

Se il diritto romano continua a essere applicato in Sud Africa, c'è però da dire che ciò avviene essenzialmente attraverso le traduzioni, quindi sulla base di fonti di seconda o terza mano. Non si tratta quindi propriamente di autentico diritto romano, ma del diritto romano-olandese, ossia il diritto romano come fu inteso e applicato in Olanda nei secoli XVII e XVIII.

### PHILIP THOMAS

University of Pretoria-South Africa  
hthomas@icon.co.za

## THE APPLICATION OF ROMAN LAW IN MODERN SOUTH AFRICAN LAW\*

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### 1. Introduction

Since the reception of Roman law during the Middle Ages, questions regarding to the applicability of specific parts of Roman law have been the topic of heated debate in court rooms<sup>1</sup>. Codification has put an end to these questions<sup>2</sup>, but in the South African legal

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<sup>1</sup> This led to a specific genre in legal literature, an excellent example of which is S. A. GROENEWEGEN VAN DER MADE, *Tractatus de legibus abrogatis et inusitatis in Hollandia vicinisque regionibus*, Leiden, 1649.

<sup>2</sup> *Cfr.* Art. 7 of the Act promulgating the French Code civil (Act of 21 March 1804): «From the day when these laws (constituting the Code) become effective,

system Roman law has remained a relevant factor in several branches of the law, because South African law has not been codified. In consequence, the debate on the application of Roman law is still topical and I want to use two decisions dealing with the praetorian Edict *de receptis nautarum cauponum stabulariorum* to illustrate the South African *usus modernus*.

## 2. Legal History

In 1652 the Dutch East India Company<sup>3</sup> established a refreshment station for its ships en route to the Dutch East Indies and back at the Cape of Good Hope<sup>4</sup>. The commander of

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the Roman laws, the Ordinances, the general and local Customs, the Charters and the Regulations all cease to have the force either of general or of special law concerning the subjects covered by the present Code».

<sup>3</sup> The company had received the monopoly of trade with the lands to the east of the Cape of Good Hope and the west of the Straits of Magellan when it received its charter in 1602 from the States-General of the United States of the Netherlands. H.R. HANLO, E. KAHN, *The South African Legal System and its Background*, Cape Town, 1973, 534 ss.

<sup>4</sup> P. J. THOMAS, *Harmonising the law in a multilingual environment with different legal systems: lessons to be drawn from the legal history of South Africa*, in *Fundamina*, XIV.2,

di difesa: *vis maior*, mancanza di colpa, negligenza degli attori e responsabilità congiunta, richiamando, in particolare, la circostanza che era stato esposto un avviso, secondo cui gli albergatori declinavano ogni responsabilità per danni o perdite di beni dei clienti, per qualsiasi motivo. Ma la sentenza fu di condanna all'integrale risarcimento più le spese, includendo fra queste il lavoro dei periti e il viaggio dagli USA. Sembrebbe quindi essere stato adottato un criterio di responsabilità assoluta a carico degli albergatori, anche se la Corte non fece espressamente riferimento ad essa, asserendo – discutibilmente – che la negligenza sarebbe stata non dei clienti, ma degli albergatori. Al riguardo, va notato che la sentenza contraddice anche il pensiero di Ulpiano, il quale, in D. 14.3.11.3, chiarisce che, se un avviso è posto in luogo accessibile al pubblico, non si può eccepire di non averlo letto e di non esserne a conoscenza.

Gli operatori del diritto continuano dunque – anche se con minore frequenza – a basare le loro argomentazioni sul diritto romano, con diversi risultati: il richiamo alla rubrica *De receptis* fu respinto nel caso dell'allenatore di cavalli, mentre fu accolto – ma in modo assai discutibile – nel caso del b & b.

l'argomentazione dell'allenatore, non perché l'editto del pretore non avrebbe dovuto applicarsi, ma perché la figura dello *stabularius*, in esso rappresentata, in quanto di basso rango tecnico e sociale, non avrebbe potuto essere assimilata a quella di un moderno allenatore di cavalli, caratterizzato da una elevata competenza e professionalità.

Un problema, in questa riaffermata applicazione del diritto romano come diritto positivo, era però rappresentato dal fatto che la maggior parte dei giuristi non aveva padronanza del latino, così da dover ricorrere a delle traduzioni, come la traduzione di Scott del *Corpus iuris*, o quella di Gane del *Commentarius ad Pandectas* di Voet.

Una sentenza del 2002, nella vertenza 'Gabriel and Another v Enchanted Bed and Breakfast CC', appare singolare. I coniugi Gabriel erano due sudafricani emigrati 23 anni prima negli USA. Tornati in Sud Africa in vacanza, soggiornarono in un 'bed & breakfast', ma, una notte, la loro stanza fu svaligiata dai ladri. Nonostante nella stanza fosse a disposizione una cassetta di sicurezza, i coniugi avevano lasciato sui comodini orologi e gioielleria, che furono trafugati e il cui valore fu stimato in 252.000 rand. I titolari del 'bed & breakfast', convenuti per la perdita, opposero quattro tipi

this settlement was of the opinion that he resorted under the office in Batavia, and that consequently the law of Holland should apply in the Cape. The law of Holland at this time consisted of some federal and provincial legislation, many municipal statutes, regional customs and Roman law as the subsidiary or default legal system<sup>5</sup>.

