundian counts the provinces of the Netherlands, consisting of present-day Netherlands, Belgium, Luxembourg and North-West France, each had their own provincial court. The Burgundians in their wish for unification established in Mechelen/Malines a Grand Council to which one could appeal from a decision of one's provincial court. When the northern provinces in 1576 seceded and in 1581 finally renounced their feudal lord, at that time Philip II of Spain, since he had broken his oath to his, they of course no longer accepted this Grand Council. So in 1580 the decision was taken to set up a Supreme Court as appellate court for the now once again sovereign provinces. The provinces of Holland and Zeeland acknowledged this Court but the other provinces did not: sovereignty is too a sweet a thing to give up hastily and so the Supreme Court remained only for these two provinces a means of appeal.

The Supreme Court consisted of 10 councillors, 9 ordinary councillors and 1 president, appointed by the States of Holland. After 1596 the procedure was that in case of a vacancy a list of six candidates was drawn up by the Supreme Court and presented to the States. Here one candidate was chosen, usually the one on top of the list, who then again was sworn in in the Court. Three posts were reserved for candidates from Zeeland, the remaining 7 for candidates from Holland. The Zeeland candidates were put up by six towns, in rotation, since the candidate had to fulfil a municipal post in the town. The practice was, however, that the town whose turn it was to appoint a councillor, sold a municipal post to the highest bidder, who then jumped so to speak into the Court. It was not a nice practice but it was silently allowed. In practice it was not that bad, since it enabled capable outsiders to obtain a post in the Court. In Holland the selling of posts was since 1579 prohibited. Since the States of Holland consisted of 19 members, 18 representatives of certain towns in Holland and 1 a representative of the nobility of Holland, candidates here had to secure support from many towns. To that effect, and since there were more appointments to make, ingenious schemes of mutual support had been drawn up between these towns, which again were ruled by oligarchies, which again often had drawn up similar 'contracts of correspondence' or entertained agreements of mutual appointments. In the end the effect of this was that Holland candidates came from the oligarchies of the voting towns, or were favourites of the Prince of Orange who in the periods he was stadholder exercised of course influence since he too appointed functionaries. The Frisian Nassau's entertained in order to continue their position similar mutual agreements of appointments. Nobility was of no importance.

So the Holland candidates usually came from local oligarchies, with sometimes somebody who was clearly a favourite Orangist and the Zeeland candidates were often *homines novi* who disposed of sufficient money to buy their place in the Court: Bijnkershoek was such a person.

Formally a university study was no requirement but in practice, certainly later on, all councillors were university educated lawyers. We have to realise that in the 18th century a university diploma in law did not have to amount for much, it was common opinion that one learned the law better in practice and often the candidates were already experienced as advocates of a town.

The appointments were for life and although theoretically the States could discharge a member, in practice this did not happen. The Supreme Court was very concerned about its independence, both towards the public authorities as to the litigants: even the appearance of bribery were to be avoided. Members of the Court could not fulfil other public offices. Further there were restrictions if family ties might hinder an independent judgment.

A councillor earned 2,550 guilders, from 1716 onwards 3,000 guilders per year, the president 4,200 guilders per year. Added to this were the emoluments from the fees charged in the procedures. These could be substantial: a provisional calculation is 1,500 guilders per year extra. Yet there were certainly big differences in life-style between councillors. Bijkershoek had a private income, his wife whose father had enjoyed the blessings of the East India Company also, in total probably far more than 10,000 guilders; but in 1742 there were in The Hague capitalists with an income of 50,000 guilders and 10 to 20,000 was not uncommon. Ketelaar, councillor together with Bijkershoek, enjoyed an income of 7,000 (including his 3,000 from the Court), but his wife disposed of 173,000 guilders capital which he did not inherit from her. To compare: an alderman and a burgomaster of The Hague got 1,500 yearly as fee, solicitors had incomes between 2,500 and 4,000, a baker 2,000 guilders. Thus being a member of the Supreme Court meant that one had, as lawyer, reached the apex of professional esteem, but absolutely not the apex of income. It helped, however, to marry into the oligarchies and its money.

