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The capture of the *Ponte*: the development of vicarious liability of shipowners and its limitation in Roman-Dutch law

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Summary

In 1599, Dutch privateer Melchior van den Kerckhoven unlawfully captured the Venetian merchantman *Ponte*, which resulted in extensive legal proceedings before the Supreme Court of Holland, Zeeland and West-Friesland. The *Ponte* case soon became the centre-piece for discussions about vicarious liability of shipowners for unlawful acts of their shipmasters, and – more importantly – about limitation of this liability to (the value of) their ship and cargo. Within these discussions, a secondary role was reserved for the case arising from the capture of the French ship *Levrette* by a Dutch merchantman in 1610. Based on extensive archival research, the present article offers a detailed reconstruction of the facts and proceedings of the *Ponte* and the *Levrette* case, and sets out how these cases were employed by Roman-Dutch lawyers to give shape to limited liability of shipowners for unlawful acts of their shipmaster.

Keywords

Roman-Dutch law – limitation of liability for maritime claims – maritime law – law of delict – vicarious liability – privateering – *noxae deditio* – *actio exercitoria*

1 Introduction*

Roman-Dutch law appears to be among the first historical legal systems to hold shipowners vicariously liable for damage caused by their shipmaster, as well as to limit this liability to (the value of) their ship. The latter has already been pointed out by a fair number of scholars¹, albeit reticently. It is the purpose of the present article to uncover the historical evolution of shipowner's vicarious liability for his shipmaster's delicts and its limitation in Roman-Dutch law. Instances of contractual liability will thus remain unexplored². The developments start with the unlawful capture of the Venetian ship *Ponte* by a Dutch privateer in 1599. This event gave rise to extensive legal proceedings before the Supreme Court (*Hoge Raad*) of Holland, Zeeland and West-Friesland, and the decision gained wider publicity through references in publications of judicial decisions and legal consultations. As such, the case became the *cause célèbre* for the topic within Roman-Dutch law. Many seventeenth- and eighteenth-century Dutch authors used the case as a stepping stone to present their scholarly view on the topic. As it turns out, the Roman-Dutch manifestation of limitation of a shipowner's vicarious liability has some theoretical peculiarities, which distinguish it from later developments in other jurisdictions.

This article will first discuss the factual events and procedural course of the *Ponte* case by using yet unstudied archival materials. Subsequently, it will offer a chronological overview of how several Roman-Dutch jurists argued in favour of or against vicarious liability and its limitation. This exposition includes a discussion of another important case before the Supreme Court, which centres

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1 See e.g. R. Wagner, *Handbuch des Seerechts*, Leipzig 1884, p. 179; J.Ch. Schilthuis, *De beperking van de aansprakelijkheid des reeders*, Groningen 1909, p. 13; D.J. Joubert, *Aspekte van die aanspreeklikheid van vennote*, Tydskrif vir Hedendaagse Romeins-Hollandse Reg, 41 (1978), p. 291-298, spec. p. 294; J. Donovan, *Origins and development of limitation of shipowners' liability*, Tulane Law Review, 53 (1979), p. 999-1045, spec. p. 1003; L. Delwaide, *Considérations sur le caractère réel de la responsabilité du propriétaire du navire*, in: Liber Amicorum R. Roland, Brussels 2003, p. 107-258, spec. p. 159-160.

2 Limitation of liability also appears in maritime customary law, albeit only with regard to claims brought on grounds such as general average, contract or quasi-delict by cargo owners or other parties under a contract with the shipowners. See e.g. art. 61, 70, 183, 224 and 236 of the *Consolato del Mare*, which are often mentioned in this respect. The customary sources do not refer to vicarious liability of the shipowner towards third parties at all, and will therefore not be discussed in this article.

around the capture of the French ship *Levrette* by a Dutch merchantman in 1610. Where possible, a distinction will be maintained between the questions whether the shipowner should be liable for the delicts of his shipmaster, and if so, whether this liability should be limited. Finally, some concluding remarks will be made on the legal nature of the Roman-Dutch regime of a shipowner's vicarious liability.

2 The *Ponte* case

2.1 *Facts of the case*

Due to the wealth of relevant documents in the archives of the Supreme Court of Holland, Zeeland and West-Friesland (hereinafter referred to as 'the Supreme Court'), the cause and development of the *Ponte* case can be reconstructed adequately³. In June 1599, a private fleet composed of the ships *Engel Gabriel*, *Drye Coningen* and *Spheramundi* and the yachts *Bonaventura* and *Duyfken* left the port of Rotterdam to trade on Africa under the command of admiral Melchior van den Kerckhoven⁴. The initiator, Pieter van der Hagen, had not

3 For a complete overview of the case documents, not all of which can be covered here, see Appendix 1. The most important sources for the cause and development of the *Ponte* case are a *Rekest* (undated, 1600) (Veniero c.s./Van den Kerckhoven & Van der Hagen) as cited by K. Heeringa, *Bronnen tot de geschiedenis van den Levantschen handel*, The Hague 1910, vol. 1, p. 35-40; *Geëxtendeerde sententie* 30/7/1603 (Veniero c.s./Van der Hagen & Van den Kerckhoven), *Nationaal Archief* (NA) 3.03.02, nos. 695/239-263; *Geëxtendeerde sententie* 30/7/1603 (Veniero c.s./Seys c.s.), NA 3.03.02, nos. 695/264-272; *Geëxtendeerde sententie* 30/7/1603 (Veniero c.s./D'Ableijn), NA 3.03.02, nos. 695/273-280; *Geëxtendeerde sententie* 20/12/1608 (Van der Veen/Seys c.s.), NA 3.03.02, nos. 700/370-378. For the sake of legibility, no further references to these sources will be made below unless they are the sole source for a vital part of the argument.

4 Resp. 'Angel Gabriel', 'Three Kings', 'Sphere of the World', 'Good Fortune' and 'Dove'. The *Bonaventura* is sometimes called the *Jacht van Aventuure* ('Yacht of Adventure'). Initially, the fleet was intended to support a public war fleet headed by admiral Pieter van der Does, which was set to conquer São Tomé. The contracts between Van der Hagen and the States General are in the archive of Johan van Oldenbarnevelt, see *Akte waarbij de Staten van Holland en West-Friesland en Pieter van der Hagen en Co. en Balthasar de Moucheron (...) een overeenkomst sluiten (...)* 25/3/1599, NA 3.01.14, nos. 3146/1-5; *Akte waarbij de Staten van Holland en West-Friesland en Pieter van der Hagen en Co. (...) een overeenkomst sluiten (...)* after 25/3/1599, NA 3.01.14, nos. 3147/1-5. However, in the end Van der Hagen and his companions decided to organise the journey on their own in order not to have to share the profits, to which Prince Maurice of Orange agreed, J.K.J. de Jonge, *De opkomst van het Nederlandsch gezag in Oost-Indie (1595-1610): verzameling van onuitgegeven stukken uit het oud-koloniaal archief*, The Hague 1862, vol. 1, p. 51-52; J.H. de Stoppelaar, *Balthasar de Moucheron: een bladzijde uit de Nederlandsche handelsgeschiedenis tijdens den Tachtigjarigen Oorlog*, The Hague 1901, p. 157-159, 300; J.H. Kernkamp, *Johan van der Veken en zijn tijd*, The Hague 1952, p. 22-23.

been able to invest any fortune himself and attracted a group of five investors to acquire parts in the ships for a sum of *f*43.140⁵. Thus, the investors became shipowners (*reders*) in a *partenrederij*, a common form of maritime enterprise in the Dutch Republic which – with regard to the *internal* relations between the shipowners – qualified as a *societas*⁶. These shipowners were Nicolaes Seys, Hans Broers, Jan de Laet, Jan Ploech and Johan van der Veeke. They also instructed Van den Kerckhoven to capture Spanish and Portuguese ships, and an official letter of marque was issued for this purpose by stadtholder Maurice of Orange⁷. Through trade and privateering, Van den Kerckhoven could thus compensate for the losses incurred by him and Van der Hagen through the failure of an earlier expedition in 1597, when their ships were captured in Angola by the Portuguese⁸. Only three ships of the 1599 expedition arrived at the coast of Western Africa, as the *Engel Gabriel* and the *Duyfken* lost track of the others and seem to have returned to the Netherlands.

On August 22nd 1599, Van den Kerckhoven encountered a ship named the *Ponte* (also called *St. Anna & St. Nicolo*) before the coast of the Cape Verdean island of Santiago. She belonged to Venetian nobleman Marco Veniero and his companions and was led by shipmaster Antonio Coluri. The journey of the *Ponte* had been a troublesome one⁹. An outbreak of bubonic plague prevented her from trading on Lisbon after her departure in August 1598. Thus, the *Ponte*

5 The sources mention 7190 Flemish pounds (1 Flemish pound = 6 Hollandic pounds of 40 groats = 6 guilders). Seys invested 2.550, Broers 2.000, De Laet 1.750 and Plouch 750 Flemish pounds, *Conclusie* 31/5/1606 (Van der Veeke/Seys c.s.), NA 3.03.02, nos. 498/246-247. It is unclear whether Van der Veeke invested 140 or 240 Flemish pounds, see note 44. Seys c.s. stated that there were more participants for a total sum of 22.272 Flemish pounds, but the Hoge Raad did not take this into account.

6 About the *partenrederij*, see H.M. Punt, *Het vennootschapsrecht van Holland, Zeeland en West-Friesland in de rechtspraak van de Hoge Raad van Holland, Zeeland en West-Friesland*, Deventer 2010, p. 74-93; M. de Jongh, *Tussen societas en universitas*, Deventer 2014, p. 14-17.

7 De Jonge, *De opkomst* (*supra*, n. 4), vol. 1, p. 122.

8 See also Kernkamp, *Johan van der Veken* (*supra*, n. 4), p. 18. Given that the 1599 expedition occurred in time of war and served to seek redress for past acts of aggression, it illustrates the transition between reprisal and privateering expeditions, see J.P. Van Niekerk, *The development of the principles of insurance law in the Netherlands from 1500 to 1800*, Cape Town 1998, vol. 1, p. 394-400.

9 The value of ship and cargo amounted to between 87.000 and 100.000 *reali* (A. Tenenti, *Naufrages, corsairs et assurances maritimes à Venise 1592-1609*, Paris 1959, p. 265; A. Tenenti, *Piracy and the decline of Venice 1580-1615*, Berkely 1967, p. 68) or 19.445 ducats. Veniero, who passed away during the proceedings and was replaced by his heirs and companions from 1603 onwards, should probably be identified as Marco Venier (1537-1602), Venetian nobleman, politician, poet and lover of Veronica Franco, the famous Venetian poetess and courtesan.

acquired Spanish goods in Cádiz and set off to trade on Brazil¹⁰. Since the trade on Brazil was under a Portuguese monopoly, Coluri appointed a Portuguese shipmaster, acquired a Portuguese passport and registered the *Ponte* under the name of Portuguese merchants – an unlucky decision, as it would turn out. On August 5th 1599, the *Ponte* was stopped by the Dutch admiral Pieter van der Does, who was leading a war expedition to the island of São Tomé against the Portuguese¹¹. Unable to distinguish whether the *Ponte* was Venetian or Portuguese, he seized her Spanish goods under the promise that Coluri could resort to the States General and apply for monetary compensation if he could prove the *Ponte* to be Venetian. In addition, Van der Does provided Coluri with a passport so as to prevent further interception by the Dutch and to facilitate a continuation of his journey with newly acquired Spanish goods. When Coluri produced this passport to Van den Kerckhoven on August 22nd, the latter promised to hold the *Ponte* for one night in order to be able to safely attack the Portuguese city of Praia on the island of Santiago. The next day, however, Van den Kerckhoven broke his promise. He took the *Ponte*'s cargo and marooned the crew¹², despite Coluri's objections that the *Ponte* belonged to Venetian shipowners and was to be considered a friendly vessel. After failing to properly equip her for his own purposes, Van den Kerckhoven set the *Ponte* on fire¹³.

The matter escalated quickly. In retaliation for the capture of the *Ponte*, the Venetian authorities seized all Dutch ships laying in the harbour of Venice, which led a group of Dutch merchants to complain at the States General in March 1600¹⁴. Van den Kerckhoven was imprisoned at his return (but released in 1601)¹⁵, and one of the ships, the *Spheramundi*, was arrested in Rotterdam.

10 The value of these goods amounted to 16.182 ducats.

11 About this expedition, which Van der Does would not survive, see De Jonge, *De opkomst* (*supra*, n. 4), vol. 1, p. 51-53. Initially, Van den Kerckhoven's ships were intended to be part of this expedition, see note 4.

12 The act of marooning, so it is said, helped to conceal Van den Kerckhoven's crimes. Apparently, this was seen as a habit of Dutch privateers, Tenenti, *Piracy* (*supra*, n. 9), p. 59.

13 Van den Kerckhoven, however, asserted that it was Coluri's boatswain Michelin Antonio who had set the *Ponte* on fire in order to prevent local 'savages' from using its iron parts against Christians.

14 See the letters of Dutch merchants to the Amsterdam burgomasters from March 1600 and the letter of Jacques Nichetti to his father in Amsterdam from March 1601, as cited by Heeringa, *Bronnen* (*supra*, n. 3), vol. 1, p. 32-33 resp. 42-43.

15 Heeringa, *Bronnen* (*supra*, n. 3), vol. 1, p. 32, 35; *Register der dicta* 2/1601 (Veniero c.s./Van der Hagen & Van den Kerckhove), NA 3.03.02, no. 881/172; *Resolutie* 31/3/1601 (Imprisonment of Van den Kerckhoven), NA 3.03.02, no. 636/189; *Resolutie* 23/5/1601 (Imprisonment of Van den Kerckhoven), NA 3.03.02, nos. 636/206; *Resolutie* 16/7/1601 (Imprisonment of Van den Kerckhove), NA 3.03.02, nos. 636/209.

The *Drye Coningen* and the *Bonaventura* had arrived in Middelburg, but the local authorities initially refused to arrest the ships – only later on their attachment would be ordered by a higher authority, namely the Supreme Court¹⁶. At first, the States General instructed the admiralties in Rotterdam and Middelburg, as prize courts, to investigate whether the *Ponte* had been lawfully taken, and required Van der Hagen to stand guarantor for a sum of f20.000¹⁷. However, after the Doge of Venice himself petitioned the States General to condemn Van den Kerckhoven to indemnify Veniero and his companions¹⁸, the States General delegated the case to the Supreme Court¹⁹, where Coluri, having miraculously escaped his fate, appeared on behalf of himself and the shipowners.

2.2 *Proceedings before the Supreme Court*

The proceedings against Van den Kerckhoven, the perpetrator of the delict at stake, and his guarantor Van der Hagen were uncomplicated. In their defence, the defendants pointed to the Portuguese documents on board of the *Ponte* and a (later on revoked) Act prohibiting foreign ships to trade with Spain or Portugal²⁰. They also pointed out that the *Ponte* and her cargo had been insured and argued that Van den Kerckhoven had not mistreated any Venetian crewmember. The Supreme Court forewent their defences. On July 30th 1603 the Supreme Court held the defendants liable *in solidum* (i.e. jointly and severally) to return the stolen documents and cargo and remunerate the value of the *Ponte*, and the three ships that had been used to conquer the *Ponte* (i.e. the *Spheramundi*, the *Drye Coningen* and the *Bonaventura*) were declared subject to execution for these purposes²¹. On December 14th 1604, the claim of the

16 See e.g. *Conclusie* 26/9/1600 (Veniero c.s./Van der Hagen & Van den Kerckhove), nos. 497/57-58.

17 Normally, security had to be provided before the start of the expedition, see art. 5 and 69 *Instructie* States General, August 13th 1597, *GPB* II, p. 1532, 1546-1547. The archival sources do not indicate whether, and if so, why this had been omitted. See also par. 3.4.

18 Letter from the Doge of Venice from 12/4/1600, as cited by Heeringa, *Bronnen* (*supra*, n. 3), vol. 1, p. 34.

19 The Supreme Court, however, did have jurisdiction over foreign merchants by its own right, M.Ch. le Bailly and Chr.M.O. Verhas, *Procesgids Hoge Raad van Holland, Zeeland en West-Friesland (1582-1795)*, Hilversum 2006, p. 20.

20 *Plakkaat* States General, 2/5/1599, *Groot Plakkaatboek (GPB)* II, p. 32; I. Prins, *De vestiging der Marranen in Noord-Nederland in de zestiende eeuw*, Amsterdam 1927, p. 171-172; J.H. Kernkamp, *De handel op den vijand 1572-1609*, Utrecht 1931, vol. 2, p. 254; *Conclusie* (undated) (Veniero c.s./Van der Hagen & Van den Kerckhoven), NA 3.03.02, nos. 497/57-58; *Geëxtendeerde sententie* 30/7/1603 (Veniero c.s./Van der Hagen & Van den Kerckhoven), NA 3.03.02, nos. 695/254-261.

21 This dictum was proposed by rapporteur Justice Vranck and followed by Justices Voogt, Hoogerbeets, Hermansz, Van Veen and president Van Brederode, *Resolutie* 23/7/1603

plaintiffs was set at *f*10.987 – a disappointment to the Venetians, because they had estimated their losses at *f*54.981²². This course of events undermines the hypothesis that liability limitations served primarily to prevent ‘troublesome’ proceedings for the determination of damages²³.