2008, 133-155.

<sup>5</sup> J. VAN DER LINDEN, *Rechtsgeleerd practicaal en koopmans handboek*, Amsteldam, 1806, I,1,4; English translation by H. JUTA, *Institutes of Holland or Manual of law, Practice, and Mercantile law*, Cape Town<sup>2</sup>, 1891, I,1,4: «In order to answer the question, What is the law in such and such a case? we must first inquire whether any general *law of the land*, or any local *ordinance* having the force of law, or any well-established *custom* can be found affecting it». The Roman law, as a model of wisdom and equity, is, in default of such a law, accepted by us through custom in order to supply this want. H. DE GROOT, *Inleydinge tot de Hollandsche Rechtsgeleerdheid*, t'Amsteldam, 1706, I,2, 26 (not 56, which is clearly a misprint); An ordinance of the States of Holland of the 25<sup>th</sup> of May, 1735 confirmed this rule, *Groot Placuet Boeck, inhoudende de Placaten ende Ordonnantien vande Hoogh-Mog: HEEREN Staten Generael der Vereenighde Nederlanden, ende vande Ed. Groot Mog: HEEREN Staten van Hollandt ende Wets-Vrieslandt, Mitsgaders avnde Ed. Mog: HEEREN Staten van Zeeland, s'Gravenhage, 1658-1796*, Deel 7,96.

After the French revolution, the French invaded the Netherlands in 1795 and the British occupied the Cape to protect the sea route to India. In terms of the articles of capitulation in 1795 and in accordance with the rule of international law stating that the laws of a conquered country remain in force until they are altered by the conqueror<sup>6</sup>, Roman-Dutch law remained the law of the Cape. The *status quo* remained unchanged when in 1814 the British retained the Cape in terms of the Convention of London<sup>7</sup> and the Cape became a British Crown Colony. Thus, the Cape was untouched by the new French codification, which had been introduced in 1811 in the

<sup>6</sup> This rule had become part of English law by the decision of Lord Mansfield in *Campbell v Hall* (1774) Cowp., 204 at 209; 98 E.R., 1045 at 1047; H. R. HAHLO, E. KAHN, *Legal System*, cit., 575.

<sup>7</sup> Convention between Great Britain and the Netherlands relative to the Dutch Colonies; Trade with the East and West Indies; etc. signed at London on August 13, 1814. The United Provinces of the Netherlands received five million pounds sterling in consideration, and in satisfaction thereof, the Prince Sovereign of the Netherlands ceded in full sovereignty to His Britannic Majesty, the Cape of Good Hope and the settlements of Demerara, Essequibo, and Berbice. See AA. VV., *Larousse Encyclopedia of Modern History*, Feltham, 1968, 283.

convenuto (il Dipartimento delle Ferrovie) non avrebbe potuto essere dimostrata contro l'editto del pretore.

La sentenza più significativa, a questo proposito, è quella del caso 'Davis v Lockstone', nella quale il Giudice Salomon respinse l'argomentazione secondo cui l'editto del pretore (secondo cui la responsabilità dei comandanti di navi etc. sarebbe stata assoluta) sarebbe diventato obsoleto, affermando che la relativa rubrica dell'editto sarebbe ancora stata alla base del diritto del Sud Africa. Fu pertanto stabilito che un'azione da 'quasi-contratto' avrebbe potuto essere esperita per ogni danno o perdita subita dagli utenti, ad eccezione dei casi di *vis maior* (o *damnum fatale*), intesi come atti di violenza.

Questa tendenza fu confermata nel 1996, nella vertenza 'Swart v Shaw t/a Shaw Racing Stables', nella quale il proprietario di un cavallo si era accordato con un allenatore di cavalli per l'allenamento del proprio animale, che però era morto mentre era affidato alle cure dell'allenatore. Questi richiese il pagamento per il lavoro svolto, mentre la controparte richiese i danni per la morte dell'animale, in base al criterio di responsabilità assoluta presente nella rubrica *De receptis* dell'editto del pretore. Il giudice respinse

nave, nella locanda o nella stalla dai dipendenti, che sarebbe invece stata *ex quasi maleficio, poenalis mixta, ad duplum*. Contro tale responsabilità sarebbe stato possibile, secondo Voet, ricorrere ad esplicite clausole di scioglimento, o a un accordo tra le parti o a una forma di esenzione tacita, manifestata consegnando al viaggiatore le chiavi della stanza.