If a case was appealed to the Supreme Court it was put on the cause-list; perhaps pleadings were wanted and heard. Then it was examined by a rapporteur, a reporter, who drew up a summary of it and gave his opinion. After that the case circulated amongst the councillors, to return to the assembly of 7 to 9 or sometimes 10 judges. It was a requirement for voting in judgment (and voting in judgment was again a requirement to share the process-fees) to have heard all pleadings and read all papers. In the meeting all gave first their opinion, after the reporter first the lowest in seniority and then upwards, with the president as last person. After this a discussion could start and at the end of the discussion the opinions, now sentences or *vota*, were collected. Since the judgment of the court was either to allow the claim in appeal or to reject it, with next to that a discretion as to the process costs, counting the votes was simple. The court gave no motivation for its decision because that might diminish its authority. So it could happen, and did happen, that a majority came into being which was based on different opinions, but, as Bijkershoek once uttered with some despair: one counts the votes only, one does not weigh them. And Pauw added to this that the suggestion of Montesquieu, made in the *Lettres Persanes*, that the minority opinion should be followed, seemed quite attractive to him.

As to the private law applied by the Court, it was primarily the customary, mostly written law of Holland and Zeeland, together with laws of the executive of these provinces. The customary law could differ according to the towns the litigants were citizen of, and there was further a great divide in the law of succession of Holland between the areas of 'aas- and 'schependomsrecht, primarily important for the succession to real estate. In the commercial law several ordonnances and some municipal regulations like the Amsterdam regulation on cheques were important. Since the Netherlands had been part of the Holy Roman Empire till 1648, they had been subjected as well to the decision made on the Reichstag at Worms in 1495 to institute a Reichskammergericht which would be court of appeal for the entire Empire. Section 3 of the act stipulated that if there was no customary law, Roman law would be applied. Although the Grand Council of Mechelen/Malines by the *jus de non appellando* cut off this way very soon, nevertheless the principle remained, far more as an acknowledgment of a grown practice than as an innovation. The public law was basically ruled by the Political Ordonnances of 1581 of Philip II, criminal law also by the Penal Ordinance (the *Constitutio Criminalis Carolina*) of Charles V of 1532: one of the few unificatory measures of the Burgundians which had success.

Yet it would be very wrong to assume that the Court busied itself permanently with this customary law. On the contrary, as courts elsewhere in Europe it had a low esteem for it, it being often considered more a bundle of unorderedly gathered writings: Roman law was the law generally applied unless there was an explicit and clear customary law or comital, imperial or states ordinance. I hope to make this relation between the various sources of law clear to you in the cases I am to relate to you now. The question is not whether we find Roman law in jurisprudence, but whether there was an area, of sufficient interest to litigate or to write about. Such areas are those of marriage and succession, of sale, lease and partnership in commerce (the area of cheques and assignments governed by the commercial law), and hypothec and pledge in financial transactions.

I shall present you with four cases. The cases are described in the summaries Bijkershoek, judge from 1704 till 1743, made every time he returned from the court. They can also be found, and now by name, in the resolution-books of the Supreme Court, and traced in some other sources.

1. **OT 2888**, 1 March 1735.

When Henry Cadogan, quartermaster general to Malborough and later ambassador to the Dutch Republic, lived in the Hague, he married a Dutch girl, Cecilia Munter in 1704. Cecilia was of bourgeois but certainly not humble birth and, as usual in those circles (her father was member of the Court of Holland), they made on 13 March 1704 a pre-nuptial agreement before exchanging vows. The marriage was blessed: two daughters, one of whom, Sarah, who married the 2nd Duke of Richmond, the other marrying a son of the 1st Earl of Portland. When Sarah married, Cadogan promised his future son-in-law a large dowry but paid him only a quarter. It may not come as a surprise that when Lord Cadogan died in 1726, Richmond claimed before the Court of Chancery from Cadogan's executor (his brother Charles Cadogan) and widow, who lived in The Hague, the remainder of 60,000 £ sterling. Of course the widow was not pleased with this. Her defence was, that she herself had many claims on the estate, some deriving from the pre-nuptial agreement and from the Earl's testament. The pre-nuptial agreement entitled her to a lifelong allowance of 4,000 guilders per annum and an usufruct on one-third of Cadogan's net estate. You see that this case has quite relevance for the present times. Also she had a claim of *doarium* on the entire estate, i.e. that the estate was burdened with what we might call a trust to support her with income. Further she claimed her dowry back (44,000 guilders) - on what ground it is not clear - and what she had brought into the marriage later on. All this was preferent to the Duke's claim.