Since Van den Kerckhoven and Van der Hagen were notoriously unable to pay²⁴, the Venetians had also brought a claim against the shipowners, whom they held liable *in solidum*. The defendants asserted that Van den Kerckhoven had acted outside the scope of his duties and hence *extra legem praepositionis* – a reference to the Roman *actio exercitoria*²⁵. They also contended that the delict had taken place *extra navem*, referring to the Roman quasi-delictual *actio furti / damni adversus nautas*²⁶. The references to these two actions of Roman law will be further discussed below (par. 2.3). Finally, the defendants declared that they had known Van den Kerckhoven to be an honest seaman who would shy from any form of piracy, which seemingly amounted to a denial of any potential

(Veniero c.s./Van der Hagen & Van den Kerckhoven), NA 3.03.02, no. 638/200; *Resolutie* 24/7/1603 (Veniero c.s./Van der Hagen & Van den Kerckhove), NA 3.03.02, no. 638/201; *Geëxtendeerde sententie* 30/7/1603 (Veniero c.s./Van der Hagen & Van den Kerckhoven), NA 3.03.02, no. 695/263; *Register der dictums* 24/7/1603 (Veniero c.s./Van den Kerckhoven & Van der Hagen), NA 3.03.02, nos. 883/185-186; *Register der dictums* 30/7/1603 (Veniero c.s./Van den Kerckhoven & Van der Hagen), NA 3.03.02, nos. 930/187-188. Only Justice Neostadius dissented, stating that, unlike the Venetian goods, the Spanish cargo carried by the *Ponte* was a lawful prize and that the loss of the *Ponte*, although not to be considered a lawful prize, was to be carried by the shipowners.

22 *Geëxtendeerde sententie* 14/12/1604 (Veniero c.s./Van den Kerckhoven & Van der Hagen), NA 3.03.02, no. 696/342; *Register der dictums* 27/11/1604 (Veniero c.s./Van den Kerckhoven & Van der Hagen), NA 3.03.02, nos. 883/305-306; *Register der dictums* 14/12/1604 (Veniero c.s./Van den Kerckhoven & Van der Hagen), NA 3.03.02, nos. 931/32-33. For the exact calculation of damages by the plaintiffs and the Supreme Court, see *Resolutie* 3/11/1604 (Veniero c.s./Van den Kerckhoven & Van der Hagen), NA 3.03.02, nos. 638/313-321. In addition, Coluri claimed *f*10.530 to cover his travel expenses, which were estimated at *f*860 and could only be recovered from Van den Kerckhoven and Van der Hagen, and not from the shipowners, see *Resolutie* 23/10/1604 (Veniero c.s./Van den Kerckhoven & Van der Hagen), NA 3.03.02, nos. 638/310-311.

23 This hypothesis is put forward by De Jongh, *Tussen societas* (*supra*, n. 6), p. 16. Cf. Punt, *Het vennootschapsrecht* (*supra*, n. 6), p. 82.

24 *Geëxtendeerde sententie* 30/7/1603 (Veniero c.s./Van den Kerckhoven & Van der Hagen), NA 3.03.02, no. 695/244; *Conclusie* 21/10/1603 (Veniero c.s./Seys c.s.), NA 3.03.02, nos. 497/566-568; *Akte van dingtalen* 21/10/1603 (Veniero c.s./Seys c.s.), NA 3.03.02, nos. 418/146-147. Van der Hagen had been ruined by another expedition, De Jonge, *De opkomst* (*supra*, n. 4), vol. 1, p. 122-124.

25 See, i.a., *Conclusie* 17/9/1600 (Veniero c.s./Seys c.s.), NA 3.03.02, nos. 497/59-60; *Conclusie* 6/11/1605 (D'Ableijn/Seys c.s.), NA 3.03.02, no. 498/132.

26 *Geëxtendeerde sententie* 30/7/1603 (Veniero c.s./Seys c.s.), NA 3.03.02, no. 695/271.

liability on the ground of *culpa in eligendo*²⁷. Thus, the defendants agreed to return the stolen cargo, but denied personal liability and asserted that their shares in the ships had not been bound by Van den Kerckhoven's acts²⁸. They also demanded that their ships would be released, which happened soon afterwards after surety was given for their value.

On July 30th, the Supreme Court gave a verdict against the defendants. The shipowners were condemned by majority vote to suffer the execution of the Venetians' claim against Van den Kerckhoven and Van der Hagen on all five of their ships without being liable any further²⁹. The majority of the judges followed rapporteur Justice Vranck's opinion that the shipowners were only liable to the extent of their share in the ships, and could therefore abandon these shares to the plaintiffs:

to condemn the defendants to pay the amount Hagen and Kerckhoven have been condemned to pay, each in accordance with their shares in the company of Pieter van der Hagen which they have abandoned, and to deny the plaintiffs their further claim³⁰.

Two judges dissented. Justice Van Veen contended that the defendants should simply be liable *in solidum* to pay the full amount³¹, whereas Justice Voogt subtly argued that although the defendants were under a primary obligation to do so, they could surrender their shares in the ships by means of a *secondary* obligation:

27 Nonetheless, Van den Kerckhoven is mentioned as an 'infamous corsair' by De Jonge, *De opkomst* (*supra*, n. 4), vol. 1, p. 52.

28 See also *Akte van dingtalen* 30/11/1605 (Seys c.s./D'Ableijn), NA 3.03.02, nos. 420/85-86.

29 *Geëxtendeerde sententie* 30/7/1603 (Veniero c.s./Seys c.s.), NA 3.03.02, no. 695/272; *Register der dictums* 25/7/1603 (Veniero c.s./Seys c.s.), NA 3.03.02, nos. 883/184-185; *Register der dictums* 30/7/1603 (Veniero c.s./Seys c.s.), NA 3.03.02, no. 930/188.

30 *Resolutie* 25/7/1603 (Veniero c.s./Seys c.s.), NA 3.03.02, no. 638/201: 'Alle de voorsz. gedaagdens elck naer concurrentie van 't gunt sy inde schepen & ingeladen goederen van de compagnije van Pieter vander Hagen hebben gehadt & bij hen is geabandonneert, te condemnieren te betalen 'tgunt daerinne Verhage & Kerckhoven zyn gecondemneert. (...) Der impetranten vorderen eysch t'ontseggen'. 'In accordance with' is the translation of '*naer concurrentie van*', which could not only imply equality of competing claims (A. Koerbagh, *'t Nieuw woorden-boek der regten*, Amsterdam 1664, p. 78), but also 'conformity'. Therefore, '*naer concurrentie van*' signifies an absolute claim limitation rather than a relative one (*pro parte*).

31 *Ibid.*: 'dat alle de gedaagden elck *in solidum* behooren te worden gecondemneert in 'tgunt daerinne Verhage & Kerckhove syn gecondemneert' ('that the defendants should each be condemned to pay the amount Hagen and Kerckhoven have been condemned to pay').

that each of the defendants should be condemned to pay the amount Hagen and Kerckhoven have been condemned to pay, and if he does not do so, to condemn the defendants following Vranck (...) and to pay for the damage that may have been inflicted upon the goods between Van den Kerckhoven's arrival and the moment when the defendants have declared before the court to surrender their goods, and to deny the plaintiffs their further claims³².

Irrespective of these dissenting opinions, the defendants were held not to be personally liable in full. They could suffice with the surrender of their shares in the ships and cargo, which they were obligated to hand over even if these had been alienated in the meantime³³. It so happened that Van der Hagen had in fact sold the *Spheramundi* prior to its seizure by the Rotterdam Admiralty. The buyer was a certain Isaak d'Ableijn, who acquired the *Spheramundi* for f4.575 under a warranty against eviction by third parties³⁴. However, since Van der Hagen was not the (sole) owner and had acted without authority, the transfer of the *Spheramundi* was invalid and the ship was still subject to execution³⁵. Nonetheless, the Supreme Court allowed the release of the *Spheramundi* because D'Ableijn had already equipped her for another expedition³⁶, under

32 *Ibid.*: 'dat elck van alle de gedaagdens *in solidum* behoort gecondemneert te worden in't gunt daerinne Verhagen & Kerckhove syn gecondemneert, ende indien hy daerinne geen gevolg en geeft, den gedaagden te condemnieren te betalen naer concurrentie ut Vranck (...), oock te betalen 'tgunt de goederen & coopmanschappen soudén moge syn beschadigt of gedissipeert sedert de aenkomste van Kerckhove tottertijdt toe bij den gedaagden in iudicio verklaringe van afstant der goederen is gedaen, & den Impetranten hunne verdere eysch t'ontseggen'.

33 *Ibid.* Justice Vranck said: 'ende indien de schepen & goederen of eenige vanden by Verhage na de wedercomste van Kerckhoven syn gealieniert, dat de gedaagden de selve den impetranten behooren te presteren' ('and if the ships and goods have been alienated after Kerckhovens arrival, that the defendants should still surrender them to the claimants'). Voogt said: 'ende indien eenige schepen of goederen daerinne geladen by Verhage syn verhandelt of gealieniert, in sulcke gevalle alle den gedaagden elck *in solidum* te condemnieren de selve gealienierte goederen de impetranten te presteren' ('and if some of the ships or goods have been sold or alienated by Van der Hagen, that the defendants should be condemned *in solidum* to surrender these alienated goods to the plaintiff').

34 The *Spheramundi* was delivered on April 28th 1600, the attachment followed on August 25th.

35 *Resolutie* 26/7/1603 (Veniero c.s./Seys c.s.), NA 3.03.02, no. 638/202; *Conclusie* 6/11/1605 (D'Ableijn/Seys c.s.), NA 3.03.02, no. 498/132. D'Ableijn installed legal action against Van der Hagen, *Akte van dingtalen* 23/3/1605 (D'Ableijn c.s./Van der Hagen), NA 3.03.02, no. 420/13.

36 This expedition, organised by Balthasar de Moucheron and led by Joris van Spilbergen, went to Indonesia and Ceylon and would become a well-known historical event. It

the condition that D'Ableijn stood guarantor for its value. This amount was set at f4.575, the price that D'Ableijn had paid³⁷. Hence, the Venetians now had a claim against D'Ableijn for f4.575³⁸.

Counter to the *Spheramundi*, the Venetians were able to exert their claims on the *Drye Coningen* and the *Engel Gabriel*, both lying in the port of Middelburg³⁹. In February 1606, the Supreme Court ruled that the Venetians should be enabled to recover the rest of the f10.987 from the other ships and their cargo⁴⁰, without clarifying whether an eventual surplus could be reimbursed. The Supreme Court, however, offered an alternative: the defendants could opt to simply pay this residual claim and have the plaintiffs' claims against D'Ableijn (for f4.575) and Van den Kerckhoven and Van der Hagen assigned to them⁴¹.

appears, however, that the *Spheramundi* was not ready when the ships departed on May 5th 1601, see *Conclusie* 6/11/1605 (D'Ableijn/Seys c.s.), NA 3.03.02, no. 498/132; *Akte van dingtalen* 30/11/1605 (Seys c.s./D'Ableijn), NA 3.03.02, no. 420/86. The *Spheramundi* did not form a part of Van Spilbergen's fleet, although he did encounter a ship called *Spheramundi* on August 2nd 1601 as part of another fleet of De Moucheron, see J. van Spilbergen, *'t Historael Journael*, Delft 1605, p. 6-7.

37 *Geëxtendeerde sententie* 13/2/1606 (Veniero c.s./D'Ableijn), NA 3.03.02, no. 698/22; *Register der dictums* 14/11/1600 (Veniero c.s./Seys c.s.), NA 3.03.02, no. 930/77-78; *Register der dictums* 25/1/1606 (Veniero c.s./D'Ableijn), NA 3.03.02, no. 884/7.

38 *Akte van dingtalen* 14/10/1603 (Veniero c.s./Seys c.s.), NA 3.03.02, nos. 418/76. Only Justice Hinojosa asserted that D'Ableijn was also liable for the *Spheramundi*'s surplus value, *Resolutie* 25/1/1606 (Veniero c.s./D'Ableijn), NA 3.03.02, no. 639/4. Cf. *Conclusie* 6/11/1605 (D'Ableijn/Seys c.s.), NA 3.03.02, nos. 498/132-134.

39 *Conclusie* 21/10/1603 (Veniero c.s./Seys c.s.), NA 3.03.02, nos. 497/566-568; *Akte van dingtalen* 14/10/1603 (Veniero c.s./Seys c.s.), NA 3.03.02, nos. 418/76; *Akte van dingtalen* 21/10/1603 (Veniero c.s./Seys c.s.), NA 3.03.02, nos. 418/146-147. The Venetians' claim on the proceeds of the execution was unsecured but significantly higher than those of other concurrent creditors, *Register der dictums* 11/1/1606 (Sale *Drye Coningen*), NA 3.03.02, nos. 884/1-2; *Register der dictums* 24/1/1606 (Sale *Engel Gabriel*), NA 3.03.02, nos. 931/69-70; *Resolutie* 11/1/1606 (Sale *Drye Coningen* and *Engel Gabriel*), NA 3.03.02, no. 639/2. Interestingly, it seems that the *Engel Gabriël* had not been attached and was in the hands of captain Jan Rem before being sold. Rem had served under Van den Kerckhoven and had behaved rather violently during the *Ponte*'s capture, see *Conclusie* 12/6/1605 (Seys c.s./Rem), NA 3.03.02, nos. 571/199-200; Kernkamp, *Johan van der Veken* (*supra*, n. 4), p. 23.

40 *Geëxtendeerde sententie* 14/2/1606 (Veniero c.s./Seys c.s.), NA 3.03.02, no. 698/23; *Resolutie* 3/2/1606 (Veniero c.s./Seys c.s.), NA 3.03.02, no. 639/6 (referring to *Conclusie* 21/10/1603 (Veniero c.s./Seys c.s.), NA 3.03.02, nos. 497/566-568); *Register der dictums* 3/2/1606 (Veniero c.s./Seys c.s.), NA 3.03.02, nos. 884/10-11; *Register der dicta* 14/2/1606 (Veniero c.s./Seys c.s.), NA 3.03.02, nos. 931/72-73.

41 Cf. *Conclusie* 6/11/1605 (D'Ableijn/Seys c.s.), NA 3.03.02, no. 498/132. Assignment of the claim against Van den Kerckhoven and Van der Hagen is only mentioned by Justice Hoogerbeets in *Resolutie* 3/2/1606 (Veniero c.s./Seys c.s.), NA 3.03.02, no. 639/6 and in *Register der dictums* 3/2/1606 (Veniero c.s./Seys c.s.), NA 3.03.02, nos. 884/10-11; *Register der dictums* 14/2/1606 (Veniero c.s./Seys c.s.), NA 3.03.02, nos. 931/72-73. It is lacking in

Given that the defendants were each condemned to pay 1/5th of this sum in April 1606 and instituted their claims against the heirs of D'Ableijn in 1608⁴², the shipowners must have reconsidered the abandonment of their ships and picked the latter option. This was a wise decision, since the Venetians' claim had turned out to be much lower than initially estimated (ƒ54.981) and did not exceed the value of their shares in the ships at all (ƒ43.140)⁴³. Thus, the yachts *Duyfken* (whose sailing course does not become clear from the archival documents) and *Bonaventura* could be left untouched.

Since the Supreme Court condemned each shipowner to pay 1/5th of the Venetians' residual claim, those shipowners with a share less than 20% were prejudiced disproportionately. Therefore, Johan van der Veeken, whose share only amounted to 140 Flemish pounds or ƒ840 (ca. 2%), brought the *actio pro socio* against his companions for compensation⁴⁴. The claim was upheld by the Supreme Court, thus finally bringing the convoluted proceedings surrounding

Geëxtendeerde sententie 14/2/1606 (Veniero c.s./Seys c.s.), NA 3.03.02, no. 698/23. The purpose of the cession is unclear since Van den Kerckhoven was most likely liable anyway towards the shipowners on contractual grounds.

42 If one of the shipowners turned out to be insolvent, his companions would be liable for the surplus, *Resolutie* 20/4/1606 (Bitter c.s./Seys c.s.), NA 3.03.02, no. 639/16; *Resolutie* 31/7/1607 (Strossi c.s./Seys c.s.), NA 3.03.02, no. 639/101; *Register der dictums* 20/4/1606 (Veniero c.s./Seys c.s.), NA 3.03.02, no. 884/25; *Register der dictums* 25/4/1606 (Veniero c.s./Seys c.s.), NA 3.03.02, nos. 931/77-78. Ploech had died in the meantime and was replaced by his widow's new husband Anthoni Adamsz, see i.a. *Resolutie* 10/2/1607 (Strossi c.s./Adamsz), NA 3.03.02, no. 639/70; *Geëxtendeerde sententie* 13/2/1607 (Strossi c.s./Adamsz), NA 3.03.02, nos. 699/10-14). About the proceedings against the heirs of D'Ableijn, see i.a. *Resolutie* 24/4/1608 (Seys c.s./D'Ableijn), NA 3.03.02, no. 639/149; *Geëxtendeerde sententie* 24/5/1608 (Seys c.s./Verhulst), NA 3.03.02, no. 700/86.

43 The preferability of payment over ship abandonment would not be affected if the shipowners were allowed to reclaim the surplus value of their ships, since the auction value may be well below market value.

44 *Conclusie* 31/5/1606 (Van der Veeken/Seys c.s.), NA 3.03.02, no. 498/269; *Conclusie* 31/5/1606 (Van der Veeken/Seys c.s.), NA 3.03.02, nos. 498/246-247; *Resolutie* 7/12/1607 (Van der Veeken/Seys c.s.), NA 3.03.02, no. 639/118; *Register der dictums* 5/12/1607 (Van der Veeken/Seys c.s.), NA 3.03.02, no. 884/195. The sources are unclear about the exact amount of Van der Veeken's share, since *Geëxtendeerde sententie* 20/12/1608 (Van der Veeken/Seys c.s.), NA 3.03.02, no. 700/371-378 and *Resolutie* 13/12/1608 (Van der Veeken/Seys c.s.), NA 3.03.02, no. 639/194 mention ƒ1440 or 240 Flemish pounds (ca. 3%). This minor inconsistency, however, cannot affect the present argument. Van der Veeken contended that the foresaid amount had not been deposited for this very expedition, but his argument was rejected by all judges except Justice Neostadius, see *Geëxtendeerde sententie* 30/7/1603 (Veniero c.s./Seys c.s.), NA 3.03.02, nos. 695/271-272; *Resolutie* 25/07/1603 (Veniero c.s./Seys c.s.), NA 3.03.02, no. 638/201. Similarly, the Supreme Court forewent the defendants' assertion that there had been other shipowners whose contribution amounted to 22.272 Flemish pounds, *Conclusie* 31/5/1606 (Van der Veeken/Seys c.s.), NA 3.03.02, nos. 498/246-247. See

the *Ponte* case to an end⁴⁵. This outcome implies that ship abandonment could only be effectuated by the shipowners together and not by a single one of them – had this been otherwise, Van der Veeken would most likely have preferred to abandon his share right away.