Nel 1879 il Presidente della Corte Connor of Natal stabilì, nella causa 'Crocker v Doig and Murray', che il common law del Sud Africa sarebbe stato identico al diritto romano nei limiti dei risarcimenti di tipo contrattuale (da 'quasi-contratto'), ma che la condanna *in duplum*, per la responsabilità *ex quasi delicto*, sarebbe stata da tempo obsoleta. Anche il giudice Shippard, nel 1881, nella causa 'Stretton v Union Steam Ship Co (Ltd.)', sostenne che il livello di responsabilità di comandanti di navi etc. nel diritto romano-olandese e nella Colonia del Capo si sarebbe basata sull'editto del pretore. Nel 1889 il Presidente della Corte della Colonia del Capo, Lord de Villiers, si espresse in termini ambigui riguardo alla possibilità di estendere la responsabilità dei comandanti di nave etc. anche al trasporto su terra, mentre il Giudice Buchanan asserì che la responsabilità del

Netherlands putting an end to the so-called Roman-Dutch law in that country. In the Cape Colony English-educated practitioners had to apply a Roman-law based system. These lawyers were trained in another legal system, in another legal tradition, in another country and in another language<sup>8</sup>. Thus lawyers trained in practice to reason from case to case, from concrete situation to precedent, were confronted with a legal science which had developed a coherent framework from principles and rules, and in which reasoning from legal principle and rule to the concrete case was the norm. The solution was to change the administration of justice and the judicial organisation<sup>9</sup>. In the common law the engine of legal development had been the administration of justice. The old Dutch pro-

<sup>8</sup> P. J. THOMAS, *Harmonising*, cit., 136.

<sup>9</sup> Already in 1807 the governor had constituted himself a court of appeal for civil cases and in 1808 the governor and two assessors became the same in criminal cases. In 1811 circuit courts were introduced; in 1813 court proceedings were conducted in public; from 1814 Dutch and English were the languages of judicial proceedings; in 1826 justices of the peace were created; in 1827 the jury system was adopted, which in turn led to the introduction of the English law of evidence in 1830. P. J. THOMAS, *Harmonising*, cit., 136, nt. 21.

cedural law<sup>10</sup> was consequently replaced by the English law of criminal and civil procedure, a jury system and the concomitant English law of evidence was introduced<sup>11</sup>.

The Charters of Justice of 1827 and 1832 replaced the Council of Justice by an independent judiciary in the form of a Supreme Court with a professional bench and the Privy Council became the highest court of appeal<sup>12</sup>. Only British and colonial advocates could be appointed as judges. All advocates had to be graduates of British universities, or had to be trained at the Inns of Court in England, Scotland or Ireland. English was the official language of all superior courts<sup>13</sup>.

<sup>10</sup>Charter of Justice of 1832, His Majesty's Royal Charter for the Better and More Effectual Administration of Justice within the Colony of the Cape of Good Hope.

<sup>11</sup> Ordinance 72 of 1830, Ordinance for Altering, Amending, and Declaring in Certain Respects the Law of Evidence within this Colony.

<sup>12</sup> For the judicial organisation, see H. R. HAHLO, E. KAHN, *Legal System*, cit., 541.

<sup>13</sup> S. 32 of the Charter of Justice of 1832. In 1822 English had become the language of government and in 1828 the language of the inferior courts in terms of s. 7 of Ordinance 33 of 1827.

il romanista olandese van Oven richiama l'usanza antica di esporre, presso le insegne di locande e stalle, l'avviso *sarcinas salvas fore*, di segno quindi opposto agli avvisi, in uso ai nostri tempi, 'a proprio rischio'. L'osservazione di Labeone, secondo cui un'eccezione al risarcimento sarebbe stata garantita in caso di naufragio o assalto di pirati, indicherebbe che, nel diritto romano classico, questa responsabilità assoluta sarebbe stata giustificata in termini di *custodia*, come sembrerebbe confermare anche Gaio.

Il padre del diritto romano-olandese, Hugo de Groot, parla della responsabilità di comandanti di navi, albergatori e gestori di stalle a proposito delle obbligazioni *ex quasi delicto*, e stabilisce che questi soggetti sarebbero stati responsabili per ogni tipo di danni alle cose o alle persone prodotto sulle navi, nelle locande o nelle stalle da parte di dipendenti. L'idea del Grozio (seguita poi da altri autori) era quindi che sussistesse un'unica azione pretoria, che sarebbe poi diventata da 'quasi delitto', e limitata nella sua applicazione, per i danni causati dai dipendenti. Secondo Johannes Voet, invece, le azioni sarebbero state due: una per responsabilità da *custodia* sui beni del cliente, considerata *quasi ex contractu*, e un'altra, per i danni prodotti sulla

essersi laureati nelle Università britanniche, o almeno avere praticato in Inghilterra, Scozia o Irlanda. Questi giudici e avvocati inglesi usavano delle traduzioni delle vecchie fonti olandesi, ma spesso adoperavano il consueto sistema anglosassone dei precedenti, col risultato di creare un sistema misto, in cui la tradizione continentale del 'civil law' si intrecciava con quella inglese del 'common law'. In tale sistema, e in assenza di una codificazione, il diritto romano continuò a essere un importante punto di riferimento normativo in diversi settori, come proprietà, contratti o risarcimenti da atti illeciti, e il *Corpus iuris civilis* rimane ancora oggi in Sud Africa una delle fonti del diritto.