The Court of Chancery judged on 11 July 1728 that the executor had to pay the remainder of the dowry first, invest the remainder in real estate so that the pre-nuptial agreement could be fulfilled, and put Cecilia and her other daughter for the choice, to stick either to the pre-nuptial agreement or to the testament.

Cecilia's reply was simple: she had served all the deceased's assets in the Netherlands with a writ of sequestration and had the executor summoned before the Court of Holland to pay her what was owed to her on ground of the pre-nuptial agreement and on other grounds. Then, according to the law of Holland the pre-nuptial agreement was preferred. The executor replied with the exception that they had already a law suit concerning this running in England (the so called *exceptio litis pendentis*), which was rejected by the Court.

In appeal all Supreme Court judges agreed that this exception held no good regarding the claims outside of the pre-nuptial agreement since they did not sue on these in England. And regarding those deriving from the agreement, since the creditor lived in Holland, it established the jurisdiction of the Court; if he had wanted to contest that, he should have used the exception of incompetence.

Thus remained the *exceptio litis pendentis*. All judges thought it did not apply, but on different grounds. The majority was of the opinion that Cecilia was merely defendant in England and had not submitted a counterclaim for the agreement. Some, on the other hand, were in doubt. Van der Hoop said: apparently in Albion a universal judgment has been introduced, by which all in a law suit, claims and pretences, can be adjudicated, even without a formal counterclaim. Yet even if it were denied to her, such a judgment would not be valid in Holland and therefore the exception were to be rejected. Van Hees even carried it further: the law suit had been settled by that and the exception was useless now. Van Bleiswijk, a good civilian, remarked that it had more of a *iudicium familiae erciscundae*, the judgment by which an estate was divided between the heirs. President Bijnkershoek was abhorred by the stupidity of Van der Hoop and Van Hees: nowhere in the world a claim were granted without that it had been first submitted formally. If that were the case, it would have been in a law suit between Richmond and the widow, not between her and the executor who were, both, in England defendants and in Holland adversaries. But he kept this for himself and remarked merely that the *exceptio litis pendentis* was only applicable between the same adversaries. For him that sufficed. And so the exception was rejected.

We may assume that Cecilia was victorious before the courts of Holland. In any case did she live very comfortably ever after: in 1742 she had a yearly income of 20,000 guilders, a coach with two horses, 7 maids, a house in The Hague, rent 800 guilders, and a country house, Raephorst (near Haarlem, inherited from her father).

We see here the importance of the prenuptial agreement in Holland and the difference with the common law. In the province of Holland marital community of property was customary law: not only of assets acquired during the marriage, but also of assets owned at the time of marriage (feudal assets excluded); and debts too became common. To avoid unwanted consequences of this system the Dutch, by virtue of the subsidiary place of Roman law, used the Roman law system of *pacta antenuptialia* or *pacta dotalia*, the dowry agreement, which in Roman law did not rule the property relations between spouses completely, but in as far as it could it did indeed. As to succession, the *dotalia* were an agreement according to which at the moment the marriage ended, either by divorce or by death, the property relations between the spouses had to be settled. The marriage had been concluded in The Hague and was, according to Dutch law, ruled by Dutch law. Hence Cecilia's claim that her claims to the dowry and the *doarium*, evidently based on the *dotalia*, were privileged. In common law, as we have all become once more aware of in the past months, they have no value. Also Cadogan's daughters were English: had they been Dutch they could have claimed a legitimate portion of their father's inheritance.