2.3 Analysis

What may have motivated the Supreme Court to hold that the Dutch shipowners were liable – and perhaps more importantly, why was this liability limited? As shown, the Dutch shipowners contended that the capture of the *Ponte* had taken place *extra legem praepositionis*: that it was irreconcilable with Van den Kerckhoven's appointment. The shipowners might have used this phrase to rule out any blameworthiness on their own part, but the phrasing obviously refers to the *actio exercitoria*⁴⁶. Under Roman law, this action could be brought against a shipowner by parties who had contracted with the shipmaster⁴⁷. Its applicability depended on whether or not the shipmaster's scope of appointment (*praepositio*) could be said to include a capacity to incur this particular debt⁴⁸. Given this limitation to contractual matters, the appearance of the *actio exercitoria* in the *Ponte* case is, to say the least, remarkable. It may indicate a rather early conception of the use of the *actio exercitoria* by way of analogy to establish vicarious liability for delicts committed by one's subordinate⁴⁹. If so, however, the Supreme Court probably did not hold that a *praepositio* to

Punt, *Het vennootschapsrecht* (*supra*, n. 6), p. 74-79 about the internal relations within the *partenrederij*.

45 *Resolutie* 13/12/1608 (Van der Veeken/Seys c.s.), NA 3.03.02, no. 639/194; *Register der dictums* 13/12/1608 (Van der Veeken/Seys c.s.), NA 3.03.02, no. 884/299; *Register der dictums* 20/12/1608 (Van der Veeken/Seys c.s.), NA 3.03.02, no. 932/85.

46 According to W.D.H. Asser, *In solidum of pro parte: een onderzoek naar de ontwikkelings-geschiedenis van de hoofdelijke en gedeelde aansprakelijkheid van vennoten tegenover derden*, Leiden 1983, p. 108-109, the shipowners implicitly refer to D. 14,1,12.

47 D. 14,1,17; D. Johnston, *Limiting liability: Roman law and the civil law tradition*, Chicago-Kent Law Review, 70 (1995), p. 1515-1538, spec. p. 1517-1521; R. Zimmermann, *The law of obligations: Roman foundations of the civilian tradition*, Oxford 1996, p. 53; M. Zimmermann, *Die Haftung des Reeders mit der actio exercitoria: ein Beitrag zur ökonomischen Analyse des römischen Rechts*, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung, 129 (2012), p. 554-570, spec. p. 557; P. Candy, *The historical development of Roman maritime law during the late Republic and the early Principate* (diss. University of Edinburgh), Era.ed.ac.uk, 11/7/2019, p. 147-148.

48 D. 14,1,1,7-12; Johnston, *Limiting liability* (*supra*, n. 47), p. 1520-1521; Zimmermann, *Die Haftung* (*supra*, n. 47), p. 558-559.

49 This development has been briefly touched upon by i.a. W. Druwé, *Qualitative liability in the early modern Low Countries (ca. 1425-1650)*, Grotiana, 42 (2021), p. 23-52, spec. p. 46-48. See also the authors mentioned in note 114.

conquer enemy ships also extended to the capture of friendly ships, because the judges agreed with the defendants that Van den Kerckhoven had in fact acted outside his scope of appointment⁵⁰. This also rules out any liability of the shipowners on the basis of complicity, especially since the expedition had been approved by official letters of marque issued by the Stadtholder. Admission of liability on the basis of the *actio furti / damni adversus nautas*, then, is unlikely. After all, this quasi-delictual action only applied to damage inflicted or theft committed on board of the ship where the delinquent shipmaster or crew is employed⁵¹, and was therefore usually brought by passengers or charterers whose property or cargo had been damaged or stolen⁵². As argued by the shipowners, the capture of the *Ponte* had taken place *extra navem*, thus barring the action's applicability.

Given these considerations, the legal motivations of the Supreme Court cannot be uncovered easily. It should not be ruled out that the Supreme Court took into consideration the political context of the case. Venice repeatedly refused to release Dutch ships in its harbour, and had given permission to Veniero to conquer Dutch ships at sea in 1601⁵³. This was a severe blow to Dutch commerce in the Mediterranean, since Spanish trade posts had already been prohibited from trading with the Dutch in 1598⁵⁴. At first, the start of proceedings before the Supreme Court did not result in the release of the Dutch ships in Venice, in part because a verdict was not reached quickly enough. In response, the States General accused the Venetian Republic of extorting the Supreme Court by taking the law into its own hands⁵⁵. Perhaps the Supreme Court indeed felt pressured to render a verdict that could be enforced effectively – that is,

⁵⁰ See the sources mentioned in note 21.

⁵¹ D. 4,9,6-7; D. 47,5; R. Knütel, *Die Haftung für Hilfspersonen im römischen Recht*, Zeitschrift der Savigny-Stiftung für Rechtsgeschichte, Romanistische Abteilung, 100 (1983), p. 340-443, spec. p. 353; Candy, *The historical development* (*supra*, n. 47), p. 225; D.S. Bogen, *Ignoring history: the liability of ship's masters, innkeepers and stablekeepers under Roman law*, The American Journal of Legal History, 36 (1992), p. 330-331, 326-360, spec. p. 334-338, 343-344. The term *nauta* can cover the shipowner as well as the shipmaster, D. 4,9,1,2; D. 4,1,1,2.

⁵² Bogen, *Ignoring history* (*supra*, n. 51), p. 334; C.P. Burger, *De beperkte aansprakelijkheid van den schuldenaar in het hedendaagsche en in het oude zeerecht*, Leiden 1889, p. 144.

⁵³ J.C. de Jonge, *Nederland en Venetië*, The Hague 1852, p. 5-6; P.J. Blok, *Relazioni Veneziane: Venetiaansche berichten over de Vereenigde Nederlanden van 1600-1795*, The Hague 1909, p. 5. See also note 14.

⁵⁴ Heeringa, *Bronnen* (*supra*, n. 3), vol. 1, p. 33. This prohibition, issued by King Philip III, would last until 1603, Kernkamp, *De handel* (*supra*, n. 20), vol. 2, p. 227, 252.

⁵⁵ Letter from the States General to the Doge of Venice of 10/12/1602, cited by Heeringa, *Bronnen* (*supra*, n. 3), vol. 1, p. 44-46: 'Quorsum enim sequestratio nunc pertineret non videmus, nisi ut iustitiae ad quam ipsimet provocarunt terrore injecto sententiam pro

against the shipowners and not only against the insolvent Van den Kerckhoven and Van der Hagen. The Dutch ships in Venice were only released after a settlement was reached in 1604 by Venetian diplomat Giovanni Scaramelli and Grand Pensionary Johan van Oldenbarnevelt⁵⁶. The States General maintained that Van der Does had rightfully taken the *Ponte's* cargo in accordance with *jus gentium*, but were prepared to pay a sum of f18.000 in order to protect diplomatic relations⁵⁷. With regard to the acts of Van den Kerckhoven, who had acted on a private basis after all, the judgments of the Supreme Court were deemed sufficient⁵⁸.

A final remark must be made with regard to the legal nature of (limitation of) the liability of a ship owner as set out in the *Ponte* case. In general, three manifestations of this liability are imaginable. The first comprises unlimited liability without further ado and more or less goes without saying. The second comprises unlimited liability in first instance, but shipowners may voluntarily rid themselves of this liability by surrendering their ship. One could perceive this construction as existing of a *primary* obligation to full indemnification and an alternative or *secondary* obligation to surrender ('abandon') the ship, like Justice Voogt has argued. It is this limitation system, which could also be imagined as an optional right or a *facultas solvendi*, that would be laid down in the French *Ordonnance de la Marine* from 1681 and eventually became prevalent in civil law jurisdictions under the term *abandon*⁵⁹. A third option, then, would be a liability which is limited *ipso jure* and does not depend on a separate act of ship abandonment. This liability only extends to the ship and cargo – or share(s) in the ship, in case of multiple owners – and thus bears much of a resemblance to an action *in rem*⁶⁰. The Roman-Dutch system of shipowner's

se extorqueant alioquin violata fide – qua se ratum habituros acta promiserunt – sibi jus dicturi, quo vix quicquam dici pos(s)et injustius.

56 Settlement of a conflict between the Netherlands and Venice 31/1/1604, cited by Heeringa, *Bronnen* (supra, n. 3), vol. 1, p. 47-49; De Jonge, *Nederland* (supra, n. 53), p. 6; Blok, *Relazioni* (supra, n. 53), p. 5-7.

57 De Jonge, *Nederland* (supra, n. 53), p. 7; Blok, *Relazioni* (supra, n. 53), p. 6; letter from the States General to the Doge of Venice of 10/12/1602, cited by Heeringa, *Bronnen* (supra, n. 3), vol. 1, p. 44-46. See also Resolution of the States-General 8/2/1601, as cited by Heeringa, *Bronnen* (supra, n. 3), vol. 1, p. 34-35.

58 De Jonge, *Nederland* (supra, n. 53), p. 7.

59 Art. 2.8.2 *Ordonnance de la Marine* 1681. See Donovan, *Origins* (supra, n. 1), p. 1003-1004. About *abandon*, see Delwaide, *Considérations* (supra, n. 1), p. 158-193.

60 Although the Roman-Dutch regime does bear an interesting similarity to the German system of maritime liability limitation, under which creditors' claims were enforceable on the ship only and were secured through a legal security right on the ship, this similarity falls outside the ambit of this article.

limitation has often been gathered under the system of *abandon*⁶¹. If, however, the outcome of the *Ponte* case is to be translated into a general rule, this understanding is incorrect. Rather, the *Ponte* case indicates that shipowners were liable for delicts committed by their shipmaster but only with (their shares in) the ship and its cargo, and so *ipso jure*. The Roman-Dutch rule entwines vicarious liability with its very limitation, and should thus instead be accommodated under the third system discussed here.

3 The *Ponte* case in Roman-Dutch law

3.1 *First recipients: Jacob Coren and Hollandic Consultation 3.221*

As has been shown, the judges of the Supreme Court ruled that the liability of the shipowners was limited to their ship and cargo, and so *ipso jure*. This being said, the shipowners were of course free to opt for full indemnification instead. Roman-Dutch literature disregards the fact that the defendants in the *Ponte* case decided to do so, because it is only the judgment against the shipowners of July 30th 1603 that made its way into printed sources. Its *locus classicus* is to be found in the *Observationes* of Jacob Coren (ca. 1570-1631), published in 1633. The author includes a short but accurate summary of the verdict right after *Observatio* no. 40⁶², which deals with (limited) shipowner's liability for inculpable ship collision. Coren only became a judge in the Supreme Court in 1621, but must have heard of the *Ponte* case and consulted the Supreme Court's archive consecutively.

The *Ponte* case, however, is not the very first instance in Dutch law of vicarious liability of a shipowner for delicts by his shipmaster. An Act from 1580 imposed subsidiary liability upon the owners of herring fishing vessels for

61 See e.g. Wagner, *Handbuch* (*supra*, n. 1), p. 179; K. Moors, *Men kan niet meer aan de zee verliezen dan hij haar heeft toevertrouwd*, *Rechtskundig Weekblad*, 17 (1953), p. 297-322, spec. p. 301; S. Killingbeck, *Limitation of liability for maritime claims and its place in the past present and future – how can it survive*, *Southern Cross University Law Review*, 3 (1999), p. 1-29, spec. p. 3; Delwaide, *Considérations* (*supra*, n. 1), p. 196; F. Stevens, *Beperking van aansprakelijkheid: zee- en binnenvaart*, Brussels 2008, p. 5; W. Druwé, *Loans and credit in the Consilia and Decisiones in the Low Countries* (ca. 1500-1680), Leiden 2020, p. 625. Van Niekerk imagines the Roman-Dutch rule as a *fictional* act of ship abandonment which took place *ipso jure*, Van Niekerk, *The development* (*supra*, n. 8), vol. 2, p. 1282-1284. Other authors do recognise the independent nature of the Roman-Dutch regime as such but do not provide a further specification, see e.g. H.J. Kluijver, *De regeling van de aansprakelijkheid des reeders*, Leiden 1901, p. 14; Schilthuis, *De beperking* (*supra*, n. 1), p. 13; R. Cleton, *De beperkte aansprakelijkheid van de scheepseigenaar*, Wassenaar 1998, p. 11; Punt, *Het vennootschapsrecht* (*supra*, n. 6), p. 82.

62 J. Coren, *Observationes rerum in eodem Senatu judicatarum*, The Hague 1633, p. 419-420.

damage inflicted by the shipmaster to other ships, if the shipmaster himself could not cover the whole damage⁶³. This liability was not limited at all, but a subsequent Act from 1611 did introduce a limitation of shipowner's liability to the value of the herring ships involved and their cargo⁶⁴. This change may have been inspired by the outcome of the *Ponte* case, especially since this liability limitation takes place *ipso jure* and not by means of a voluntary act of ship abandonment.

The *Ponte* case is also referred to in Hollandic Consultation 3.321 [*leg.* 221], dated July 6th 1624 (but first published in 1648) and signed by Jan Vermeren, Dirck de Jonge and Nicolaes van Sorgen, three counselling lawyers at the High Court (*Hof*) of Holland, Zeeland and West-Friesland⁶⁵. Given that Coren's *Observationes* were not published until 1633, the consultation proves that the *Ponte* case must have gained wide publicity through word-of-mouth. In the case at hand, a privateer had conquered a neutral ship without having been ordered to do so by his shipowners. Offering a rather accurate abstraction of the Supreme Court's verdict of July 30th 1603 in the *Ponte* case, the counsellors advised that the shipowners, in the absence of personal suretyship or specific instructions from the States General⁶⁶, were not personally liable for the delicts of the shipmaster but only with their shares in the ship and its cargo, and could therefore abandon these assets:

That in such a case the shipowners are not liable for the captain's misbehaviour beyond their parts in the ship and the goods therein; and that it is sufficient for them to present the foresaid ship and cargo in favour of the prejudiced party. And this has also been understood by the Supreme Court in Holland between Antonio Colari, Venetian, and

63 Art. 21 *Plakkaat* Philip II 9/3/1580, GPB I, p. 689.

64 Art. 20 *Plakkaat* States of Holland 20/3/1611, *Hollandts Placcaet-Boeck*, Amsterdam 1645, vol. 1, p. 369. The words that effectuate a limitation of liability to the ships and their cargo have been erroneously omitted in the version in GPB I, p. 694, as is pointed out by C. van Bijkershoek, *Quaestionum juris privati libri quatuor*, Leiden 1744, p. 712 (no. 4.23); Asser, *In solidum* (*supra*, n. 46), p. 104. See also Schilthuis, *De beperking* (*supra*, n. 1), p. 11; Joubert, *Aspekte* (*supra*, n. 1), p. 294.

65 Vermeren (installed before 1593), De Jonge (installed 1601) and Van Sorgen (installed 1606) are mentioned in order of seniority, see R. Huijbrechts, S. Scheffers and J.S. Scheffers-Hofman, *Album advocatorum: de advocaten van het Hof van Holland 1560-1811*, The Hague 1996, p. 183, 293, 324. It was a common practice for lawyers at the High Court to provide legal advice, *ibid.*, p. 11-12.

66 About suretyship for excesses during privateering expeditions, see par. 3.4 and *infra* at note 143 in particular.

the shipowners of Melchior vanden Kerckhove, who had unlawfully taken the Venetian's ship⁶⁷.

This, so they asserted, also followed from Roman law, since the *actio exercitoria* could only be installed for acts that fell under the shipmaster's *praepositio*⁶⁸. Hence, a shipmaster could only bind the shipowner 'in line with his *praepositio*, which, if it is overstepped, does not bind the shipowner', with reference to Bartolus' comment on D. 14.1.1,2⁶⁹. The consultation is of interest for a number of reasons. First, the counsellors adhere to the view that the capture of friendly or neutral ships does not fall under the *praepositio* of the privateering shipmaster, who after all has only been committed to take enemy vessels. As will be discussed later on, some Roman-Dutch scholars would take a different view. Furthermore, the consultation is not only intriguing because it construes vicarious liability for the delicts of one's shipmaster in terms of the *actio exercitoria* – had they done so in a consistent manner, they would simply have rejected *all* liability for delicts that fell outside the scope of the shipmaster's appointment, as the *praepositio* urges for a strict dichotomy between liability in full and no liability at all⁷⁰. Instead, the counsellors stress the absence of *personal* liability in the scenario at hand but declare that the shipowner's liability nonetheless extends to his ships, thus amounting to a *sui generis* nature of the limited liability of shipowners. If argumentation *a contrario* is allowed here – but we should be careful there – a general rule can be deduced that the shipowner's liability for delicts committed outside the scope of the *praepositio*

67 J. Naeranus (red.), *Consultatiën, advysen en advertenties*, Rotterdam 1645-1666, vol. 3, p. 584-585 (*Holl. cons.* 3.321): 'Dat in sulken gevalle de voorsz. Reeders nopende 't voorsz. mesuis van den kapitein verder niet zijn gehouden, dan na advenant van hare parten scheeps, ende de goederen daarinne geweest zijnde: Ende dienvolgende mogen volstaan met hare presentatie van 't genoemde schip ende goederen te abandonneren tot behoeve van de beschadigde. 't Welck alsoo bij den Hoogen Rade in Holland is verstaan tusschen Antonio Colari, Venetiaan, ende de Reeders van Melchior vanden Kerckhove, het schip van den Venetiaan qualijk genomen hebbende'. See also Asser, *In solidum* (*supra*, n. 46), p. 107-108; Druwé, *Loans* (*supra*, n. 61), p. 624.