In base al titolo 4. 9 dei Digesti, *Nautae cauponae stabularii ut recepta restituant*, i comandanti di navi, gli albergatori e i gestori di stalle che avessero concluso un contratto di *locatio conductio operis* sarebbero stati responsabili, nei confronti dei loro clienti, solo per colpa, ma, riguardo ai beni da questi ricevuti, la loro responsabilità sarebbe stata considerata assoluta, ossia anche senza colpa. L'origine di tale responsabilità è controversa, in quanto, se qualcuno la fa risalire a Pomponio – secondo il quale l'editto del pretore avrebbe inteso contrastare la scorrettezza contrattuale –,

The British trained judges and advocates used translations of the old Dutch sources<sup>14</sup>, but

<sup>14</sup> The preface of R. W. LEE, *An Introduction to Roman-Dutch law*, Oxford, 1915, throws more light on the legal system known as Roman-Dutch law. The author states that the book emanated from a course of lectures delivered at the University of London, which lectures were aimed at introducing students to the general principles of Roman-Dutch law as administered at that time by the courts of South Africa, Ceylon, and British Guiana. As Maasdorp's Institutes of Cape law dealt only with the jurisdiction to which it related, a work was needed which would enable students to acquire a knowledge of the general principles of Roman-Dutch law as it existed in Africa, Asia, or America. The references are principally to de Groot, Voet, Van Leeuwen, Van der Keessel and Van der Linden. This reliance on old authority forced the colonial administrators of justice and the lawyers in the developing republics to look back in order to ascertain the law. Groot, Voet, Van Leeuwen, Van der Keessel and Van der Linden not only formed the basis of the legal systems of the Boer Republics, but played a similar role in the Cape Colony. This meant that a dire need for translations of the works of the old institutional writers into English existed and it is noteworthy that prominent South African advocates and judges like Kotze, Juta and Maasdorp were willing and able to undertake this thankless labour; Kotze translated S. VAN LEEUWEN, *Het Roomsche Hollandsch Recht*, Leiden en Rotterdam, 1664 into

often looked to English law for precedent, which made the South African common law a mixed jurisdiction as the civilian tradition was mixed with the English common law. Since South Africa never codified, Roman law has remained a relevant and living component in several branches of the South African common law, namely the law of property, contract law, and the law of delict. This means that the *Corpus Juris Civilis* remains even today one of the sources of law in South Africa, and I want to illustrate this modern application of the 17<sup>th</sup> and 18<sup>th</sup> century application of Roman law by the SA courts on the basis of decisions dealing with the praetorian Edict *de receptis nautarum cauponum stabulariorum*, the liability of skippers, stable- and innkeepers.

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*Commentaries on Roman-Dutch law*, J. VAN DER LINDEN, *Regtsgeleerd, Practicaal, en Koopmanshandboek* were translated by Sir H. Juta as *Institutes of Holland*, and Maasdorp's translation of H. DE GROOT, *Inleiding tot de Hollandsche Rechtsgeleertheit*, cit., *Introduction to Dutch Jurisprudence* appeared for the same reason as well as various translations of selected chapters from Voet. See M. HEWETT, *Old wine in new bottles or the story of translations of the 'old authorities' produced by South Africans*, in THRHR, 1998, 551-564.

*stabulariorum*.

Nel 1652 la Compagnia Olandese delle Indie Orientali fondò al Capo di Buona Speranza una stazione di ristoro per le sue navi in rotta verso le Indie. Il comandante dell'insediamento ritenne che ivi dovesse essere applicato il diritto olandese, che all'epoca, in chiave sussidiaria, si fondava anche sul diritto romano. Dopo la Rivoluzione Francese, la Francia invase l'Olanda e gli inglesi occuparono il Capo per proteggere la rotta per le Indie, ma, in base agli accordi di capitolazione del 1795, il diritto romano-olandese continuò a essere applicato fino al 1814, quando il Capo, in base alla Convenzione di Londra, divenne una colonia britannica. Il Capo di Buona Speranza, così, non fu toccato dalla nuova codificazione francese, che era stata introdotta in Olanda nel 1811, ponendo termine, in quel Paese, al cosiddetto diritto romano-olandese.

Nella colonia di Capo di Buona Speranza un sistema normativo di base romanistica si trovò così a essere applicato da operatori del diritto formati sul diritto anglosassone, secondo una procedura, tanto civile quanto criminale, di tipo britannico. Potevano diventare magistrati soltanto avvocati inglesi o delle colonie britanniche, e tutti gli avvocati dovevano

today's topic. The cases illustrate that, as a result of the historical development of the South African legal system, South African lawyers are, by virtue of necessity, well versed in second hand or third hand Roman law. By this I mean that Roman-Dutch law that is Roman law as understood and applied in Holland during the 17<sup>th</sup> and 18<sup>th</sup> centuries, usually in translations, and Roman law as set out in textbooks are on occasion argued before the courts. Thus, not only at the universities but at the bar and on the bench a number of 'legal historians' make use of the old sources, in a typically South African way.