2. **OT 420** 1708 Joannes Vollenhoven, vicar of the Great Church in The Hague (1631-1708) had died on 14 March 1708, leaving a holographic testament with his children as witnesses. In it he instituted his two sons for the legitimate part, saying that through his protection they had already been blessed with some profitable offices. This is certainly possible. Vollenhoven had married in second marriage a sister of Frederik Rosenboom, member of the Court of Holland and had got by that firmly hold into the Orangist clique, which could provide sine cures; as could his brother, burgomaster of Zwolle and member of the Admiralty of Amsterdam. The remainder of his estate was for his three daughters (who of course did not have such opportunities).

Still one son was not a true Christian: as soon as he became of age he started to contest the will, saying that it was invalid since it lacked a date. The daughters and the other son opposed this and asked the Supreme Court maintenance in possession. As the other son was content with the legitimate portion, he based himself on Justinian's Code 6.33.3, which says that whoever is first instituted as heir, ought to have possession. The older son again claimed possession on the ground that his father had died intestate. Normally a testament needs a date, but, so Bijkershoek, in my *Commentarii* I have refuted this idea. Yet here we deal with a *testamentum inter liberos* and for that Justinian's Novel 107.1 and the *Authentica Quod sine* (inserted in the Codex after C. 6.23) require explicitly that the time must be designated. That had not been done here and so C. 6.33.3 did not apply.

But the other party objected that that was only for the case more than one testament existed. Otherwise it were impossible to determine which one was the last one. That, however, was not the case here: a daughter who had died less than a year before the testator, had been passed over in the testament. Consequently it must have been drawn up within this short period. They also cited D. 20.1.34.1. Here a contract of pledge, which lacks a date is considered valid. The Supreme Court accepted this exception to the rule since there was but one testament. The texts and authors the plaintiff cited (Justinian's Novel 107.1, Sande's *Decisiones Frisicae* and some *Consilia*) followed the formalities of the law, but not its substance. Judge van Vrijhoven also cited Grotius in favour of this, President Admiraal reminded that the Novel 107 did not sanction with nullity, and that the *Accursian Glosse* allowed for exceptions in case of testaments *ad pias causas*, as Gothofredus did. Already on 26 June the Court decided the case in favour of the faithful children.

If you look at Bijkershoek's text of the case, the Roman law sources are clearly distinguishable. It would seem as if this was only the Roman law and the rest not. Yet that is a very wrong impression. All the rest is Roman law too. Grotius in his *Introduction to Roman-Dutch Law* deals with the testament and simply follows the Roman law. Only after he has described the way a testament is executed according to Roman law, he says that it is allowed to do it thus, but that we - the Hollanders - usually follow the custom, i.e., execute the testament before a public officer. Also customary law is that husband and wife may make one testament. After that he continues with the division of the estate, ordered by the *de cuius*, and he states that here the custom is not followed. Thus the customary law is almost only dealing

with the execution of the deed: substantially it is all Roman law. It is Roman-Dutch law, but the Roman part is major. The common law executorship, on the other hand, also known in mediaeval continental Europe, is an indigenous invention, but on the continent it only survived as an available particular testamentary disposition.

In other areas of the law, such as contracts, Roman law influence was even bigger. An exception here were insurance, bills of exchange and average gross. I cite a case of a sale, which is also interesting since it demonstrates the great importance of the option in trade.

3. **OT 1420** On 6 July 1706 Adam van Kempen gave Lucas Condrij an option on 5,000 pounds of whalebones to be delivered between 6 July and 30 November 1706, for a price up till 41 guilders per 100 pounds. If Lucas had not demand delivery before that date, delivery would have to take place on 30 November at that price. Because the price increased up till 58 or 59 guilders, Lucas claimed delivery on the 23 October 1706. But no delivery was made and Adam was cited before the Bench of Amsterdam and condemned to deliver for the agreed price and also to restitute Lucas the *id quod interest, quanti unquam plurimi*, his full interest in having had the delivery on that date. Adam indeed offered to deliver, but as to the damages he merely offered to pay the difference between the 41 guilders and the market price of the whalebones on the 23 October.