68 The counsellors refer to D. 14.1.1,12.

69 'Secundum modum quo praepositi sunt, quodque modus egressus non obligat exercitorem'. Bartolus' comment reads: 'Modus praeponendi est considerandus qui si excedatur dominis non obligatur', Bartolus de Saxoferrato, *Bartoli a Saxoferrato omnium juris interpretum antesignani commentaria* (...) *tomus secundus, in secundam Digesti Veteris partem*, Venice 1590, f. 86, at *Item praepositio*.

70 Cf. Asser, *In solidum* (*supra*, n. 46), p. 107-108.

is limited to his ship, whereas he is fully liable for those delicts that can be covered by the *praepositio*⁷¹.

3.2 *Grotius and Groenewegen van der Made*

It appears that the outcome of the *Ponte* case, as it was understood by Vermeren, De Jonge and Van Sorgen, has been controversial from its very conception onwards. In *De Jure Belli ac Pacis*, Grotius takes the view that according to natural law, one was only liable for his own delicts, that is, for acts resulting from his own *culpa*⁷². Liability for delicts of subordinates, therefore, could only be introduced by positive law and should be applied restrictively⁷³. In his *Introduction to Hollandic Jurisprudence* Grotius states that shipowners may thus be liable towards the charterers under the *actio furti / damni adversus nautas* and the *actio de recepto*, but cannot be held responsible for delicts committed against third parties as these delicts 'do not concern the shipmaster's office, including acts of piracy'⁷⁴. The phrasing is regrettably vague. Grotius may have had the *actio exercitoria* in mind, in which case the scope of the *praepositio* (if loosely translated as 'office') would indeed determine the scope of liability of the shipowner. This interpretation of Grotius, however, necessitates the view that the capture of neutral or friendly ships ('piracy') can *never* be gathered under the shipmaster's *praepositio*, even if he had been committed as a privateer. In *De Jure Belli ac Pacis*, Grotius concludes accordingly and writes that sovereign authorities (but also private shipowners) were not responsible for damage inflicted by pirating privateers⁷⁵. Few instances would then be left to accept

71 Cf. Druwé, *Loans* (*supra*, n. 61), p. 624; Druwé, *Qualitative liability* (*supra*, n. 49), p. 47-48. Druwé opposes this consultation to Hollandic Consultation 3.336, advising that a shipmaster engaging in illegal trafficking without consent of his shipowners must be deprived of all cargo but that the ship itself is not to be confiscated. This consultation, however, deals with criminal law and is primarily concerned with art. 12 *Plakkaat* of Robbert Dudley, Earl of Leicester 4/8/1586, GPB 1, p. 1096, which prohibits illegal trafficking on penalty of confiscation of ship and cargo. The consultation can therefore not easily be understood as laying down a general rule of maritime private law.

72 Grotius, *De jure belli ac pacis*, The Hague 1680, p. 319 (2.17.1), 322 (2.17.12), 324 (2.17.20.2); Zimmermann, *The law* (*supra*, n. 47), p. 1032-1034; J. Sampson, *The historical foundations of Grotius' analysis of delict*, Leiden 2018, p. 25-28. The same principle lay at the basis of Roman delict law.

73 Grotius, *De jure belli* (*supra*, n. 72), p. 324 (2.17.20.2). Cf. H. Grotius, *Inleidinge tot de Hollandsche Rechts-geleerdheid*, ed. S. Groenewegen van der Made, Amsterdam 1706, p. 188 (3.1.34).

74 Grotius, *Inleidinge* (*supra*, n. 73), p. 188 (3.1.32).

75 Grotius, *De jure belli* (*supra*, n. 72), p. 323-324 (2.17.20). The text of Grotius' advice has survived, see R. Feenstra, *Die Quasi-Delikte bei Hugo Grotius, Die Lehre in seinen juristischen Hauptwerken und eine Akte aus dem in djb ii, 17, 20 erwähnten Prozess von Stettiner Kaufleuten*

shipowner's liability at all – one could think of intentional or culpable ship collision – and even more so in the absence of *limited* liability for delicts committed *extra praepositionem*, which Grotius does not mention by any means. Besides the fact that Grotius employed the term 'shipmaster's office' earlier (and perhaps exclusively) for liability under the *actio furti* / *damni adversus nautas*⁷⁶, it is hence more probable that Grotius entirely disavowed liability for delicts by the shipmaster on the basis of the *actio exercitoria*. He promoted this view in a legal advice from 1617, which lies at the very basis of his treatment of the matter in *De Jure Belli ac Pacis*⁷⁷. This, of course, does not affect remedies for unjust enrichment and the shipowner's liability for those delicts which he himself has ordered or caused through aiding and abetting and where *culpa* is present, as Grotius concludes his treatment of shipowner's liability in the *Introduction*⁷⁸.

Thus, Grotius' view aligns with Roman law. Apart from the *actio furti* / *damni adversus nautas* and the *actio de recepto*, shipowners are not liable for the delicts of the shipmaster unless they have conducted themselves in a blameworthy manner, a position that was also held by Ulrich Huber⁷⁹. Simon Groenewegen van der Made, who had consulted circulating case law manuscripts as well as the archives of the appellate courts in The Hague for his

gegen die Generalstaaten (1609–1617), in: M.J. Schermaier, J.M. Rainer and L.C. Winkel (ed.), *Iurisprudentia universalis. Festschrift für Theo Mayer-Maly zum 70. Geburtstag*, Cologne 2002, p. 175–89, spec. p. 179–189. The law professors of Leiden University gave their advice in the same case in 1610, see *Hollandic Consultation* 5.1; H.F.W.D. Fischer, *De adviezen van de Leidse professoren, in het bijzonder tijdens het professoraat van Everardus Bronchorst (1587-1627)*, *Tijdschrift voor Recbhtsgeschiedenis* 29 (1961), p. 463–483, spec. p. 469–470.

76 Grotius, *Inleidinge* (*supra*, n. 73), p. 188 (3.1.32).

77 Grotius opposes the view that D. 14.1.1,2 ('quamquam ex delicto cuiusvis eorum qui navis navigandae causa in nave sint, detur actio in exercitorem') lays down vicarious liability of the shipowner for his shipmaster's delicts as a general rule, as the text should not be understood '*universaliter*' but '*indefinite et relative*', Feenstra, *Die Quasi-Delikte* (*supra*, n. 75), p. 185–186. Indeed, Ulpian only refers to delicts actionable under the *actio furti* / *damni adversus nautas*, which also follows from the subsequent sentence: '*alia* (i.e. the *actio exercitoria*) enim est contrahendi causa, *alia* (i.e. the *actio furti* / *damni adversus nautas*) delinquendi'. See i.a. P. Peckius Senior, *Commentaria in omnes pene juris civilis titulos ad rem nauticam pertinentes*, ed. A. Vinnius, Leiden 1647, p. 78–79; U. Huber, *Praelectiones juris civilis*, Franeker 1687–1690, vol. 2, p. 500 (14.1.8); Burger, *De beperkte aansprakelijkheid* (*supra*, n. 52), p. 144. Contra: Asser, *In solidum* (*supra*, n. 46), p. 109, according to whom D. 14.1.1,2 does impose general vicarious liability.

78 Grotius, *Inleidinge* (*supra*, n. 73), p. 188 (3.1.32).

79 U. Huber, *Heedensdaegse rechtsgeleertheit*, Leeuwarden 1686, vol. 1, p. 590 (3.24.17); Huber, *Praelectiones* (*supra*, n. 77), vol. 2, p. 500 (14.1.8).

annotated edition of Grotius' *Introduction*⁸⁰, tries to buttress Grotius' theory with case law of the Supreme Court. Firstly, he uses the *Ponte* case as an illustration of shipowner's liability for his shipmaster's delicts on the basis of complicity⁸¹. As we saw earlier, the facts of the *Ponte* case do not justify this interpretation⁸². Besides, if the shipowners had acted in a blameworthy manner on their own, it is unlikely that the Supreme Court would have limited their liability. The *Ponte* case, therefore, does not fit Grotius' theory. Groenewegen brings in another case from the Supreme Court to support Grotius' overall denial of vicarious liability, which centres around the capture of the French ship *Levrette*⁸³. Although this case did not have much of an afterlife – only Huber and Voet mention it briefly⁸⁴ – it is interesting to investigate whether it lays down a similar rule. Although the case has not been as well documented in the archives of the High Court and the Supreme Court as the *Ponte* case, the archival documents still allow for a proper reconstruction⁸⁵.

80 See the preface to H. Grotius, *Inleidinge tot de Hollandsche Rechts-geleerdheid*, ed. S. Groenewegen van der Made, Amsterdam 1652. In a letter from December 10th 1644, Grotius expresses his appreciation of this edition towards Groenewegen van der Made, see C.M. Ridderikhoff and H.J.M. Nellen (ed.), *Briefwisseling van Hugo Grotius, zestiende deel*, The Hague 2000, no. 7185.

81 Grotius, *Inleidinge* (*supra*, n. 73), p. 188 (3.1.32), note 46.

82 Besides D. 26,9,3, regarding a case of unjust enrichment, Groenewegen van der Made mentions D. 10,2,45,1 as an example of *culpa in eligendo*. As stated earlier, the facts of the *Ponte* case do not give an indication of shipowner's liability on this basis.

83 Grotius, *Inleidinge* (*supra*, n. 73), p. 188 (3.1.32), note 45.

84 Huber, *Praelectiones* (*supra*, n. 77), vol. 2, p. 500 (14.1.8). For Voet, see note 117.

85 For a complete overview of the case documents, not all of which can be covered here, see Appendix II. The most important sources for the cause and development of the *Levrette* case in the archive of the High Court are *Register der sententiën* 29/3/1613 (De Gourfaleur/Jansz & Van der Veeken c.s.), NA 3.03.01.01, nos. 629/104-141; *Register der sententiën* 29/3/1613 (De Gourfaleur/Fernandez & Nunges c.s.), NA 3.03.01.01, nos. 629/141-152. The most important sources from the archive of the Supreme Court are *Geëxtendeerde sententie* 18/11/1614 (Van der Veeken/De Gourfaleur), NA 3.03.02, nos. 706/220-228; *Geëxtendeerde sententie* 18/11/1614 (Jansz/De Gourfaleur), NA 3.03.02, nos. 706/228-235; *Geëxtendeerde sententie* 18/11/1614 (De Gourfaleur/Fernandez, Nunges & Vlaming), NA 3.03.02, nos. 706/325-329. For the sake of legibility, no further references to these sources will be made below unless they are the sole source for a vital part of the argument. The (incomplete) case file containing documentary and testimonial evidence has been surrendered in the archive of Johan van Oldenbarnevelt as *Stukken betreffende het proces tussen Govert Janssen (...) en François Courfailleur, heer van Quarantilly (...)*, NA 3.01.14, no. 3349.

3.3 *The Levrette case*

3.3.1 Facts of the case

In October 1609, the *Sint Jacob*, belonging to the aforementioned Johan van der Veeken and his fellow shipowners, left Rotterdam under shipmaster Govert Jansz and his first mate Cornelis Jacobsz to trade on Portodalo in Guinea⁸⁶. The journey took place under a voyage charter and had been commissioned on payment of freight by charterers Jaspar Sanches and Jaspar Nunges, two industrious Portuguese-Jewish merchants from Amsterdam who also appointed two supercargoes, Gaspar and Louis Fernandez⁸⁷. According to the code of conduct drafted by the shipowners, the crew was subject to the joint orders of shipmaster and first mate.

Having arrived at Portodalo, the *St. Jacob* was visited by two Frenchmen in a canoe, who came from a French ship nearby and invited shipmaster Jansz to trade some goods. Jansz refused politely, not in the least because the two African oarsmen in the canoe informed him that their passengers had come from a French pirate ship. The Frenchmen immediately repeated their invitation to a nearby Dutch ship called the *Meeuken*⁸⁸, but its shipmaster Heyndrick Claesz similarly turned the offer down. After both Jansz and Claesz came ashore, they were informed by local inhabitants and European merchants that a limping French pirate had just violently overtaken a Portuguese merchantman and a slave ship and boasted himself as ruler of the area, only allowing French merchants to trade.

Two days later, Jansz and Claesz encountered the *Levrette*, a French vessel which, unusually well-manned as it was for a merchantman, they identified as the pirate ship. The shipmaster and owner was François de Gourfaleur, a Norman nobleman and lord of Carantilly. This person was, in fact, a notable corsair⁸⁹, but before the Courts of Holland he would claim to have been a

86 'Saint James'. The modern city is called Saly Portudal and lies in Senegal. The other ship-owners were Willem Jansz van Loon, Cornelis Jansz van Loon, Jasper Moerman, Jan Jorisz, Jan Maet, Gillis Marinus, Gerrit Moensch de Visch, Pieter Lenertsz Busch and Symen Aerts.

87 The expedition and the underlying contracts are mentioned in F.I. Ribeiro da Silva, *The Dutch and the Portuguese in West Africa: empire building and Atlantic system (1580-1674)*, unpublished doctoral thesis Leiden University 2009, p. 273-274, 288-289; F.I. Ribeiro da Silva, *Portuguese Sephardi of Amsterdam and the trade with Western Africa, 1580-1660*, Le Verger: la Revue de Cornucopia, 5 (2014), p. 1-22, spec. p. 9-10.

88 'Gull'.

89 The Granville corsair François de Gourfaleur, lord of Carantilly and Bonfossé, is mentioned in R. Toustain de Billy, *Mémoires sur l'histoire du Cotentin*, Saint-Lo 1864, p. 231; A. Cahierre, *Dictionnaire des capitaines corsaires granvillais*, Saint-Lô 2009, p. 161. The correctness of this identification is supported by the information provided in *Stukken betreffende het proces tussen Govert Janssen (...) en François Courfailleure, heer van Quarantilly (...)*, NA

cavalry officer in the Dutch army and to have entered the maritime trade after his leg was permanently damaged in an accident, leaving him with a limp ever since. Be that as it may, De Gourfaleur invited the Dutchmen to come aboard. This they cautiously refused, even when the French amicably sent them some bottles of wine. Deliberating on what to do, Claesz proposed to launch a preventive attack in order to protect their ships and liberate the surrounding areas. Jansz refused to cooperate at first, but gave in when Claesz insisted and lent his constable and one other seaman, despite his first mate's advice to the contrary. This provoked a significant part of Jansz' crew, who demanded permission to join as well. Jansz succumbed to the pressure and selected four candidates by drawing lots, under the condition that they would act at their own risk and outside of Jansz' responsibility. The constable and the aforementioned seaman rejected this arrangement and joined nonetheless, amounting to a total deputation of six men.

After De Gourfaleur and a few crewmembers disembarked to pay toll, the *Levrette* was violently overtaken. The cargo, which did include slaves as well as Portuguese goods and documents⁹⁰, was stolen, the ship itself was abandoned and the remaining crewmembers were put ashore. Jansz, who had not assisted in the capture himself, refused to share in the booty and only agreed to safe-keep four canons and hand them over to the Rotterdam admiralty until the owner could reclaim them, since Claesz would otherwise have thrown them into the sea.

After the capture, the *Sint Jacob* and the *Meeuken* continued their journey each on its own to stock up on fresh water. They happened to come across the *Perle*, De Gourfaleur's second ship, which Jansz identified as the stolen Portuguese merchantman. The *Perle*, which had only just salvaged De Gourfaleur and his crew, took flight and ran aground. Anxious to take revenge

3.01.14, nos. 3349/97, 105, 114. Cahierre points to 1595 as his birth year, which is improbable. Groenewegen van der Made wrongly spells 'De Gourteleur', Grotius, *Inleidinge* (*supra*, n. 73), p. 188 (3.1.32), note 45. He would not remain the only one to do so, see note 95.

90 It concerns nine enslaved Africans bearing the Portuguese coat of arms, seven of whom were sold in Africa and two of whom were sold by the supercargoes and brought to the Low Countries. Together with two other slaves bought in Portudal and Joal, these two are mentioned in P. Mark and J. da Silva Horta, *The forgotten diaspora: Jewish communities in West Africa and the making of the Atlantic world*, Cambridge 2011, p. 172-173. One of them, a woman called Esperanza, gave a testimony before a civil notary in Antwerp at the request of Govert Jansz and testified that the Portuguese caravel which had initially transported her had violently been overtaken by a limping French pirate, see *Stukken betreffende het proces tussen Govert Janssen (...) en François Courfaillieur, heer van Quarantilly (...)*, NA 3.01.14, nos. 3349/128-129. The documents included a bill of lading from a caravel called *Nossa Senhora da Ascensão* and belonging to shipmaster Fernand Torina.

for the loss of his two ships, De Gourfaleur soon after managed to persuade an English privateer, Thomas Godart, to help him track down the two Dutch 'pirates' that had mugged him. Godart set sail to find the *Sint Jacob* – but having done so, Jansz successfully convinced Godart that De Gourfaleur rather than he himself was a pirate. Godart sent his French passenger away under threats of throwing him overboard, and De Gourfaleur was forced to scour the African coastline before he could find a ship to bring him to Normandy.