### ABSTRACT

Le moderne codificazioni hanno posto termine al dibattito riguardo all'applicabilità pratica di specifiche parti del diritto romano nelle corti di giustizia, ma in Sud Africa il diritto romano ha continuato a rappresentare un importante punto di riferimento in diversi settori del diritto positivo, in quanto il diritto sudafricano non ha conosciuto la codificazione. Il problema dell'applicazione attuale del diritto romano è pertanto ancora attuale, come può dimostrare l'esempio di due decisioni giuridiziarie prese sulla base della rubrica dell'editto del pretore *De receptis nautarum cautionum*

### 3. Roman Law

The topic is found in D. 4. 9 *Nautae cautiones stabularii ut recepta restituant*. As a rule skipper, innkeepers and stable keepers concluded a *locatio conductio operis* contract with their clients. Their liability in these contracts was for fault<sup>15</sup>. However, in respect of property received by them in terms of their contracts they were held strictly liable, that is they were also liable if there was no fault on their side<sup>16</sup>.

The origin of this absolute liability is open to speculation. One line of thought expressed by Pomponius<sup>17</sup> holds that the praetor wished to repress dishonesty in these branches<sup>18</sup>, but there is also a view proposed by

<sup>15</sup> Ulp. 14 ad ed. D. 4.9.3.1. (*et quia in locato conducto culpa, in deposito dolus dumtaxat praestatur*).

<sup>16</sup> Ulp. 14 ad ed. D. 4.9.1.pr. *Ait praetor: Nautae cautiones stabularii quod cuiusque saluum fore receperint nisi restituant, in eos iudicium dabo*. Also Ulp. 14 ad ed. D. 4.9.3.1 *at hoc edito omnimodo qui recepit tenetur, etiamsi sine culpa eius res perit vel damnum datum est... 2. (e)odem modo tenentur cautiones et stabularii, quo exercentes negotium suum recipiunt*.

<sup>17</sup> Cited by Ulpian in D. 4.9.3.1.

<sup>18</sup> *Ibid.* (*nisi forte, inquit (Pomponius), ut innotesceret praetor curam agere reprimendae improbitatis hoc genus hominum*).

the Dutch romanist van Oven<sup>19</sup> that the origin of this liability was the practice to have signs at the inn and stables indicating *sarcinas salvas fore*, which is the opposite of our modern 'at own risk' notices. Labeo's remark that an exception is granted if anything is lost by shipwreck or as a result of an attack by pirates<sup>20</sup>, indicates that in classical law this absolute liability was watered down to *custodia*, which view is also put forward by Gaius<sup>21</sup>.

The same entrepreneurs could be held liable in *duplum quasi ex delicto* for damage, fraud or theft committed on ship, inn or stable by their employees<sup>22</sup>. The opinions of romanists are divided on the question whether this is an additional liability over and above the contractual liability for *custodia*<sup>23</sup>, or a post-classical reclassification of the action deriving from *de receptis*.<sup>24</sup>

<sup>19</sup> J. C. VAN OVEN, *Leerboek van Romeinsch Privaatrecht*<sup>3</sup>, Leiden, 1948, 310.

<sup>20</sup> D. 4.9.3.1. *inde Labeo scribit, si quid naufragio aut per vim piratarum perierit, non esse iniquum exceptionem ei dari.*

<sup>21</sup> Gai 15 *ad ed. prov.* D. 4.9.5.pr. *et tamen custodiae nomine tenentur.*

<sup>22</sup> I. 4.5.3; Ulp. 18 *ad ed. D.* 4.9.7 and Paul. 2 *Inst. D.* 44.7.5.6.

<sup>23</sup> M. KASER, *Das römische Privaatrecht*<sup>6</sup>, I, München, 1971, 586.

<sup>24</sup> J. C. VAN OVEN, *Leerboek*, cit., 310; See also W. W.

these evergreens was Ulpian and the text is found in D 14.3.11.3<sup>75</sup>.

The point of interest is that again the legal practitioners relied on Roman law. Although statistics prove a decline in this practice, it is noteworthy that both legal practitioners and the courts are equipped to do so. The reliance on the rubric *de receptis* was not successful in the case of the racehorse owner, while the applicability of the rubric in the bed and breakfast case was surprising.