His appeal being rejected, he appealed to the Supreme Court. This had had cases like this before and it was its standing opinion, that the *interesse* was to be reckoned as to the day delivery should have taken place and not the day the claim was raised before the court (or. e.g., the day of judgment). The Supreme Court based this on several texts of the Digest: D. 12.1.22, D. 13.3.4 and D.2.11.12.1, and further Sande, Decisiones Frisicae III.4.8. The D. 12.1.22 deals with the question, whether to take the moment of due delivery, of raising the claim or of the judgment to establish the *litis aestimatio*, i.e. the value the case has for the claimant. Sabinus' answer is: the moment of delivery, unless this was not established, in which case the moment the proceedings started should be taken. D. 13.3.4 says the same, but Cassius here answers for the second case the day of judgment. D. 2.11.12.1, not cited in the previous cases, in a general way states that the moment in which the performance should have taken place is to be taken. we see, it is Roman law which dictates the solution. The decision of the Frisian court was the same (which is not surprising, since Roman law was applied there as well). Further the Court condemned Adam van Kempen to pay interest on the sum claimed, but now only from the moment the claim was raised. This was contrary to previous decisions, but here the price had gone up since - it was at the moment 100 to 110 guilders per 100 pounds! - whereas in the previous decisions the price had gone down and delivery had not been in the interest of the buyer.

But Lucas Condrij claimed both delivery and *id quod interest*, which was possible in Roman law. But was it right in this case? Van Kempen thought not, since it was use in Amsterdam and a custom amongst merchants that one could always deliver and be discharged. Bijnkershoek and the Court thought otherwise. If the whale beards were delivered - and Condrij could insist on that, since there was still a contract of sale -, Condrij could sell them at 100 to 110 guilders per 100 pounds. If he would receive next to that the price difference on 23 October, he would be enriched without ground. The *id quod interest* was, in this particular case, what he would get in case delivery did not take place. So if there was a delivery, it was not right that he would also be entitled to the *interesse*. Therefore the Court confirmed on 25 February 1718 the Amsterdam judgment but with the modification that Van Kempen either had to delivered or to pay the *interesse*; leaving it to Condrij to choose what he wanted. We see here, by the way, the slow but irresistible entrée of the unjustified enrichment idea, not unknown in Roman law, but more developed by the canonists.

4. **OT 1326** April 1723 Another case in this area is that of the sale of hay. In September 1697 Robeijns bought from Verploeg all the hay, still on the land to be mowed. Before the hay could be delivered the land was flooded. Robeijns retreated from the contract, but Verploeg insisted on specific

performance, i.e., that Robeijns would take the hay. On 5 October 1697 they agreed that Robeijns, the buyer, would as soon as possible mow the hay and take it with him, that some hay stacks would be left for another buyer, and that arbiters would estimate the damage caused by the flooding. The next day Robeijns' ships took a sizable part of the hay, but an even larger part remained on the land. The day after another flooding spoiled the remainder of the hay. The seller, Verploeg, now sued Robeijns for the entire price and the third party buyer for the price of the haystacks. The court of Heusden awarded Verploeg his claim, the Court of Holland confirmed this ten years later, in 1710. In 1723 the case was before the Supreme Court, since the buyer appealed. There had not yet been an estimation of the damages.

The opinions of the judges varied enormously. Some judges confirmed the judgments of the previous courts, who had based themselves on the rule *periculum est emptoris*: as soon as a sale is perfect, the risk of the yet undelivered thing is for the buyer. Other judges contested this, since it concerned in this case generic goods and here, as said in D.18.1.35, 18.6.1 and CJ 4.48.2, the contract was not perfect until the goods had been weighted, counted or measured: individualised as we say now. That had not taken place for the second delivery. As to the first, no estimate had yet been made. They rejected the previous judgments consequently. Bijnkershoek thought this was sensible.