Having arrived in Normandy, De Gourfaleur obtained an attachment order from the admiralty of Dieppe, which was unenforceable as the *Sint Jacob* had already arrived in Rotterdam as of September 1610. Thus, De Gourfaleur went on to file a case at the High Court (*Hof*) of Holland, Zeeland and West-Friesland (hereinafter referred to as 'the High Court') against shipmaster Jansz, shipowners Van der Veecken and his companions, charterers Gaspar Sanches and Gaspar Nunges and their supercargo Gaspar Fernandez⁹¹. De Gourfaleur claimed that the defendants were jointly and severally liable to pay the value of the *Levrette* and the *Perle* and return (or compensate for) their cargo. The *Sint Jacob* and its cargo, which mainly existed in a batch of peltries bought by Fernandez in Guinea⁹², were attached for these purposes, and Jansz and Fernandez were remanded in custody. This remained so as long as no security was given for the Court's verdict (*cautio de judicato solvendo*). Jansz was unable to do so and requested that his house be accepted as security. The High Court did not settle the issue⁹³, but the Supreme Court granted Jansz' request after cross-appeal⁹⁴. With regard to Fernandez, then, the High Court ruled that a secured promise to merely appear in court (*cautio judicio sisti*) did not suffice but that security had to be given for the Court's verdict – a decision that has itself been included in Roman-Dutch literature on civil procedure⁹⁵.

91 The High Court's jurisdiction in first instance extended over foreigners not domiciled in Holland or Zeeland, M.Ch. Le Bailly, *Procesgids Hof van Holland, Zeeland en West-Friesland*, Hilversum 2008, p. 23.

92 The peltries are mentioned in Ribeiro da Silva, *The Dutch* (*supra*, n. 87), p. 274.

93 *Register der sententiën* 23/11/1610 (Jansz/De Gourfaleur), NA 3.03.01.01, nos. 623/130-131.

94 *Resolutie* 29/1/1611 (Jansz/De Gourfaleur), NA 3.03.02, no. 640/57; *Geëxtendeerde sententie* 1/2/1611 (Jansz/De Gourfaleur), NA 3.03.02, no. 703/15; *Register der dictums* 29/1/1611 (Jansz/De Gourfaleur), NA 3.03.02, no. 885/77. On top of the *cautio de judicato solvendo*, Jansz had to give the *cautio judicio sisti* too.

95 See *Register der sententiën* 20/5/1611 (Sanches c.s./De Gourfaleur), NA 3.03.01.01, nos. 624/216-217; *Register der sententiën* 25/11/1611 (Sanches c.s./De Gourfaleur), NA 3.03.01.01, no. 625/255; Naeranus, *Consultatiën* (*supra*, n. 67), vol. 6, p. 325 (misspelling 'Gouwfacileux'); P. Vromans, *Tractaet de foro competenti*, Leiden 1722, p. 52 (misspelling 'Donfaleur'). Sanches and Nunges provided the security under protest, and filed a cross-appeal against the decision, see *Conclusie* 11/1/1612 (Nunges/De Gourfaleur), NA 3.03.02, no. 499/482. As

3.3.2 Proceedings

The proceedings against shipmaster Jansz, the charterers and the shipowners have been documented separately in the archives of the High Court and the Supreme Court, and will thus be treated separately here. Jansz, firstly, persisted in his suspicions that De Gourfaleur was in fact a pirate⁹⁶. Furthermore, he declined responsibility for acts committed by his crew off board and denied that he himself had benefitted from the capture. On March 16th 1613, the High Court allowed the claim against Jansz only as far as the *Levrette* was concerned – the loss of the *Perle* was not imputed to Jansz⁹⁷. Jansz filed an appeal at the Supreme Court, which was dismissed on November 18th 1614⁹⁸. The Supreme Court decided that Jansz' property was to be attached but that he himself should be released from custody⁹⁹.

Secondly, the charterers provided security for their supercargo Fernandez, which allowed him to be released from prison. They stressed before the High Court that they bore no legal relation to De Gourfaleur and that neither Fernandez nor any of his adjuncts had had any part in the capture of the *Levrette*, as he was buying peltries in Joal at that very moment¹⁰⁰. Similarly, the charterers had not benefitted from the capture. On March 29th 1613, the nine judges of the High Court unanimously lifted the attachment of the peltries, cancelled Fernandez' arrest and denied De Gourfaleur's claim¹⁰¹. De

the High Court later denied De Gourfaleur's claims (see par. 3.3.2), the appeal was probably withdrawn.

- 96 Jansz argued that the *Perle* was not a French vessel but a Portuguese caravel carrying Madeira wine, and that the *Levrette* had mainly carried Portuguese documents and goods, including slaves marked with the coat of arms of Portugal, see also note 90. Furthermore, Jansz mocked De Gourfaleur's noble descent, asserted that the French nobility despised maritime trade and concluded that a 'rider' becoming a 'robber' was 'a more likely metamorphosis' than one into a merchant.
- 97 Only Justices Rosa and Buijs dissented, *Notulen van beraadslagingen* 19/3/1613 (De Gourfaleur/Jansz), NA 3.03.01.01, no. 6000.
- 98 *Register der dictums* 15/11/1614 (Jansz/De Gourfaleur), NA 3.03.02, no. 886/74; *Register der dictums* 18/11/1614 (Jansz/De Gourfaleur), NA 3.03.02, no. 993/153. It appears that only Justice Honert dissented, who preferred to condemn Jansz merely to return whatever he may have enjoyed from the *Levrette*'s cargo, see *Resolutie* 25/10/1614 (Jansz/De Gourfaleur), NA 3.03.02, no. 641/47.
- 99 *Resolutie* 19/11/1614 (Jansz/De Gourfaleur), NA 3.03.02, no. 641/57.
- 100 Alternatively, had an adjunct in fact assisted in the capture of the *Levrette* (which they denied), the charterers still denied liability since neither they nor the supercargoes had ordered or consented to such acts.
- 101 *Notulen van beraadslagingen* 21/3/1613 (De Gourfaleur/Sanches), NA 3.03.01.01, no. 6000; *Notulen van beraadslagingen* 22/3/1613 (De Gourfaleur/Sanches Quinges), NA 3.03.01.01, no. 6000.

Gourfaleur filed an appeal at the Supreme Court, which was dismissed on November 18th 1614¹⁰².

Lastly, the shipowners asserted before the High Court that they had not ordered Jansz to inflict damage upon anyone and that they were not accused of having done so either. They also argued that the delict committed had not taken place aboard the *Sint Jacob* – a reference to the *actio furti / damni adversus nautas* discussed earlier – and that they had not benefitted from it themselves. Apart from that, they supported Jansz' suspicions that De Gourfaleur was a pirate himself. The defendants demanded that the *Sint Jacob* should be released, and were happy to provide security for the Court's verdict but certainly not beyond the value of the *Sint Jacob*¹⁰³. This telling argument, which implicitly alludes to limitation of shipowner's liability, was accepted by both De Gourfaleur and the High Court¹⁰⁴. On March 29th 1613, the High Court ordered the release of the *Sint Jacob* and held the shipowners jointly and severally liable to pay the value of the *Levette* and its cargo, albeit only up to the value of the *Sint Jacob* and those goods aboard that belonged to the shipowners¹⁰⁵, which were all to be sold for these purposes, as well as the earned freight. It should be noted that this joint and several liability (although limited to the ship) deprived the individual shipowners of the possibility to surrender only their share in the ship – as discussed earlier, the outcome of the *Ponte* case implied a similar impediment. One judge dissented, because the shipowners' partnership contract prescribed proportionate liability between each other, with a limitation to each share in the venture¹⁰⁶. His colleagues, however, did not support this opinion; in all likelihood, the contract was not given external effect, nor could the proportionate and limited *contractual* liability of *socii* towards third parties

102 *Register der dictums* 15/11/1614 (De Gourfaleur/Fernandez, Nunges & Vlaming), NA 3.03.02, nos. 886/74-75; *Register der dictums* 18/11/1614 (De Gourfaleur/Fernandez, Nunges & Vlaming), NA 3.03.02, no. 993/153. See also *Resolutie* 14/11/1614 (De Gourfaleur/Fernandez, Nunges & Vlaming), NA 3.03.02, no. 641/47.

103 *Register der sententiën* 29/3/1613 (De Gourfaleur/Jansz & Van der Veeken c.s.), NA 3.03.01.01, nos. 135-137. See also note 95.

104 *Ibid.* De Gourfaleur reserved a right to raise the appraised value if the judicial valuation proved inadequate.

105 Apart from the 6000 peltries acquired by Fernandez, the *Sint Jacob* also contained a batch of 2000 peltries which had been transshipped from another ship belonging to Van der Veeken and Van Loo, on payment of freight to the supercargoes. Since Van der Veeken's and Van Loo's ownership of these peltries did not relate to their quality as shipowners of the *Sint Jacob*, the peltries were not included in the High Court's verdict.

106 *Notulen van beraadslagingen* 19/3/1613 (De Gourfaleur/Jansz), NA 3.03.01.01, no. 6000. This was Justice Cromhout. Justice Aleman withheld his view on the matter, probably because he did not see its practical relevance in a scenario where the ship is surrendered entirely.

(applying under contemporary mercantile law) casually be drawn into the field of delict¹⁰⁷. Two judges denied shipowner's liability entirely¹⁰⁸, whereas another judge hesitantly expressed a preference to regard ship abandonment as optional instead of an *ipso jure* limitation of liability¹⁰⁹. The versatility of this debate, by the way, is revealed by the clerk's records of the judicial opinions, a fascinating source which has seldom, if ever, been consulted.

Thus, the High Court imposed vicarious liability upon the shipowners with an *ipso jure* limitation to the ship, their parts in the cargo and the earned freight, neatly aligning itself with the High Court's judgment in the *Ponte* case¹¹⁰. Nonetheless, the shipowners felt wronged and appealed to the Supreme Court. In a verdict from November 18th 1614, the Supreme Court overturned the High Court's sentence and dismissed De Gourfaleur's claims¹¹¹. Oddly, the deliberations on the case had already taken place on October 24th – that is, *before* the judges discussed the liability of shipmaster Jansz on October 25th. From the nine judges of the Supreme Court, five had also adjudged the *Ponte* case. From these five, four were of the opinion that the shipowners were not liable¹¹². Only Justice Vranck supported the sentence of the High Court, thus persevering in the opinion that he had rendered as rapporteur in the *Ponte* case.

107 On this topic, see i.a. Asser, *In solidum* (*supra*, n. 46), p. 84-162, 228-264. Outside the realm of maritime law, however, the existence of this legal figure was not undisputed in Roman-Dutch law, see Punt, *Het vennootschapsrecht* (*supra*, n. 6), p. 79-93, 183-199; De Jongh, *Tussen societas* (*supra*, n. 6), p. 4-17.

108 *Notulen van beraadslagingen* 19/3/1613 (De Gourfaleur/Jansz), NA 3.03.01.01, no. 6000. These were Justices Rosa and Buijes, the latter of whom thought that acts committed off board the ship could not possibly effect the ship or its cargo – an implicit reference to the *actio furti / damni adversus nautas*.

109 *Ibid.* This was Justice Junius, who argued that the shipowners were jointly and severally liable for the full sum and could opt to surrender the *Sint Jacob* at first, just like Justice Voogt had done in the *Ponte* case (see note 32). Nonetheless, he immediately added that he wanted to give further thought to the matter.

110 As the *Ponte* case did not involve separate charterers, the earned freight did not play a role there.

111 *Register der dictums* 15/11/1614 (Van der Veeken c.s./De Gourfaleur), NA 3.03.02, no. 886/73; *Register der dictums* 18/11/1614 (Van der Veeken c.s./De Gourfaleur), NA 3.03.02, no. 933/152-153.

112 *Resolutie* 24/10/1614 (Van der Veeken c.s./De Gourfaleur), NA 3.03.02, no. 641/47. Cf. note 21. These judges were Justices Hoogerbeets, Hermansz, Veen and president Van Brederode. Justices Honert, Schotte, Vosbergen and Asperen shared the same opinion. Honert's opinion may be explained by the fact that he did not consider shipmaster Jansz liable to pay damages, see note 98.

3.3.3 Analysis

The reader should not be surprised by the event of Jansz' condemnation. Although he may not have been personally involved in the capture of the *Levrette*, Jansz did not prevent his crewmembers from taking part. On the contrary, he acted in violation of their code of conduct by giving them permission against his first mate's advice – in the case file, this fact is underlined¹¹³. The dismissal of De Gourfaleur's claim against the charterers and their supercargo is not remarkable either, as Fernandez was not even on the *Sint Jacob* when the capture took place. The legal position of the shipowners, however, is interesting. According to the High Court, they carried liability for the damage resulting from the loss of the *Levrette*, but this liability did not extend beyond the value of the *Sint Jacob* and their parts in its cargo, which were to be sold, as well as the earned freight. It is highly probable that the judges of the High Court drew on the outcome of the *Ponte* case, although one cannot know whether they considered this liability limitation applicable either with regard to acts perpetrated within or outside the scope of the shipmaster's appointment (*praepositio*), nor can one know how they qualified Jansz' acts in this respect. The Supreme Court overturned the sentence of the High Court, but – and in spite of what Groenewegen may have wanted his readers to believe – this does not necessarily imply that shipowners could not be considered vicariously liable at all for the acts of their shipmaster. Perhaps the Supreme Court pondered on a restriction of vicarious liability to acts perpetrated within the *praepositio* of the shipmaster and simply thought that the capture of the *Levrette* lay too far beyond the core task of Jansz, who was a merchant captain, after all, and not a privateer. The fact that Jansz had overstepped the code of conduct may also have played a role. This explanation would account for the fact that the shipowners primarily denied liability and, alternatively, argued that their liability would be limited before the High Court. Since this explanation implies a confinement of such limitation liability to acts within the *praepositio*, however, it would be a deviation from the line set out by the counsellors of Hollandic Consultation 3.321. Unfortunately, the archival documents are too obscure to clarify this issue. This may well have to do with the fact that the Supreme Court – unlike in the *Ponte* case – only served as an appellate court in the *Levrette* case.

113 See the testimony of Heyndrick Claesz in *Stukken betreffende het proces tussen Govert Janssen (...) en François Courfilleur, heer van Quarantilly (...)*, NA 3.01.14, no. 3349/8.

3.4 Voet and Van Bijkershoek

Despite Grotius' impact on Roman-Dutch law, later authors have deviated from his strict view on ship owner liability. Johannes Voet explicitly underwrites the application of the *actio exercitoria* to delicts of the shipmaster, imposing on the shipowner what he calls quasi-delictual liability¹¹⁴. This means that the shipowner is liable for delicts committed in the course of the 'office' to which the shipmaster has been appointed (*praepositus*), such as intentional or culpable ship collisions. Vice versa, he is not bound by acts falling outside the *praepositio*¹¹⁵. This, of course, does not alter his existing liability for restitution of unjust enrichment or for delicts of the shipmaster which he himself has ordered (*mandassent*) or caused through aiding and abetting¹¹⁶. Against this background, Voet concludes that shipowners are not liable for acts of piracy by the shipmaster, for which he relies on Groenewegen van der Made's reference to the outcome of the *Levrette* case¹¹⁷. This is interesting, because Voet thus adheres to an interpretation of the *Levrette* case that aligns with the extensive use of the *actio exercitoria* that he has in mind, as suggested above

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- 114 Voet, *Commentarius ad Pandectas*, The Hague 1707, vol. 1, p. 689 (14.1.7). Cf. *ibid.*, p. 698-699 (14.3.4). Through Voet, the *praepositio* (as borrowed from the *actio exercitoria* and *actio institoria*) became instrumental in the functional limitation of more general forms of vicarious liability, see Johnston, *Limiting liability* (*supra*, n. 47), p. 1527-1528; H. Wicke, *Respondent Superior: Haftung für Verrichtungsgehilfen im römischen, römisch-holländischen, englischen und südafrikanischen Recht*, Berlin 2000, p. 146-147; R. Zimmermann, *Roman law, contemporary law, European law: the civilian tradition today*, Oxford 2001, p. 124.
- 115 Voet supports his argument with D. 39,4,11,2 and Hollandic Consultation 3.336, which, however, concern illegal trafficking at the penalty of confiscation of ship and cargo rather than private law liability, cf. note 71. He also mentions that sovereign nations are not liable under *jus gentium* for the capture of friendly or neutral ships by its privateering subjects, referring to Grotius, *De jure belli* (*supra*, n. 73), p. 323-324 (2.17.20) and Hollandic Consultation 5.1 (see note 75). Cf. E. van Zurck, *Codex Batavus*, Delft 1711, p. 612.
- 116 Although Voet only refers to D. 26,9,3-4, I. 4,1,11, D. 50,16,53,2 (erroneously mentioning the title *De verborum obligationibus* instead of *De verborum significatione*) and D. 50,17,47pr., he likely had Grotius, *Inleidinge* (*supra*, n. 73), p. 188 (3.1.32) in mind.
- 117 Voet, *Commentarius* (*supra*, n. 114), p. 689 (14.1.7). Voet also refers to Wamesius, *Responsorum sive consiliorum ad ius forumque pertinentium centuria secunda*, Leuven 1628, p. 311-319 (cons. 2.86). Here, however, Wamesius adheres to the opinion that shipowners are only liable for damage done on board the ship, see Druwé, *Qualitative liability* (*supra*, n. 49), p. 35-36, 46-47. Such a rule seems to interlace the *actio furti* / *damni adversus nautas* and the *actio exercitoria*. In Druwé, *Loans* (*supra*, n. 61), p. 623, it is asserted that Wamesius espoused limitation of shipowner's liability to (the value of) the transported goods, on the basis of Wamesius, *Responsorum* (*supra*), p. 315 (at 12 and 14), 317 (at 20 and 21). These texts, however, similarly restrict liability of the shipowner to events occurring within the ship and do mention the ship's cargo. As such, it is unlikely that Wamesius envisaged a limitation of this liability.