## 6. Conclusion

As stated earlier, this is not a case discussion and not intended to criticise the outcome, or to correct the judge's knowledge of Roman Law. The fact that Roman law is active in the South African Courts, and the manner in which this manifests itself, are

<sup>75</sup> Ulp. 28 *ad ed. D.* 14.3.11.3: *Proscribere palam sic accipimus claris litteris, unde de plano recte legi possit, ante tabernam salicet vel ante eum locum in quo negotiatio exercetur, non in loco remoto, sed in evidenti. litteris utrum Graecis an Latinis? puto secundum loci condicionem, ne quis causari possit ignorantiam litterarum. certe si quis dicat ignorasse se litteras vel non observasse quod propositum erat, cum multi legerent cumque palam esset propositum, non audietur.*

liability of the new varieties of the Roman entrepreneurs<sup>73</sup> has come to an end. However, the question of strict liability was not really addressed, since the court held that 'If anyone was negligent, it was the defendant'<sup>74</sup>, in other words the Enchanted Bed and Breakfast. Remarkable in the decision was the conclusion of Cleaver J that leaving a quarter of a million worth of jewellery on your bedside table, when there is a safe in your room is not negligent.

Finally, the setting aside of the exemption clause and the fact that Voet's tacit exemption clause was not addressed by the court, are other aspects of the case which may surprise. The defence of the plaintiffs that they had not seen the notice or did not read the brochure may be answered with the following citation: By 'public notice' is meant a notice in writing, clearly visible and easily read, in the open, for example in front of the shop or the place of business, not hidden away but on display. No one should be able to claim that he did not know what the notice said. Certainly, if the notice was posted openly and was widely read, no one will be heard to say that he did not see it or know what it said'. The author of

<sup>73</sup> *Essa v Dwaris, supra; Anderson Shipping (Pty) Ltd v Poly-sius (Pty) Ltd*, 1995 3 SA 42 (A); *Swart v Shan, supra*.

<sup>74</sup> At 605G.

#### 4. Roman Dutch Law

These different approaches seem to have persisted during the reception of Roman law in Holland. The father of Roman-Dutch law, Hugo de Groot mentions the liability of skippers, inn- and stable keepers where he deals with obligations from quasi-delic<sup>25</sup> and states that skippers, inn- and stable keepers are liable for all damage to persons and property on board of ship, or in an inn or stable caused by their employees<sup>26</sup>. This indicates that de Groot was of the opinion that there was only one praetorian action and that this action had become quasi delictual and limited in its application, namely to damage caused on the premises by employees. This opinion of de Groot is followed by other Dutch authors, such as Groenewegen<sup>27</sup>, van Leeuwen<sup>28</sup>, van

BUCKLAND, *A Textbook of Roman law*<sup>3</sup>, Cambridge, 1968, 531, 560 s., 599.

<sup>25</sup> H. DE GROOT, *Inleydinge tot de Hollandsche Rechts-geleerdheid*, cit., III.38 title, *Van Misdaet door Wet-dyding* (=obligationes quasi ex delicto).

<sup>26</sup> *Inleydinge*, cit., 3.38.10.

<sup>27</sup> Groenewegen wrote notes on H. DE GROOT, *Inleydinge tot de Hollandse Regts-Geleertheit, midsgaders eenige by-nogels en aanmerkingen op de sebbe door Mr Simon van Groen-vegen van der Made*, cit., note on 3.38.10.

<sup>28</sup> *Het Roomsche Hollandsch Recht*, cit., 4.2.10 and 4.39.3.

der Keessel,<sup>29</sup> and van der Linden<sup>30</sup>.

On the other hand Johannes Voet<sup>31</sup>, law professor at the university of Leiden and a representative of the *usus modernus* opines in his *Commentarius*<sup>32</sup> that there were two different actions<sup>33</sup>. After discussing the praetorian action for *custodia* liability relative to the customers' goods<sup>34</sup>, which action he views as *quasi ex contractu*, he makes mention of another action *ex quasi maleficio, poenalis mixta, ad duplum* and relative to damage in ship, inn or stable caused by employees<sup>35</sup>. Groenewegen mentions that the double value by way of penalty had been abrogated<sup>36</sup>. Of particular interest is that Voet relates the possibility of explicit exclusionary clauses and the required agreement to the

<sup>29</sup> D.G. VAN DER KEESSEL, *Praelectiones Iuris Hodierni ad Hugonis Grotii Introductionem ad Inisprudentiam Hollandicam*, edd. P van Warmelo et al., Amsterdam-Rotterdam-Kaapstad 1961-1967, *Praelectiones* ad 3 38 9.

<sup>30</sup> *Koopmanshandboek*, cit., 1.16.6.

<sup>31</sup> Johannes Voet (1647-1713), professor of law at Herborn, Utrecht and Leiden.

<sup>32</sup> *Commentarius ad Pandectas*, Hagae-Comitum, 1731.

<sup>33</sup> This distinction may be the result of his adherence to the order of the Digest.

<sup>34</sup> J. VOET, *Commentarius*, cit., 4.9.2.

<sup>35</sup> J. VOET, *Commentarius*, cit., 4.9.3.