Again other judges said that the individualisation had not taken place because the buyer had been *in mora*, in default. By that the risk was now for him, see CJ 4.48.2. Yet, so Bijnkershoek, it was not certain that the buyer had been in default either before the first or before the second flooding. Therefore this opinion could not stand, in his opinion.

Lastly, another group of judges, amongst whom Bijnkershoek, were of the opinion that the case was not ripe for any decision since the facts were too obscure: they were not yet *in forma probanti*. This seemed to a majority the best way to go - nothing better in case of doubt than to postpone the matter - and in an interlocutory decision parties were charged to present their case better. As to the third party, with a majority of one vote his claim was adjudicated but not yet promulgated. Of course this was nonsense and Bijnkershoek jotted down his dissatisfaction with it. On 17 April a majority in the Court decided that Robeijns had been in default on both occasions, whereas the third party-buyer had not. Thus the judgment of the previous courts were only as regarded the third party annulled.

The *observationes* of Bijnkershoek show us two things. First, how the judgment of the Supreme Court was reached. It was a case of finding a majority. But behind the vote lay the motive to vote this way: how did a judge appreciate the legal aspects of the case? Here opinions could quite differ and sometimes a majority was found, but on complete different grounds and, rarely though, on grounds which in themselves could not carry the decision. To speak of 'the opinion of the Court' is to speak of a fiction: as such the common law way of judges each delivering in public their opinion is more clear and transparent, but making the search for a ratio decidendi more difficult too. Until 1815 this was anyway impossible in Dutch jurisprudence since the judgments were given without motivation, unlike in Germany at the end of the 18th century. After that moment a motivation is constructed, but again it may disguise differences in opinion between the judges.

The second thing is that we see here how the reception of Roman law had its way in Holland, and, in principle, everywhere else where it was accepted as subsidiary law. If there was a clear local or customary law, it had to be applied. But as soon as there was a gap, Roman law could and would be applied. Practice was, actually, the way around: Roman law was the basis of jurisprudence and positive law, unless there was an explicit local law. There were so many gaps, that since its application is so wide it made the customary law dwindle and form merely barren islands in a luke-warm and fertile sea of Roman law, full with vegetation and sea animals, where constantly new islands, lush with vegetation, arose. In that practice developed new views, which of course were framed in a Roman law setting.