(par. 3.3.3). It seems that according to Voet, piracy can *never* be gathered under a *praepositio* – neither in the privateering business, nor in maritime trade¹¹⁸.

If liability can be established under the *actio exercitoria* on the grounds of the *praepositio*, Voet asserts that the shipowner can, however, release himself from his vicarious liability by abandoning his ship¹¹⁹. His opinion thus differs from the one given in Hollandic Consultation 3.321, which, after all, only limits liability for delicts *extra praepositionem*. Furthermore, Voet terms the liability limitation *noxae deditio*, a remarkable analogy stemming from the Roman-Dutch regime of ship collisions without fault¹²⁰. Voet is the first to introduce it in the sphere of delict. He even uses ship abandonment to prove that noxal surrender, which under Roman law only applied to slaves and four-footed animals and was deemed obsolete by many of his contemporaries, was still good law¹²¹. Thus, Voet provides the doctrine of limitation of shipowner's liability with an authoritative legal basis. The analogy is not flawless, however. After all, noxal liability implies a liability in full, which the debtor can choose to fulfil through the (separate act of) surrender of his slave or animal¹²², whereas in the case law of the High Court and the Supreme Court, the shipowner's vicarious liability is limited *ipso jure* to the value of his ship with cargo, which could be attached and sold to meet the obligation.

In line with Voet, Van Bijckershoek recognises the scope of the shipmaster's *praepositio* as the sole criterion for shipowner's liability under the *actio exercitoria*¹²³. This liability is justified, so Van Bijckershoek elaborates, because the shipowner only has himself to blame for having hired a malicious shipmaster¹²⁴. It is important to note, however, that this conclusive

118 J.P. Taunay, *Disputatio juridica inauguralis an et quousque exercitores navium ex magistrorum factis obligentur*, Leiden 1802, p. 27-28 criticises Voet for including intentional and culpable ship collision under the *praepositio* while excluding acts of piracy, since a shipowner cannot have thought of the former at the time he appointed his shipmaster.

119 Voet, *Commentarius* (*supra*, n. 114), p. 689 (14.1.7). See also p. 302 (4.9.10), 557 (9.4.10). Interestingly, Voet supports his view by giving a twist to D. 4.9.7.5. This text, which deals with quasi-delict, does not lay down limited but proportionate shipowner liability.

120 I hope to publish an article on this topic shortly.

121 Voet, *Commentarius* (*supra*, n. 114), p. 557 (9.4.10). This opinion is shared by Groenewegen van der Made, *Tractatus de legibus abrogatis*, Leiden 1649, p. 62 (at I. 4.9pr.). Contra: A. Vinnius, *In quatuor libros Institutionum imperialium commentarius*, Amsterdam 1655, p. 836 (at I. 4.9).

122 Zimmermann, *The law* (*supra*, n. 47), p. 1118.

123 C. van Bijckershoek, *Quaestionum juris publici libri duo*, Leiden 1737, p. 142-143 (1.19); Van Bijckershoek, *Quaestionum juris privati* (*supra*, n. 64), p. 709 (no. 4.23), referring to D. 14.1.1,12.

124 Van Bijckershoek refers to D. 14.1.1,9 and *Resolutie States General*, 22/10/1627, GPB II, p. 2297, which parenthetically states that shipowners should exercise good care in

presumption of *culpa in eligendo* is not meant to establish an independent legal ground for shipowner liability here – this ground, after all, is to be found in the scope of the *praepositio* – but serves as a mere theoretical rationalisation of this liability¹²⁵. The Roman quasi-delicts were sometimes treated in the same manner by Roman-Dutch lawyers¹²⁶. Like Voet, Van Bijnkershoek thus seems to make an effort to gather vicarious shipowner liability under this category of obligations.

Van Bijnkershoek does not completely take sides with Voet, however, as he adopts a different approach towards the scope of the *praepositio* – that is, what acts the *praepositio* does and does not cover. According to Van Bijnkershoek, an appointment by the shipowners to capture enemy ships also covers the capture of neutral and friendly ships (which Van Bijnkershoek qualifies as an improper performance of one's duty, but a performance nonetheless), whereas a mere appointment to convey cargo does not¹²⁷. Intentional or culpable ship collision, on the other hand, may never be gathered under the *praepositio*, since no shipowner would appoint a shipmaster to ram into other ships¹²⁸. The argument is at odds with Voet and seems rather illogical, given that one would expect the shipmaster's primary task to exist in navigating the ship, with unfortunate ship collisions as a possible result. Culpable ship collision would then qualify as an improper performance of that task, resulting in liability under the *actio exercitoria*. Be that as it may, Van Bijnkershoek employs a strict all-or-nothing approach and thus saw no room for limitation of shipowner's liability in this regard – to him, analogous application of the *noxae deditio* and

selecting a shipmaster (see also note 138). Rather than imposing shipowner liability towards a third party on the ground of *culpa*, these sources merely explain why a certain risk occurring at the side of the shipowner should not be moved to another party.

- 125 Besides, the trustworthiness of an employee does not necessarily depend on his specific appointment. *Culpa in eligendo* – aside from being an instance of guilt liability rather than vicarious liability – would thus result in a different scope of liability than the *praepositio*. Van Bijnkershoek, *Quaestionum juris private libri quattuor* (*supra*, n. 64), p. 714-715 (no. 4.23), mentions an anonymous judge who doubted whether a shipowner could be liable for the acts of his shipmaster on the sole basis (or even in total absence) of *culpa in eligendo*; the considerations above strengthen the assumption that this cannot have been Van Bijnkershoek himself, see Asser, *In solidum* (*supra*, n. 46), p. 146; H. Grotius, *Inleidinge tot de Hollandsche rechts-geleerdheid*, ed. L.J. van Apeldoorn, Arnhem 1939, vol. 2, p. 315-316.
- 126 Wicke, *Respondeat Superior* (*supra*, n. 114), p. 124-125.
- 127 Van Bijnkershoek, *Quaestionum juris publici* (*supra*, n. 123), p. 141, 144-145 (1.19). Needless to say, it was the purpose of the venture that mattered and not the (absence of) a privateering license (letters of marque), *ibid.*, p. 145-146 (1.19).
- 128 Van Bijnkershoek, *Quaestionum juris privati* (*supra*, n. 64), p. 709-710, 716 (no. 4.23).

the *actio de pauperie*, having an 'entirely different rationale', was unheard of¹²⁹. Hence, the outcome of the *Ponte* case was nothing short of an anomaly in Van Bijckershoek's eyes¹³⁰, and in this respect it did not matter whether Van den Kerckhoven would have been appointed to take enemy ships or not (which Van Bijckershoek did not know)¹³¹. Codifications of limitation of shipowner's liability, such as the aforementioned Act from 1611¹³², were thus to be treated as a statutory exception¹³³.

With regard to the privateering business, the discussion about limitation of shipowner's liability is complicated to a further degree. According to an Act from 1597, security had to be provided (most likely by the shipmaster)¹³⁴ for acts of privateers prior to their departure and the shipmaster had to swear to abstain from harming friendly and neutral ships¹³⁵. In 1622, the security amount was set at f10.000, but it was added that this sum served only to ensure that privateers took their booty to the admiralty and paid a statutory levy¹³⁶. An additional sum of f12.000 to be provided by the shipowners was introduced in or before 1624 in order to safeguard the interests of those allies and neutrals that might be harmed by the shipmaster¹³⁷. It was determined in 1627 that these allies and neutrals could also apply to the first sum of f10.000 if the shipowner's security sum proved insufficient¹³⁸. In 1705, then, the security sum was raised to f30.000 (without indicating whether it had to be provided by the shipmaster or the shipowner), which was first to be called upon before the shipowners could be addressed¹³⁹. Similar provisions are also found in several

129 Van Bijckershoek, *Quaestionum juris publici* (*supra*, n. 123), p. 144-145 (1.19). Cf. Van Bijckershoek, *Quaestionum juris privati* (*supra*, n. 64), p. 711-712 (no. 4.23).

130 *Ibid.*, p. 142-145 (1.19).

131 Van Bijckershoek had not consulted the Supreme Court's archives and thus only knew the case from Coren's *Observatio* 40 and Hollandic Consultation 3.321, Van Bijckershoek, *Quaestionum juris publici* (*supra*, n. 123), p. 142 (1.19).

132 See note 64.

133 Van Bijckershoek, *Quaestionum juris privati* (*supra*, n. 64), p. 711-712 (no. 4.23).

134 Van Bijckershoek, *Quaestionum juris publici* (*supra*, n. 123), p. 140 (1.19). Nonetheless, it was Van der Hagen who stood guarantor *ex post* in the *Ponte* case, see par. 2.1.

135 Art. 5 and 69 *Instructie* States General, 13/8/1597, GPB II, p. 1532, 1546-1547.

136 *Plakkaat* States General, 1/4/1622, GPB I, p. 972. This security was to be provided 'on top of the ship', which may or may not allude to limited shipowner's liability. The text states that a reimbursement of this sum did not affect the shipmaster's liability towards unlawfully harmed parties, without mentioning the shipowners' position.

137 *Ordre* States General, 9/8/1624, GPB II, p. 2297.

138 *Resolutie* States General, 22/10/1627, GPB II, p. 2297. The shipowners did not have a right of recourse against this sum because it was their responsibility to select a reliable shipmaster.

139 Art. 3, 27 and 42 *Plakkaat* States General, 28/7/1705, GPB V, p. 307-309.

peace treaties from the time¹⁴⁰. One Anglo-Dutch treaty from 1674 is special in stating: ‘moreover it has been decided that the ship itself shall provide satisfaction for the damage inflicted by them (*i.e.* the ship officers),’ without mentioning the legal position of the shipowners any further – a clear reference to limited shipowner’s liability¹⁴¹.

It stands beyond doubt that these provisions did not affect the shipmaster’s liability towards those he had damaged unlawfully¹⁴². More important is the question as to their effect on the shipowner’s liability. Although rendered against the background of the Act of 1624, Hollandic Consultation 3.321 (dated July 6th 1624) answers in the negative, as it provides for limited liability in case of an omission by the shipowners to provide the f12.000 security sum – apparently, this omission did not hinder the departure of privateering expeditions, at least not until 1624¹⁴³. The Roman-Dutch scholars, however, do distinguish such an effect, but their perceptions differ. Voet employs the regime to his own ends, namely to support his theory that shipowners are not *ipso jure* liable for acts of piracy, since the provision of security would otherwise be of no extra use to the creditor¹⁴⁴. The argument, however, does not take into account that the guarantee could well protect the creditor’s interests against ship surrender in case of limited shipowner’s liability. Besides, Voet’s argument only applies if the shipowner *personally* stands guarantor, which does not have to be so. After all, the sources imply that the security could exist in a security deposit or, as one of Voet’s sources explicates, a third party guarantor¹⁴⁵, who may well serve

140 See e.g. art. 37–38 *Treaty between Louis XIV and the States General*, 27/4/1662, GPB II, p. 2915. Art. 37 prohibits shipmasters from harming Dutch (or French) citizens. Art. 38, then, requires shipowners to stand surety for a sum of 15.000 pounds for claims that arise against their shipmaster from a violation of art. 37.

141 Art. 10 *Treaty between Charles II and the States General*, 1/12/1674, GPB III, p. 355. It should be noted that the joint and several liability for full indemnification mentioned in this provision (for which security had to be provided by a third party) is imposed upon the ship commanders, *not* upon the shipowners. See notes 145 and 147.

142 Van Bijkershoek, *Quaestionum juris publici* (*supra*, n. 123), p. 141 (1.19). See also note 136.

143 Naeranus, *Consultatiën* (*supra*, n. 67), vol. 3, p. 584.

144 Voet, *Commentarius* (*supra*, n. 114), p. 689 (14.1.7). Cf. art. 2.8.3 of the French *Ordonnance de la Marine* 1681, which states that the owners of privateering ships cannot be bound beyond the security provided.

145 Voet refers to art. 10 *Treaty between Charles II and the States General*, December 1st 1674, GPB III, p. 2915, see note 141. Third party guarantors are also mentioned in Naeranus, *Consultatiën* (*supra*, n. 67), vol. 3, p. 584 (Hollandic Consultation 3.321); C. Moll, *Disputatio juridica inauguralis de jure piratarum*, Utrecht 1737, p. 15 and Van Bijkershoek, *Quaestionum juris publici* (*supra*, n. 123), p. 140–142 (1.19), where Van Bijkershoek criticises the author of I. van den Berg (ed.), *Nederlands advys-boek*, Amsterdam 1693–1698, vol. 4, p. 620–622 (*Ned. Adv.* 4.205) and insists that the liability of these guarantors is not unlimited and does

to secure a creditor's claim against the shipowner in case of insolvency of the latter. One should also not forget that the *Ponte* case indicates that if the guarantor (Van der Hagen) was insolvent, the shipowners were liable nonetheless.

Van Bijnkershoeck, on the other hand, uses the security regime to support his opposition against limitation of shipowner's liability for the shipmaster's delicts. First, he argues that article 3 of the Act of 1705 should be interpreted so as to impose unlimited liability upon the shipowners for the shipmaster's delicts¹⁴⁶. Under the terms of the Act, this liability would then be secured by a separate legal security interest in their ship and cargo. The text, however, is not unequivocal as to the existence of this security right¹⁴⁷, nor can such a right follow from the *Ponte* case¹⁴⁸. Besides, it would not necessarily imply *unlimited* liability, and even then, the Act could lay down a mere statutory exception to the default rule of limited liability. Secondly, Van Bijnkershoeck argues that, had the shipowners not been liable beyond the value of their ship, it would have been inequitable towards the shipowners to demand security amounting to f12.000 or even f30.000 if the ship's value was less than that – instead, the security should then simply have been limited to the value of the ship¹⁴⁹. Inequitable as this may be, it is quite possible that the States General introduced obligatory securities precisely because they did not want victims of

not extend beyond the security amount. See also J.Th.H. van Meer, *De Zeeuwse kaapvaart tijdens de Spaanse Successieoorlog 1702-1713*, Middelburg 1986, p. 21-23.

146 Van Bijnkershoeck, *Quaestionum juris publici* (*supra*, n. 123), p. 143-145 (1.19). The text of art. 3 *Plakkaat* States General, July 28th 1705, GPB V, p. 307 is: 'In order to gain this permission (i.e. letters of marque), security must be given for an amount of f30.000, besides special attachment (*particuliere verbant*) of the persons and goods involved in the shipping company'.

147 Van Bijnkershoeck connects the term *particuliere verbant* solely with the goods involved in the shipping company and translates it as *specialis hypotheca*, i.e. a security interest in a specified object or group of objects (as opposed to a floating charge). However, besides the fact that the foresaid goods are not closely defined, the text itself (see note 146) connects the term to the shipowners as well, and it remains unclear how these persons could possibly be affected by a *specialis hypotheca*. Art. 9 *Treaty between Charles II and the States General*, December 1st 1674, GPB III, p. 355-356 employs the term *verbandt* to establish regular, unsecured shipowner liability. It should be noted that this article – unlike art. 10 of the Anglo-Dutch treaty – deals with shipowners who ordered the capture of English ships and thus acted culpably themselves. Cf. art. 37 *Treaty between Louis XIV and the States General*, 27/4/1662, GPB II, p. 2915.

148 After all, the Venetian plaintiffs did not enjoy any priority on the proceeds of the *Drye Coningen* and the *Spheramundi*, see note 39.

149 Taunay, *Disputatio* (*supra*, n. 118), p. 31-32 argues against Van Bijnkershoeck here, and compares the provision of security, somewhat incorrectly, to a penalty clause rather than a regular guarantee. His point is that payment from the security amount does not mirror or affect the shipowner's (limited) liability for damages.

piracy to be fobbed off. They may also have considered the possibility of ship surrender an insufficient deterrent to facilitating piracy¹⁵⁰.

3.5 *Schorer & Van der Keessel*

In spite of their status amongst Roman-Dutch jurists, neither Voet's nor Van Bijnkershoeck's opinion settled the debate. Cornelis Willem Decker, for example, follows Hollandic Consultation 3.321. He argues that the limited liability of shipowners only extends to those acts that fall *outside* the shipmaster's *praepositio*, assuming liability *in solidum* for acts within the *praepositio*¹⁵¹. Willem Schorer takes a more daring stance in his commentary on Grotius' *Introduction*. He questions the usefulness of the scope of the *praepositio* as the decisive standard for shipowner's liability, thus seemingly arguing in favour of universal vicarious liability for delicts¹⁵². Speaking out against Van Bijnkershoeck, Schorer refers to the outcome of the *Ponte* case and its interpretation in Hollandic Consultation 3.321, and asserts that according to Dutch customary law, the liability of shipowners for delicts of the shipmaster is limited through the availability of *noxae deditio*. According to Schorer, it is a matter of justice that a shipowner cannot be liable beyond the value of his ship with cargo, since 'it would be inequitable if, in the absence of a fault of our own, our things could burden us beyond their price'¹⁵³. Although Schorer does not elaborate further, the reasoning there is derived from D. 39,2,7,1. Under Roman law, the owners of collapsed buildings were liable to clean up the debris but could be released from this obligation by abandoning the property¹⁵⁴. The owner was not liable to pay damages unless, of course, he had given security for the damage before it occurred (*cautio damni infecti*). In D. 39,2,7,1, the absence of such liability is explained through a rather curious comparison with the *noxae deditio*. Through the availability of noxal surrender, living things cannot burden their owner beyond their own value. The same, so the text reads, should be true for inanimate objects like buildings. As these are lost to the owner after their collapse, any liability to pay damages in addition would be inequitable.