<sup>36</sup> *De legibus abrogatis*, cit., ad D. 4.9.7.1.

negligence and contributory negligence<sup>67</sup>. The court rejected these defences on the following grounds: first, the burglary had not been violent and burglaries were common in the area<sup>68</sup>; secondly, the notice on the front door of the premises reading «The owner and the staff will not be held liable for any loss or damage sustained by whatsoever cause» had been relatively insignificant<sup>69</sup> and the plaintiffs had been unaware of this notice and had not read the similar disclaimer in the brochure in their room<sup>70</sup>; thirdly, on the basis of the evidence the court concluded that the plaintiffs had not been negligent with the keys to their room, nor in leaving their watches and jewellery next to their bed<sup>71</sup>; finally, since the plaintiffs were not negligent contributory negligence was irrelevant<sup>72</sup>. Judgment was accordingly for the plaintiffs in the sum of R 252 000- and costs, the latter including the expert witness and the travel from the USA.

It would appear that the reluctance of the courts to extend the additional contractual

<sup>67</sup> At 599H.

<sup>68</sup> At 600A-D.

<sup>69</sup> At 600F-601A.

<sup>70</sup> At 601A-C.

<sup>71</sup> At 601C-605E.

<sup>72</sup> At 605F.

and *Another v Enchanted Bed and Breakfast CC*,<sup>64</sup> the result was more surprising.

### 5.3.1. The Facts

Mr and Mrs Gabriel are South Africans who emigrated 23 years ago to the USA. They came on holiday to South Africa and stayed during their visit to Cape Town in a bed and breakfast. During their stay their room was burglarised during the night. Although a small safe was provided in a cupboard, the Gabriels had left their watches and jewellery on their bedside tables as was their custom, which items were stolen and later valued at R 252 000-<sup>65</sup>.

### 5.4. The Court's decision

Justice Cleaver relied on the applicability of the praetor's edict on the basis of the decision of *Davis v Lockstone*<sup>66</sup>. The defendants had raised four defences, i.e. *vis maior*, exemption from liability, plaintiff's

notice as well as the tacit exemption clause agreed upon by handing over the keys of the room to the traveller<sup>37</sup>.

The next step is the reception of Roman and/or Roman- Dutch law in South Africa and how this received law has been developed.

### 5. South African Common Law: Nineteenth Century

In 1879 Chief Justice Connor of Natal held in the case of *Crocker v Doig* and *Murray*<sup>38</sup> that the SA common law was identical to Roman law as far as the (quasi-) contractual remedy was concerned, but that in respect of the more limited quasi-delictual action the double penalty has long been obsolete. In 1881 Shippard J in *Stretton v Union Steam Ship Co. (Ltd)*<sup>39</sup> also held that in Roman-Dutch or Common Law of the Cape Colony the extraordinary degree of responsibility upon skippers et al was based on the praetorian edict. The court mentioned that van Leeuwen discussed in his *Censura Forensis*<sup>40</sup>

<sup>37</sup> *Commentarius*, cit., 4.9.7.

<sup>38</sup> 1879-80, 1, NLR, 111.

<sup>39</sup> 1881, 1, EDC, 315.

<sup>40</sup> S. VAN LEEUWEN, *Censura Forensis, theoretico-practica*,

<sup>64</sup> 2002, 6, SA, 597 (CPD).

<sup>65</sup> At 597I-599F.

<sup>66</sup> At 599F-H.

the liability in question under the head of obligations *quasi ex delicto*, but did not enter into the contractual or quasi-delictual character of the action(s). In 1899 the Chief Justice of the Cape Colony, Lord de Villiers, was ambivalent in the case of Tregidga v Sivewright about the extension of the praetor's edict relating to innkeepers, shipmasters and stable keepers to carriers by land,<sup>41</sup> while Buchanan J held that the responsibilities of the defendants (the railway department) were not to be tested against the edict<sup>42</sup>.

### 5.1. Landmark decision

The landmark decision in this regard is *Davis v Lockstone*<sup>43</sup>. It was argued before the Appellate Division that the edict provided two specific actions, one quasi-contractual, the other quasi-delictual<sup>44</sup>; it was also argued that the edict had become obsolete<sup>45</sup>. Justice Solomon rejected the argument that the law

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Lugduni Bataavorum, 1662, I.V.30.3.

<sup>41</sup> 1899, 14, SC, 76.

<sup>42</sup> At 86

<sup>43</sup> 1921, AD, 153.

<sup>44</sup> At 154, *S.B. Kitchen, K.C.*, for the appellant.

<sup>45</sup> At 157, *Kitchen, K.C.*, in reply. The court rejected this argument at 159 s.

Another point of interest is the reliance by the courts on Zimmermann's *The law of Obligations*<sup>62</sup>. Although it is to be commended that this excellent publication has replaced the century-old textbooks on Roman law which the courts preferred to use, exclusive use of Zimmermann is in danger of elevating his views to dogma. This should be avoided, but limitations of language play an important role in this respect.

This leaves us with the strange translation of *stabularius*, which derives from the word *stabulum*, defined as: «standing room quarters..especially in a disparaging sense, a pothouse, haunt, brothel .. term of abuse»<sup>63</sup>.