## Appendix

OT 2465, 2752. The use of these antenuptial agreements could go far. On 4 November 1688 the count von Heems, an Austrian nobleman and since 1696 ambassador of the German emperor in Berlin, after 1707 resident in The Hague and extraordinary imperial envoy, ambassador, there, married Agneta Heidoorn, widow of Daniel Schadeberg, who had two sons out of her first marriage. Agneta and Heems had some assets, Daniel had nothing. On 20 November they concluded an agreement, which Bijkershoek calls *pacta dotalia*, since it said that parties had agreed this before the marriage. As to the two boys, Heems agreed to give them a sum of 1000 rixdollars, out of the revenues of which they could be sustained until they were 16. If he would die without children, Maria would receive a pre-legacy of 500 rixdollars and for the rest their goods would be divided into two halves, each of which would go to the relatives of each spouse: unless one of the contracting parties had wanted to bestow upon the other by testament something more. Heems died in 1718. He had made a testament, in which he had instituted his brother as heir, bestowing upon his wife the usufruct of all his possessions. She accepted this and enjoyed it till she died in 1721. Meanwhile, one of the boys, who both had been travelling and studying around in Prague and Bresslau, Frans, had died. Now a law suit emerged between brother Johann Baptist and the other boy, Ernst, now himself calling more genteelly Mr Ernestus de Schadeberg. Brother Joachim contended that according to the law of Vienna, under which Heems had married Maria, there was no community of property whatsoever, that all his brother had ever possessed, had been acquired by him and not by Agneta, and so he as brother was now as sole heir entitled to all. To be sure, he asked for a declaration by the Court that there had been no community between the spouses. Lacking an account of what each spouse had contributed at the moment of marrying, his second argument was frail. The judge-reporter remarks that Heems apparently had been under the impression that the nuptial agreement had introduced community of property, but exactly that had not been the case. Besides, Agneta had accepted the testament which had replaced the agreement. He therefore concluded to adjudicate the claim of Heems. As to the other judges, De Roovere agreed with this; Van der Hoop on the other hand was of the opinion that the agreement had introduced community of property, but by testament one could deviate from this and Agneta had accepted that. Van Hees and Duirkant joined him. Van der Does, on the other hand, considered the agreement a conditional testament, revoked by Heems' subsequent testament. Bijkershoek came to the point. Antenuptial agreements had in the 18th century to be ante-nuptial. It was saved by the insertion that it was agreed, orally apparently, beforehand. But it did not introduce marital community of property: it ruled what was to happen after death. What we see here is that the antenuptial agreement almost takes the place of a testament; as in nowadays German law *Ehe-* and *Erbvertrag* can fuse. The exception only allowed to grant by testament the other spouse more than half and this what the testament did: it gave the usufruct to Agneta over the other half (of Heems), but this did not mean that it could take away Agneta's own half. Unfortunately she had been under the impression that all would go to her husband's brother, but this had no legal consequences. Apparently his argument convinced several of his colleagues, because in his observation he notes that four of the seven followed this reasoning. I think that this was not what the count had wanted in his testament, but his *voluntas* did not count here, since he had already restricted his *facultas testandi*. Apparently Bijkershoek thought here of the mutual testament which, like the modern German Berliner testament, an *Erbvertrag*, which generally cannot be revoked without the consent of the other party.

There were more differences between parties. Heems' brother also claimed those expenses from Ernst back, which the deceased had made after his 16th birthday. Ernst retorted with claims of large accounts in Vienna and a house in Berlin which had belonged to his mother. Two judges simply concluded that Heems never had the intention to claim these expenses back; Van Hees, followed by three other judges, stated that there had been community of property and that these expenses were communal and burdened, according to D. 17.2.73, the community. Bijkershoek again dotted the i's and crossed the t's - he must have been exasperating at times for his fellow judges - stating first that the Roman law rules on *communio omnium bonorum* could be applied to the marital community of property. That is not self-evident and present Dutch law does not totally accord with that. Further: First, according to Roman law, if a stepfather supported his stepson while planning to reclaim this, he was considered not to reclaim: C. 2.18.15. This text says this of a freedman who supports his manumissor's daughter. He

did what he already should have done as moral duty. The same went for a stepfather. Secondly, although there was no marital community of property in Rome, the Romans nevertheless were of the opinion that if there was a *communio omnium bonorum* between partners, it also included money spent on children of a partner. D. 17.2.73 stated that if a communion of property between partners had been engaged upon, it included future acquisitions, but also expenses *ob honorem* for the children. With that the Romans had meant, of course, expenses necessary in the ambit of a honorific municipal office. But that did not matter: If this was valid for such an office, the more it was valid for expenses as food, travel and study. Besides, the stepfather was prepared to spend lavishly. Thirdly, according to modern practice and confirmed by Dutch authors as Someren, Wesel and Voet, a stepfather was obliged to this: he had accepted with the marriage the burden of her children from the previous marriage.