150 Taunay, *Disputatio* (*supra*, n. 118), p. 31-32 adheres to this hypothesis.

151 S. van Leeuwen, *Het Rooms-Hollands regt*, ed. C.W. Decker, Amsterdam 1780-1783, vol. 2, p. 24. Cf. note 157.

152 H. Grotius, *Inleiding tot de Hollandsche rechtsgeleerdheid*, ed. W. Schorer, Middelburg 1767, p. 441-442. (3.1.31).

153 Strictly speaking it is not the ship but the shipmaster that burdens the shipowner, unlike in case of liability for inculpable ship collision. The consistency of Schorer's argument is therefore best maintained if 'things' is to be understood as 'maritime investments'. For the sake of the argument, these nuances will not be explored further.

154 D. 39,2,6.

Groenewegen van der Made and others thus used D. 39,2,7,1 to show the 'splendid equitability' of noxal surrender¹⁵⁵. Jacob Coren had been the first to employ the text in order to justify limitation of shipowner liability, albeit only with regard to the law of inculpable ship collision¹⁵⁶. It is interesting that Schorer explicitly subjects his argument to the condition that the shipowners themselves are *without fault*. It may well be that the background of limitation of shipowner liability is thus to be found in an aversion of liability without fault as dictated by a natural law perspective. In this line of reasoning, liability limitation would then serve to mitigate the inequity of vicarious liability.

Working at the end of the period of Roman-Dutch law and into the Napoleonic age, Dionysius van der Keessel considers the *praepositio* as the decisive criterion for shipowner liability. He sides with Van Bijckershoek by asserting that piracy can only be covered under the *praepositio* of a privateering shipmaster and not under that of a merchant captain¹⁵⁷. Unlike Van Bijckershoek, however, he contends that shipowners also bear (limited) liability for damage arising from intentional or culpable ship collision. After all, ship collision is a matter of (improper) navigation – the very core of a shipmaster's task¹⁵⁸. Van der Keessel's argument is based in part on a Rotterdam Ordonnance from 1721, which limits the shipowner's liability for culpable ship collision to his share in the ship¹⁵⁹. A stronger feeling of dissent flows from

155 Groenewegen van der Made, *Tractatus* (*supra*, n. 121), p. 62 (at I. 4,9pr.): 'summa aequitate nititur, ut res nostrae non ultra nos onerent, quam valeant'. The same idea has been laid down in I. 4,8,2. Cf. H. Donellus, *Commentarii de iure civili*, Luca 1762-1770, vol. 4, p. 577 (15,51.4): 'non enim aequum est nos ex rebus nostris ultra earum aestimationem onerari; idque ita ius comparatum est, et in animalibus nostris, quae pauperiem fecerunt, et in aedibus, quae ruina damnum dederunt, et in hac ipsa noxa atque maleficio servorum nostrorum', referring to I. 4,8; D. 9,1,1; D. 9,4,2pr.; D. 39,2,7,1.

156 Coren, *Observationes* (*supra*, n. 62), p. 418 (*obs.* 40). Coren is cited on the matter of inculpable ship collision in Van Bijckershoek, *Quaestionum juris privati* (*supra*, n. 64), p. 688 (no. 4.20), which figures amongst Schorer's sources here.

157 D.G. van der Keessel, *Praelectiones juris hodierni ad Hugonis Grotii introductionem ad jurisprudentiam Hollandicam*, ed. P. Warmelo, L.I. Coertze and H.L. Gonin, Amsterdam 1961-1975, vol. 4, p. 20. Van der Keessel is mistaken when he states that Van Bijckershoek was willing to accept limited shipowner's liability outside the shipmaster's *praepositio* in case of culpable ship collision in Van Bijckershoek, *Quaestionum juris privati* (*supra*, n. 64), no. 4.20. This text, after all, is only concerned with *inculpable* ship collision, Asser, *In solidum* (*supra*, n. 46), p. 154.

158 D.G. van der Keessel, *Theses selectae juris Hollandici et Zelandici*, Leiden 1800, p. 274-275; Van der Keessel, *Praelectiones* (*supra*, n. 157), vol. 5, p. 380-382, 406. Van der Keessel adds that a different solution would be incomprehensible from the creditor's perspective, since he can also claim damages in case of inculpable ship collision.

159 Art. 255 and 267 *Ordonnance* City of Rotterdam, 28/1/1721 (reprint *Ordonnantie op het stuck van assurance ende avarye, mitsgaders zee-zaken*, Rotterdam 1748). Art. 167 lays

Van der Keessel's opinion on the Supreme Court's judgment in the *Ponte* case, which he regards as old but highly authoritative¹⁶⁰. Comparing the case to the later Herring Act of 1611, Van der Keessel states that if a shipmaster cannot pay damages claims arising from his own delicts, the shipowner is liable up to the value of the ship involved and its cargo. Van der Keessel asserts that this rule is 'universally accepted' and distances himself from Van Bijnkershoek, who stands alone in his opposition against the Supreme Court's sentence¹⁶¹. This limitation of a shipowner's liability, then, should be qualified as a form of *noxae deditio*¹⁶².

4 Conclusion

This article has provided a brief overview of the beginning and development of vicarious liability of shipowners and its limitation in Roman-Dutch law. The question whether shipowners were liable for the delicts of their shipmasters has always been a matter of controversy since its inception in the *Ponte* case¹⁶³. Many authors were hesitant to express their opinion on the matter¹⁶⁴, and those who were convinced that this legal concept did have a place in contemporary law were struggling to incorporate the *Ponte* case in a Roman law framework. Oddly, these authors did not opt for a broader application of the *actio furti* / *damni adversus nautas* and only loosely applied quasi-delictual terminology. Instead, they preferred analogous application of the contractual *actio exercitoria*. The shipmaster's *praepositio* thus became the central criterion for determining whether or not the shipowner was liable for his shipmaster's delicts. Limitation of this liability, then, was justified by some through a comparison with the Roman *noxae deditio*. Both ideas – the transplantation of the *praepositio* into the law of delict and the justification of liability limitation

down a general limitation of liability of ship owners for acts of the shipmaster not ordered by themselves, but it remains unclear whether this also includes delicts, T. Goudsmit, *Geschiedenis van het Nederlandsche zeerecht*, The Hague 1882, p. 415-417. See also Kluijver, *De regeling* (*supra*, n. 61), p. 16-17; Van Niekerk, *The development* (*supra*, n. 8), p. 1283.

160 Van der Keessel, *Praelectiones* (*supra*, n. 157), vol. 4, p. 18.

161 Van der Keessel, *Praelectiones* (*supra*, n. 157), vol. 4, p. 18-20. Cf. Taunay, *Disputatio* (*supra*, n. 118), p. 26, 29.

162 Van der Keessel, *Praelectiones* (*supra*, n. 157), vol. 5, p. 382.

163 Cf. J.P.L. Gelpke, *Eenige beschouwingen over het recht van afstand*, Gouda 1894, p. 36-37.

164 See e.g. Moll, *Disputatio* (*supra*, n. 145), p. 34; Taunay, *Disputatio* (*supra*, n. 118), p. 15. Falck does acknowledge vicarious liability of shipowners on the basis of the *praepositio*, but his opinion on whether this liability was limited by means of noxal surrender is not unequivocal, I.W. Falck, *De delictis maritimis, eorumque poenis*, Utrecht 1756, p. 6, 17-18.

by reference to noxal surrender – were picked up by foreign authors¹⁶⁵. As influential as Roman-Dutch maritime law has been in general¹⁶⁶, it is likely to have exerted international influence in this regard too. Further research may improve our perception of maritime liability limitation as a legal principle as well as our understanding of modern regimes of vicarious liability in general.

The positions of the authors discussed can be grouped under three headings. Firstly, Roman-Dutch authors differed over the question whether shipowners were liable towards third parties for their shipmaster's delicts – if so, then this liability was framed in terms of the *actio exercitoria*. Secondly, they thought differently about the scope of the *praepositio*, more specifically with regard to the question whether intentional or culpable ship collision and the capture of allied and neutral ships should be (categorically) included or excluded. Thirdly, assuming liability, the discussion turned to the question whether a shipowner's liability for his shipmaster's delicts should be limited, and some went as far as to state that limited liability of the shipowner only existed for acts falling *outside* the scope of the shipmaster's *praepositio*. Irrespective of these nuances, it is clear that many Roman-Dutch authors accepted that shipowners were liable for delicts committed by their shipmaster. It is striking that almost all sources seem to set forth a liability limitation which is effectuated *ipso jure*. This conception stands in contrast to the traditional view that limitation of shipowner's liability was structured as a primary obligation to pay damages in full, which one could dispose of through the voluntary fulfilment of a secondary obligation to abandon his ship. From a conceptual point of view, the Roman-Dutch regime thus cannot be gathered under (what would later

165 With regard to Pothier's thoughts on the *praepositio*, see Johnston, *Limiting liability* (*supra*, n. 47), p. 1527-1533. The French system of liability limitation is compared to noxal surrender by the anonymous editor of *Ordonnance de la Marine, commentée & conférée sur les anciennes Ordonnances, le droit Romain & les nouveaux Reglemens*, Paris 1714, p. 177.

166 For the influence on the Swedish *Års Sjölag* of 1667, see K. Pineus, *Sources of maritime law seen from a Swedish point of view*, Tulane Law Review, 30 (1955-1956), p. 85-98, spec. p. 88; H. Pihlajamäki, *The birth of commercial law in early modern Sweden: sources and historiography*, in: Understanding the sources of early modern and modern commercial law, Leiden 2018, p. 272-275. For the influence on the French *Ordonnance de la Marine* of 1681, see J. Chadelat, *L'élaboration de l'ordonnance de la marine*, Revue historique de droit français et étranger, 31 (1954), p. 74-98 and 228-253, spec. p. 228-234, 240; R. Warlomont, *Les sources néerlandaises de l'ordonnance maritime de Colbert (1681)*, Revue belge de philologie et d'histoire, 33 (1955), p. 333-344; B.H.D. Hermersdorf, *Adriaen Verwer (1655-1717) en de Ordonnance de la Marine (1681)*, Rotterdams Jaarboekje, 5 (1967), p. 227-261. For the influence on the English *Responsibility of Shipowners Act* of 1733, see R.G. Marsden, *The law of collisions at sea*, London 1961, p. 132; Donovan, *Origins* (*supra*, n. 1), p. 1007-1008.

become) the French system of ship abandonment, but bears more of a resemblance to an *actio in rem*.

Appendix I – Archival documents of the *Ponte* case

The following documents are to be found in the archives of the Supreme Court of Holland, Zeeland and West-Friesland (*Nationaal Archief*, inv. 3.03.02). If the document has been digitised, the relevant scan has been indicated after the document number (after the slash).

General

Akte waarbij de Staten van Holland en West-Friesland en Pieter van der Hagen en Co. en Balthasar de Moucheron (...) een overeenkomst sluiten (...) 25/3/1599, NA 3.01.14, nos. 3146/1-5.

Akte waarbij de Staten van Holland en West-Friesland en Pieter van der Hagen en Co. (...) een overeenkomst sluiten (...) after 25/3/1599, NA 3.01.14, nos. 3147/1-5.

Supreme Court

REKESTEN:

Rekest (undated, 1600) (Veniero c.s./Van der Hage & Van den Kerckhoven), as cited by K. Heeringa, *Bronnen tot de geschiedenis van den Levantschen handel*, The Hague 1910, vol. 1, p. 35-40.

AKTEN VAN DINGTALEN:

Akte van dingtalen 6/12/1600 (Veniero c.s./Van der Hagen & Van den Kerckhoven), NA 3.03.02, no. 415/175.

Akte van dingtalen 9/1/1601, (Veniero c.s./Van der Hagen & Van den Kerckhoven), NA 3.03.02, no. 416/3.

Akte van dingtalen 15/2/1601 (Veniero c.s./Van der Hagen & Van den Kerckhoven), NA 3.03.02, no. 416/36.

Akte van dingtalen 14/4/1601 (Veniero c.s./Van der Hagen & Van den Kerckhoven), NA 3.03.02, no. 416/38.

Akte van dingtalen 11/5/1601 (Veniero c.s./Van der Hagen & Van den Kerckhoven), NA 3.03.02, no. 416/38.

- Akte van dingtalen* 27/3/1601 (Veniero c.s./D'Ableijn & Geleijnse), NA 3.03.02, no. 416/48.
- Akte van dingtalen* 29/5/1601 (Veniero c.s./Van der Hagen & Van den Kerckhoven), NA 3.03.02, nos. 416/141-142.
- Akte van dingtalen* 29/6/1601 (Veniero c.s./Van der Hagen & Van den Kerckhoven), NA 3.03.02, no. 416/142.
- Akte van dingtalen* 5/9/1601 (Veniero c.s./Van der Hagen & Van den Kerckhoven), NA 3.03.02, no. 416/142.
- Akte van dingtalen* 17/5/1601 (Veniero c.s./D'Ableijn & Geleijnse), NA 3.03.02, no. 416/195.
- Akte van dingtalen* 17/5/1601 (Veniero c.s./Seys c.s.), NA 3.03.02, nos. 416/195-196.
- Akte van dingtalen* 22/9/1601 (Veniero c.s./Van der Hagen & Van den Kerckhoven), NA 3.03.02, no. 416/196.
- Akte van dingtalen* 14/4/1601 (Veniero c.s./Van der Hagen & Van den Kerckhoven), NA 3.03.02, no. 416/196.
- Akte van dingtalen* 17/5/1601 (Veniero c.s./Van der Hagen & Van den Kerckhoven), NA 3.03.02, no. 416/196.
- Akte van dingtalen* 14/3/1601 (Veniero c.s./Van der Hagen & Van den Kerckhoven), NA 3.03.02, no. 416/199.
- Akte van dingtalen* 14/3/1601 (Veniero c.s./Seys c.s.), NA 3.03.02, no. 416/199.
- Akte van dingtalen* 9/1/1601 (Veniero c.s./Van der Hagen & Van den Kerckhoven), NA 3.03.02, no. 416/199.
- Akte van dingtalen* 24/1/1601 (Veniero c.s./D'Ableijn), NA 3.03.02, no. 416/200.
- Akte van dingtalen* 20/2/1601 (Veniero c.s./Van der Hagen & Van den Kerckhoven), NA 3.03.02, no. 416/200.
- Akte van dingtalen* 14/4/1601 (Veniero c.s./Van der Hagen & Van den Kerckhoven), NA 3.03.02, no. 416/200.
- Akte van dingtalen* 3/7/1602 (Veniero c.s./D'Ableijn), NA 3.03.02, no. 417/70.
- Akte van dingtalen* 16/7/1602 (Veniero c.s./D'Ableijn), NA 3.03.02, nos. 417/70-71.
- Akte van dingtalen* 2/5/1602 (Veniero c.s./Van der Hagen & Van den Kerckhoven), NA 3.03.02, no. 417/71.
- Akte van dingtalen* 15/5/1602 (Veniero c.s./Van der Hagen & Van den Kerckhoven), NA 3.03.02, nos. 417/71-72.
- Akte van dingtalen* 10/9/1602 (Veniero c.s./Van der Hagen & Van den Kerckhoven), NA 3.03.02, no. 417/72.
- Akte van dingtalen* 29/1/1602 (Veniero c.s./Van der Hagen & Van den Kerckhoven), NA 3.03.02, no. 417/90.
- Akte van dingtalen* 29/4/1603 (Veniero c.s./Van der Hagen & Van den Kerckhoven), NA 3.03.02, no. 418/49.
- Akte van dingtalen* 25/9/1603 (Veniero c.s./Van der Hagen & Van den Kerckhoven), NA 3.03.02, no. 418/57.

- Akte van dingtalen* 13/11/1603 (Veniero c.s./Seys c.s.), NA 3.03.02, no. 418/74.
- Akte van dingtalen* 14/10/1603 (Veniero c.s./Seys c.s.), NA 3.03.02, no. 418/76.
- Akte van dingtalen* 15/12/1603 (Veniero c.s./Van der Hagen & Van den Kerckhoven), NA 3.03.02, nos. 418/88-89.
- Akte van dingtalen* 21/10/1603 (Veniero c.s./Seys c.s.), NA 3.03.02, nos. 418/146-147.
- Akte van dingtalen* 17/2/1604 (Strossi c.s./Van der Hagen & Van den Kerckhoven), no. 419/31.
- Akte van dingtalen* 17/5/1604 (Veniero c.s./Van der Hagen & Van den Kerckhoven), NA 3.03.02, nos. 419/31-32.
- Akte van dingtalen* 6/9/1604 (Veniero c.s./Van der Hagen & Van den Kerckhoven), NA 3.03.02, no. 419/68.
- Akte van dingtalen* 25/5/1604 (Veniero c.s./Van der Hagen & Van den Kerckhoven), NA 3.03.02, nos. 419/71-72.
- Akte van dingtalen* 5/10/1604 (Veniero c.s./Van der Hagen & Van den Kerckhoven), NA 3.03.02, no. 419/72.
- Akte van dingtalen* 22 jni 1604 (Veniero c.s./Van der Hagen & Van den Kerckhoven), NA 3.03.02, no. 419/72.
- Akte van dingtalen* 30/11/1604 (Veniero c.s./Van der Hagen & Van den Kerckhoven), NA 3.03.02, no. 419/92.
- Akte van dingtalen* 8/3/1605 (Veniero c.s./Van der Hagen & Van den Kerckhoven), NA 3.03.02, no. 420/12-13.
- Akte van dingtalen* 23/3/1605 (D'Ableijn c.s./Van der Hagen), NA 3.03.02, no. 420/13.
- Akte van dingtalen* 8/3/1605 (Veniero c.s./Van der Hagen & Van den Kerckhoven), NA 3.03.02, no. 420/13.
- Akte van dingtalen* 19/4/1605 (Veniero c.s./D'Ableijn), NA 3.03.02, no. 420/19.
- Akte van dingtalen* 17/5/1605 (Veniero c.s./Van der Hagen & Van den Kerckhoven), NA 3.03.02, no. 420/24.
- Akte van dingtalen* 18/5/1605 (Veniero c.s./Seys c.s.), NA 3.03.02, no. 420/25.
- Akte van dingtalen* 31/3/1605 (Veniero c.s./Seys c.s.), NA 3.03.02, no. 420/29.
- Akte van dingtalen* 27/4/1605 (Veniero c.s./Van der Hagen & Van den Kerckhoven), NA 3.03.02, no. 420/50.
- Akte van dingtalen* 21/6/1605 (Strossi c.s./Adamsz), NA 3.03.02, no. 420/59.
- Akte van dingtalen* 16/7/1605 (Strossi c.s./Adamsz), NA 3.03.02, nos. 420/59-60.
- Akte van dingtalen* 8/10/1605 (Strossi c.s./Adamsz), NA 3.03.02, no. 420/60.
- Akte van dingtalen* 18/5/1605 (Strossi c.s./D'Ableijn), NA 3.03.02, no. 420/63.
- Akte van dingtalen* 16/12/1605 (Seys c.s./D'Ableijn), NA 3.03.02, no. 420/82.
- Akte van dingtalen* 30/11/1605 (Seys c.s./D'Ableijn), NA 3.03.02, nos. 420/85-86.
- Akte van dingtalen* 18/5/1605 (Seys c.s./D'Ableijn), NA 3.03.02, no. 420/100.
- Akte van dingtalen* 3/5/1606 (Strossi c.s./Adamsz), NA 3.03.02, no. 421/21.
- Akte van dingtalen* 13/6/1606 (Seys c.s./D'Ableijn), NA 3.03.02, no. 421/25.