The outcome of the case appears to have been satisfactory, because there is, of course, a vast difference between a racing stable and an ordinary livery stable.

### 5.3. Gabriel and Another v Enchanted Bed and Breakfast

However, in the 2002 case of Gabriel

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<sup>62</sup> R. ZIMMERMANN, *The law of Obligations. Roman foundations of the civilian tradition*, Cape Town, 1990.

<sup>63</sup> At 204C.

This paper is not a case discussion<sup>59</sup>, and thus no applause or condemnation of the decision will be forthcoming. Nor is it my intention to criticise or make jokes in regard to the judge's knowledge of Roman Law. The point of interest is that, on occasion, legal practitioners do indeed rely on Roman law. Although the reliance on the rubric *de receptis* was not successful, the applicability of the rubric in other circumstances was reaffirmed. However, in most instances the first argument is that the Roman law rule is obsolete and the impression that Roman law is the last resort might gain ground.

The use of sources in the case under discussion deserves attention. We are back in the situation just after the British conquest, namely, that most lawyers have no knowledge of Latin. Thus, translations were used, in this instance the Scott translation of the *Corpus Iuris*<sup>60</sup>, and Gane's translation of Voet's *Commentarius ad Pandectas*<sup>61</sup>.

<sup>59</sup> For a discussion of the case see P. J. THOMAS, *Classless society? South African Roman law*, in *SALJ*, CXIII, IV, 1996, 589-593.

<sup>60</sup> Hodes AJ, referred to Scott's translation, which is gradually replaced by the Watson translation of the Digest.

<sup>61</sup> Referred to at 204A and D.

fixing skippers etc with strict liability had become obsolete and held that the specific rubric of the edict is the basis of SA common law. Although the court relied heavily on Voet's interpretation and adaptation to define the degree of adoption into Roman-Dutch law<sup>46</sup>, the quasi-delictual action was not dealt with. The Court held that the (quasi) contractual action could be instituted against skippers etc to make good any damage or loss even without fault on their part, except damage or loss caused by *vis major* (also called *damnum fatale*)<sup>47</sup>. The court followed Voet in holding that the latter term referred to acts of violence<sup>48</sup>.

Decisions after *Davis v Lockstone* have accepted the principle of this strict liability, but the courts showed a definite reluctance to extend the ambit thereof. Thus it was held that a garage keeper is not the same as a stable keeper<sup>49</sup> and that a parking-garage-keeper is no stable-keeper<sup>50</sup>.

<sup>46</sup> At 158, 160 s., 165 s.

<sup>47</sup> At 161, 166.

<sup>48</sup> At 161 and 166.

<sup>49</sup> *Marriott's Garage v Kilburn*, 1942, NPD, 269.

<sup>50</sup> *Essa v Dinariis*, 1947, 1, SA, 753 (A).

## 5.2. Swart v Shaw t/a Shaw Racing Stables

This trend was continued in 1996 in the case of *Swart v Shaw t/a Shaw Racing Stables*<sup>51</sup>. The facts of the case were that Swart, the appellant had concluded an oral agreement with the respondent, a racehorse trainer, for the training and caring for a horse. The horse was raced, but died in the care of the trainer. The trainer claimed for outstanding training fees; the owner counterclaimed<sup>52</sup>. The appellant claimed the amount of R 20 000 from the trainer in damages for the death of the horse, which amount was averred to represent the market value of the animal. This claim was primarily founded on the section *de receptis* of the Edict<sup>53</sup>.

The judge, Hodes AJ, accepted that this section of the Edict was received into Roman-Dutch law and that it also applies in South African law. He was of the opinion that it has not been extended to garage keepers, public carriers by land or beyond the original *stabularius* or low-class innkeeper<sup>54</sup>. It is thus up

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<sup>51</sup> 1996, 1, SA, 202 (CPD).

<sup>52</sup> At 203C-F.

<sup>53</sup> At 203E-I.

<sup>54</sup> At 204J-205D.

to him to decide whether it would be appropriate to extend the Edict to race-horse trainers.

The judge prepared the ground for the ensuing *ratio decidendi* by ample *obiter dicta*, the essence of which strangely enough, revolves on the low-class status of the *stabularius*<sup>55</sup>. According to this view the *stabularius* was not so much a stable keeper, but rather a low-class innkeeper. To compare such a low-class establishment with modern racing stables or ‘the ignoble innkeeper of Roman times’<sup>56</sup> with a modern, scientifically orientated race-horse trainer is hardly apposite, according to the judge. A modern race-horse trainer administers sophisticated treatment to horses<sup>57</sup> and the court thus came to the conclusion that logic and fairness and convenience dictate that the Edict should not be applied to race-horse trainers<sup>58</sup>.

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<sup>55</sup> At 204A-J.

<sup>56</sup> At 205D, 205F and 206F.

<sup>57</sup> At 205E the judge refers to ‘blistering’, which is deliberate injury to the horse, but to his mind qualifies as sophisticated and scientific treatment.

<sup>58</sup> At 206F.