## A case of unjust enrichment

*W. Pauw, Observationes Tumultuariae Novae* nr. 145

Maevius, qui societatem vinariam inierat cum Sempronio, a Titio emit certam vini quantitatem 3875 flor., qui cum non solverentur, Titius apud iudices Amstelodamenses ab utroque illos petiit in solidum cum usuris a mora. Maevius, qui nihil in bonis habebat et distracta jam societate, refereert zig ter discretie van scheepenen, atque ita condemnatur; dog Sempronius neemt contrarie conclusie et 3 Decemb. 1739 absolvitur. Hanc sententiam probavit Curia 27 Jul. 1742. Appellatum est. Satis est liquidum ex facto socii non obligari socium, nisi qui contraxit sit institor societatis l.4 § 1 D. de exerc. act. At dicebat Titius, Maevium re vera institorem fuisse illius societatis vinariae, want dat volgens 't contract van societeit alleen canteerde op de naam van Maevius, atque illud verum erat. Sed non probabat Titius contraxisse se cum Maevio tanquam institore, quin potius contrarium apparebat, cum solum Maevium sine ulla designatione debitorem in libris rationum constituisset. Obtulit quidem Titius apud H.R. jusjurandum cognitam sibi fuisse societatem Maevium inter et Sempronium initam seque, cum vinum Maevio venderet, secutum maxime fidem Sempronii, sed hujus jusjurandi nulla ratio fuit habita, cum nullo probabili argumento adjuvaretur. Quid si cum Maevio tanquam institore contraxisset Titius? Neque ideo teneretur Sempronius, cum legem praepositionis excessisset Maevius l.2 § 12 D. de exerc. act., l.11 § 5 de instit. act., nam vinum hoc inscio Sempronio emerat Maevius, cum tamen contractu societatis convenerat, ne quod vinum compararetur nisi consensu utriusque contrahentis. Atque ita probandae fuissent sententiae anteriores. Sed ex instrumentis litis apparuit, Sempronium post dissolutam societatem arresto inclusisse, quaecumque ex vino vendito erant redacta, cumque omnino esset probabile inter ea fore nummos qui provenerant ex vendito d.q.a. vino, quo nomine certe de in rem verso teneretur Sempronius, placuit Titio injungi probationem of en hoeveel penningen etc. van de wijn in quaestie gekomen onder de gearresterde penningen wierden gevonden, ita judicatum est 15 Decemb. 1745.

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Maevius, who had entered into a contract of partnership with Sempronius in order to trade wine, purchased from Titius a certain quantity wine for *f* 3875. Since this amount was not paid, Titius claimed the entire amount with moratory interests from both partners before the Amsterdam judges. Maevius, who lacked any means - the contract of partnership being dissolved - referred to the discretion of the sheriffs/aldermen (*scheepenen*), and was therefore condemned. Sempronius, however, brought a statement of defence and was absolved on 3 December 1739. The court confirmed the decision on 27 July 1742. An appeal was made. It is sufficiently clear that a partner cannot be obligated by the act of the other partner, unless the one who entered the contract was the branch manager (*institor*) of the partnership, see D. 14.1.4.1. But Titius maintained that indeed Maevius was the branch manager of the wine trade partnership, which according to the contract of partnership merely acted in the name of Maevius, and the latter was true. But Titius did not prove that he entered the contract with Maevius as with a branch manager, but precisely the opposite, because it appeared that without any further designation he had only noted Maevius as his debtor in the bookkeeping. Titius did offer the Supreme Court to swear that it was known to him that there was a partnership between Maevius and Sempronius and that he, when selling the wine to Maevius, was particularly relying on approval of Sempronius, but this oath was not taken into account because it was supported by no probable argument. What if Titius entered into the contract with Maevius as with a branch manager? As a consequence Sempronius will not be obligated because Maevius had broken the clause of appointment, see D. 14.1.1.12 and D. 14.3.11.5,‡ when he Maevius purchased the wine without Sempronius knowing this, although he had agreed in the contract of partnership that wine would not be purchased without the consent of both parties. As a consequence the earlier decisions should be confirmed. However, from the deeds of the trial it appeared that after the partnership was dissolved by sentence Sempronius had locked away whatever proceeded from the sale of wine. Because it was certainly probable that among this there were coins proceeding from the wine sold, on which account Sempronius was certainly bound by the *actio de in rem verso*, Titius was allowed to bring evidence how many coins, proceeding from the wine under dispute, were found among the coins distressed. And so it was decided on 15 December 1745.

‡ the clause of appointment: according to D. 14.1.1.12 and D. 14.3.11.5 the agreement of appointment determines exactly which acts of the branch manager will bind the principal and which will not.