- Akte van dingtalen* 16/6/1606 (Seys c.s./D'Ableijn), NA 3.03.02, no. 421/25.
Akte van dingtalen 13/6/(Strossi c.s./Adamsz), NA 3.03.02, no. 421/33.
Akte van dingtalen 19/9/1606 (Van der Veeken/Seys c.s.), NA 3.03.02, no. 421/59.
Akte van dingtalen 9/7/1608 (Van der Veeken/Seys c.s.), NA 3.03.02, no. 423/48.
Akte van dingtalen 25/9/1608 (Van der Veeken/Seys c.s.), NA 3.03.02, nos. 423/48-49.
Akte van dingtalen 25/6/1608 (Van der Veeken/Seys c.s.), NA 3.03.02, nos. 423/54-55.

GEGROSSEERDE CONCLUSIES:

- Conclusie* (undated, Veniero c.s./Van der Hagen & Van den Kerckhoven), NA 3.03.02, nos. 497/57-58.
Conclusie 17/9/1600 (Veniero c.s./Seys c.s.), NA 3.03.02, nos. 497/59-60.
Conclusie 26/9/1600 (Veniero c.s./Van der Hagen & Van den Kerckhoven), NA 3.03.02, nos. 497/123-127.
Conclusie 6/12/1601 (D'Ableijn/Van der Hagen), NA 3.03.02, nos. 497/358-359.
Conclusie 21/10/1603 (Veniero c.s./Seys c.s.), NA 3.03.02, nos. 497/566-568.
Conclusie 6/11/1605 (D'Ableijn/Seys c.s.), NA 3.03.02, nos. 498/132-134.
Conclusie 23/7/1605 (Strossi c.s./Adamsz), NA 3.03.02, nos. 498/152-153.
Conclusie 31/5/1606 (Van der Veeken/Seys c.s.), NA 3.03.02, nos. 498/246-247.
Conclusie 31/5/1606 (Van der Veeken/Seys c.s.), NA 3.03.02, no. 498/269.
Conclusie van 11/5/1606 (Strossi c.s./Adamsz), NA 3.03.02, nos. 498/321-322.

ONGEGROSSEERDE CONCLUSIE:

- Conclusie* 12/6/1605 (Seys c.s./Rem), NA 3.03.02, nos. 571/199-200.

RESOLUTIES TOT DE SENTENTIES:

- Resolutie* 31/3/1601 (Imprisonment of Van den Kerckhoven), NA 3.03.02, no. 636/189.
Resolutie 23/5/1601 (Imprisonment of Van den Kerckhoven), NA 3.03.02, nos. 636/206.
Resolutie 16/7/1601 (Imprisonment of Van den Kerckhoven), NA 3.03.02, nos. 636/209.
Resolutie 23/7/1603 (Veniero c.s./Van der Hagen & Van den Kerckhoven), NA 3.03.02, no. 638/200.
Resolutie 24/7/1603 (Veniero c.s./Van der Hagen & Van den Kerckhoven), NA 3.03.02, no. 638/201.
Resolutie 26/7/1603 (Veniero c.s./Seys c.s.), NA 3.03.02, no. 638/202.
Resolutie (undated, Gijzeling Van den Kerckhoven), NA 3.03.02, no. 638/235.
Resolutie 23/10/1604 (Veniero c.s./Van den Kerckhoven & Van der Hagen), NA 3.03.02, nos. 638/310-311.
Resolutie 3/11/1604 (Veniero c.s./Van den Kerckhoven & Van der Hagen), NA 3.03.02, nos. 638/313-321.
Resolutie 11/1/1606 (Sale Drye Coningen and Engel Gabriël), NA 3.03.02, no. 639/2.
Resolutie op 25/1/1606 (Veniero c.s./D'Ableijn), NA 3.03.02, no. 639/4.

- Resolutie 3/2/1606* (Veniero c.s./Seys c.s.), NA 3.03.02, no. 639/6.
Resolutie 20/4/1606 (Bitter c.s./Seys c.s.), NA 3.03.02, no. 639/16.
Resolutie 10/2/1607 (Strossi c.s./Adamsz), NA 3.03.02, no. 639/70.
Resolutie 31/7/1607 (Strossi c.s./Seys c.s.), NA 3.03.02, no. 639/101.
Resolutie 7/12/1607 (Van der Veeken/Seys c.s.), NA 3.03.02, no. 639/118.
Resolutie op 24/4/1608 (Seys c.s./D'Ableijn), NA 3.03.02, no. 639/149.
Resolutie 13/12/1608 (Van der Veeken/Seys c.s.), NA 3.03.02, no. 639/194.

GEËXTENDEERDE SENTENTIES:

- Geëxtendeerde sententie 30/7/1603* (Veniero c.s./Van der Hagen & Van den Kerckhoven),
 NA 3.03.02, nos. 695/239-263.
Geëxtendeerde sententie 30/7/1603 (Veniero c.s./Seys c.s.), NA 3.03.02, nos. 695/264-272.
Geëxtendeerde sententie 30/7/1603 (Veniero c.s./D'Ableijn), NA 3.03.02, nos. 695/273-280.
Geëxtendeerde sententie 14/12/1604 (Veniero c.s./Van den Kerckhoven & Van der
 Hagen), NA 3.03.02, nos. 696/342-343.
Geëxtendeerde sententie 14/2/1606 (Veniero c.s./Seys c.s.), NA 3.03.02, nos. 698/22-23.
Geëxtendeerde sententie 13/2/1607 (Strossi c.s./Adamsz), NA 3.03.02, nos. 699/10-14.
Geëxtendeerde sententie op 24/5/1608 (Seys c.s./Verhulst), NA 3.03.02, no. 700/86.
Geëxtendeerde sententie 20/12/1608 (Van der Veeken/Seys c.s.), NA 3.03.02, nos. 700/
 370-378.

REGISTER DER DICTUMS:

- Register der dictums 11/11/1600* (Veniero c.s./Van der Hagen & Van den Kerckhoven),
 NA 3.03.02, nos. 881/154-155.
Register der dictums 2/1601 (Veniero c.s./Van der Hagen & Van den Kerckhoven),
 NA 3.03.02, no. 881/172.
Register der dictums 6/1601 (Veniero c.s./Van der Hagen & Van den Kerckhoven),
 NA 3.03.02, no. 881/201.
Register der dictums 25/7/1603 (Veniero c.s./Seys c.s.), NA 3.03.02, nos. 883/184-185.
Register der dictums 24/7/1603 (Veniero c.s./Van den Kerckhoven & Van der Hagen),
 NA 3.03.02, nos. 883/185-186.
Register der dictums 27/11/1604 (Veniero c.s./Van den Kerckhoven & Van der Hagen),
 NA 3.03.02, nos. 883/305-306.
Register der dictums 11/1/1606 (Sale Drye Coningen), NA 3.03.02, nos. 884/1-2.
Register der dictums 25/1/1606 (Veniero c.s./D'Ableijn), NA 3.03.02, no. 884/7.
Register der dictums 3/2/1606 (Veniero c.s./Seys c.s.), NA 3.03.02, nos. 884/10-11.
Register der dictums 20/4/1606 (Veniero c.s./Seys c.s.), NA 3.03.02, no. 884/25.
Register der dictums 10/2/1607 (Strossi c.s./Adamsz), NA 3.03.02, no. 884/117.
Register der dictums 5/12/1607 (Van der Veeken/Seys c.s.), NA 3.03.02, nos. 884/195-196.

Register der dictums 24/4/1608 (Strossi c.s. en Seys c.s./Verhulst), NA 3.03.02, nos. 884/223-224.

Register der dictums 13/12/1608 (Van der Veeken/Seys c.s.), NA 3.03.02, no. 884/299.

Register der dictums 14/11/1600 (Veniero c.s./Seys c.s.), NA 3.03.02, nos. 930/77-78.

Register der dictums 2/6/1601 (Veniero c.s./Van der Hagen & Van den Kerckhoven), NA 3.03.02, nos. 930/97-98.

Register der dictums 30/7/1603 (Veniero c.s./Van den Kerckhoven & Van der Hagen), NA 3.03.02, nos. 930/187-188.

Register der dictums 14/12/1604 (Veniero c.s./Van den Kerckhoven & Van der Hagen), NA 3.03.02, nos. 931/32-33.

Register der dictums 24/1/1606 (Sale *Engel Gabriël*), NA 3.03.02, nos. 931/69-70.

Register der dictums 14/2/1606 (Veniero c.s./Seys c.s.), NA 3.03.02, nos. 931/72-73.

Register der dictums 25/4/1606 (Veniero c.s./Seys c.s.), NA 3.03.02, nos. 931/77-78.

Register der dictums 13/2/1607 (Strossi c.s./Adamsz), NA 3.03.02, no. 932/4.

Register der dictums 24/5/1608 (Strossi c.s. and Seys c.s./Verhulst), NA 3.03.02, no. 932/51.

Register der dictums 20/12/1608 (Van der Veeken/Seys c.s.), NA 3.03.02, no. 932/85.

Appendix II – Archival documents of the *Levrette* case

The following documents are to be found in the archives of the Supreme Court of Holland, Zeeland and West-Friesland (*Nationaal Archief*, inv. 3.03.02) and the High Court of Holland, Zeeland and West-Friesland (*Nationaal Archief*, inv. 3.03.01.01). If the document has been digitised, the relevant scan has been indicated after the document number (after the slash).

General

Stukken betreffende het proces tussen Govert Janssen (...) en François Courfailleur, heer van Quarantilly (...), NA 3.01.14, nos. 3349/1-141.

High Court

REGISTER DER SENTENTIËN

Register der sententiën 23/11/1610 (Jansz/De Gourfaleur), NA 3.03.01.01, nos. 623/130-131.

Register der sententiën 20/5/1611 (Sanches c.s./De Gourfaleur), NA 3.03.01.01, nos. 624/216-217.

Register der sententiën 25/11/1611 (Sanches c.s./De Gourfaleur), NA 3.03.01.01, no. 625/255.

Register der sententiën 29/3/1613 (De Gourfaleur/Jansz & Van der Veeken c.s.), NA 3.03.01.01, nos. 629/104-141.

Register der sententiën 29/3/1613 (De Gourfaleur/Fernandez & Nunges c.s.), NA 3.03.01.01, nos. 629/141-152.

ROLREGISTER

Rolregister (undated) (De Gourfaleur/Jansz), NA 3.03.01.01, no. 3841.

Rolregister (undated) (De Gourfaleur/Van der Veeken c.s.), NA 3.03.01.01, no. 3841.

Rolregister (undated) (De Gourfaleur/Van der Veeken c.s.), NA 3.03.01.01, no. 3841.

Rolregister (undated) (De Gourfaleur/Jansz), NA 3.03.01.01, no. 3841.

Rolregister (undated) (De Gourfaleur/Van der Veeken c.s.), NA 3.03.01.01, no. 3841.

Rolregister (undated) (De Gourfaleur/Jansz), NA 3.03.01.01, no. 3841.

GEWONE QUAETCLAP

Gewone quaetclap 17/5/1611 (Sanches/De Gourfaleur), NA 3.03.01.01, no. 5734.

Gewone quaetclap 17/5/1611 (Nunges/De Gourfaleur), NA 3.03.01.01, no. 5734.

Gewone quaetclap 27/3/1613 (De Gourfaleur/Jansz), NA 3.03.01.01, no. 5735.

Gewone quaetclap 27/5/1611 (Sanches/De Gourfaleur), NA 3.03.01.01, no. 5735.

NOTULEN DER BERAADSLAGINGEN

Notulen van beraadslagingen 19/3/1613 (De Gourfaleur/Jansz), NA 3.03.01.01, no. 6000.

Notulen van beraadslagingen 21/3/1613 (De Gourfaleur/Sanches), NA 3.03.01.01, no. 6000.

Notulen van beraadslagingen 22/3/1613 (De Gourfaleur/Sanches Quinges), NA 3.03.01.01, no. 6000.

Supreme Court

AKTEN VAN DINGTALEN

Akte van dingtalen 22/12/1610 (De Gourfaleur/Jansz), NA 3.03.02, no. 425/73.

Akte van dingtalen 26/1/1612 (De Gourfaleur/Jansz), NA 3.03.02, no. 427/6.

Akte van dingtalen 27/1/1612 (De Gourfaleur/Nunges), NA 3.03.02, no. 428/6.

Akte van dingtalen 15/6/1613 (De Gourfaleur/Fernandez & Nunges), NA 3.03.02, no. 428/35.

Akte van dingtalen 10/7/1613 (De Gourfaleur/Fernandez & Nunges), NA 3.03.02, nos. 428/36-37.

Akte van dingtalen 22/5/1613 (Jansz/De Gourfaleur), NA 3.03.02, no. 428/44.

Akte van dingtalen 22/5/1613 (Van der Veeken c.s./De Gourfaleur), NA 3.03.02, nos. 428/44-45.

Akte van dingtalen 10/7/1613 (Jansz/De Gourfaleur), NA 3.03.02, no. 428/45.

Akte van dingtalen 17/11/1613 (Van der Veeken c.s./De Gourfaleur), NA 3.03.02, no. 428/85.

Akte van dingtalen 19/2/1614 (De Gourfaleur /Van der Veeken c.s.), NA 3.03.02, nos. 429/13.

GEGROSSEERDE CONCLUSIES:

Conclusie 11/1/1612 (Nunges/De Gourfaleur), NA 3.03.02, no. 499/482.

Conclusie 17/1/1612 (Nunges/De Gourfaleur), NA 3.03.02, no. 499/483.

Conclusie 17/1/1612 (Nunges/De Gourfaleur), NA 3.03.02, nos. 499/484-485.

RESOLUTIES TOT DE SENTENTIES:

Resolutie 29/1/1611 (Jansz/De Gourfaleur), NA 3.03.02, no. 640/57.

Resolutie 24/10/1614 (Van der Veeken c.s./De Gourfaleur), NA 3.03.02, no. 641/47.

Resolutie 25/10/1614 (Jansz/De Gourfaleur), NA 3.03.02, no. 641/47.

Resolutie 14/11/1614 (De Gourfaleur/Fernandez, Nunges & Vlaming), NA 3.03.02, no. 641/47.

Resolutie 19/11/1614 (Jansz/De Gourfaleur), NA 3.03.02, no. 641/57.

GEËXTENDEERDE SENTENTIES:

Geëxtendeerde sententie 1/2/1611 (Jansz/De Gourfaleur), NA 3.03.02, no. 703/15.

Geëxtendeerde sententie 18/11/1614 (Van der Veeken/De Gourfaleur), NA 3.03.02, nos. 706/220-228.

Geëxtendeerde sententie 18/11/1614 (Jansz/De Gourfaleur), NA 3.03.02, nos. 706/228-235.

Geëxtendeerde sententie 18/11/1614 (De Gourfaleur/Fernandez, Nunges & Vlaming) NA 3.03.02, nos. 706/325-329.

REGISTER DER DICTUMS:

Register der dictums 29/1/1611 (Jansz/De Gourfaleur), NA 3.03.02, no. 885/77.

Register der dictums 15/11/1614 (Van der Veeken c.s./De Gourfaleur), NA 3.03.02, no. 886/73.

Register der dictums 15/11/1614 (Jansz/De Gourfaleur), NA 3.03.02, no. 886/74.

Register der dictums 15/11/1614 (De Gourfaleur/Fernandez, Nunges & Vlaming), NA 3.03.02, nos. 886/74-75.

Register der dictums 1/2/1611 (Jansz/De Gourfaleur), NA 3.03.02, no. 933/4.

Register der dictums 18/11/1614 (Van der Veeken c.s./De Gourfaleur), no. 933/152-153.

Register der dictums 18/11/1614 (Jansz/De Gourfaleur), NA 3.03.02, no. 993/153.

Register der dictums 18/11/1614 (De Gourfaleur/Fernandez, Nunges & Vlaming), NA 3.03.02, no. 993/153.