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Jacob Coren's *Observatio* 40: shipowner liability for inculpable ship collision and its limitation in Roman-Dutch law

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Summary

In 1617, two Dutch merchantmen collided in a storm on the North Sea. The incident resulted in extensive legal proceedings before the Supreme Court of Holland, Zeeland and West-Friesland, lasting until 1640. In an unprecedented decision, which was published as no. 40 of Jacob Coren's well-known *Observationes*, the Court limited the liability of shipowners for inculpable ship collision to the value of their ship. Based both on extensive archival research and the text of Coren's *Observatio*, the present article offers a detailed discussion of the facts and proceedings of the case, and sets out how the case was received by Roman-Dutch scholars. As it turns out, limitation of shipowner liability was analysed in terms of noxal surrender in order to reconcile shipowner liability for inculpable ship collision with contemporary perceptions of equity.

Keywords

ship collision – Roman-Dutch law – maritime law – shipowner liability – limitation of liability for maritime claims – quasi-delict – strict liability – noxae deditio

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1 Introduction

In the historiography of limitation of liability for maritime claims, the role of Roman-Dutch law receives little attention. This lacuna is rather odd, and not only so because of the influence that the Dutch Republic has exerted over the development of maritime law in general. The Roman-Dutch law of ship collision, in particular, provides one of the earliest well-defined instances of limitation of non-contractual liability in learned legal discourse. Particularly influential in this development was the case of *Jansdr. v. Blaeu*. In this case, the Supreme Court (*Hoge Raad*) of Holland, Zeeland and West-Friesland limited shipowner liability for damages claims arising from inculpable ship collision to the value of the ship. The proceedings took place between 1618 and 1640, and have been rendered in detail by rapporteur Justice Jacob Coren (†1631) as no. 40 of his well-known *Observationes*[1]. From that point on, the case was picked up by legal scholars in the Dutch Republic.

The main importance of the case lies in its normative motivation of limitation of shipowner liability, which draws inspiration from the Roman law of noxal surrender and seems to be rooted in early modern conceptions of equity. In order to argue this, the present article will show, firstly, that limitation of shipowner liability for ship collision claims does not yet appear in Roman law or in Dutch statutory provisions predating *Jansdr. v. Blaeu*. This serves to show that the outcome of *Jansdr. v. Blaeu* cannot be explained by reference to the law as it stood at the time. Subsequently, the facts, procedural course and legal outcome of *Jansdr. v. Blaeu* will be set out and discussed. Reference will be made both to Coren's elaborate *Observatio* 40 and yet unstudied case documents from the archive of the Supreme Court. Lastly, the article sets out how the outcome of *Jansdr. v. Blaeu* and its rationalisation by Coren have been received by Roman-Dutch legal scholars. In doing so, the article aims to show that a detailed discussion of *Jansdr. v. Blaeu* offers an interesting contribution to the historiography of limitation of liability for maritime claims, which is usually explained by reference to mere economic utility and encouragement of maritime investments[2].

1 Coren, *Observationes rerum in eodem Senatu judicatarum*, The Hague 1633, p. 410-419.

2 See e.g. Lord Denning in *The Bramley Moore* [1963] 2 Lloyd's Rep. 429; J.J. Donovan, *Origins and development of limitation of shipowners' liability*, Tulane Law Review, 53 (1978-1979), p. 999-1045, spec. p. 1002, who relies on Justice Ashur Ware in *The Rebecca*, 20 F. Cas. 373, 376 (D. Maine 1831) (No. 11,619). Although a noxal comparison is made by Oliver Wendell Holmes (see *The common law*, Cambridge (Massachusetts) 2009, p. 11-21, 26-33), theories of noxal influence are usually dismissed, Donovan, *Origins* (*supra*, n. 2), p. 1000; 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. 120-129.

2 Ship collision in Roman and Dutch statutory law

In Roman law, ship collision was not dealt with in separate legislation but fell under chapter three of the *lex Aquilia* on wrongful damage to property. The relevant texts from the Digest (D. 9,2,29,2-4) are rather uncomplicated at first sight. If two ships collide due to the culpable act or omission of crew or shipmaster, the *actio ex lege Aquilia* can be brought against him who is to blame. If the collision could not have been avoided, on the other hand, the *actio ex lege Aquilia* does not apply. Even so, the texts contain an ambiguity with regard to the shipowner's position, as it is explicitly stated that the owner of the ship (*dominus navis*) is *not* liable if the collision occurs by force of nature[3], or as a result of another inculpable event such as a broken cable or the absence of a helmsman[4]. The phrasing begs for an argument *a contrario*, and this line of thought is indeed advocated by the Accursian gloss, which states that the shipowner is vicariously liable for collisions caused by the fault of the shipmaster or crew[5]. This liability is further explained by a reference to I. 4,5,3, which deals with the quasi-delictual liability of the shipowner for theft committed or wrongful damage inflicted by his shipmaster or crew under the *actio furti / damni adversus nautas*[6]. The reference seems flawed, though, as the latter action only lay in case of damage inflicted on board of the ship and not in case of ship collision[7]. Besides, vicarious liability of the shipowner for wrongful acts of his shipmaster or crew is hardly reconcilable with the legal framework of the *lex Aquilia*, which requires *culpa* of one's own in order to establish liability in delict[8]. Thus, the interpretation *a contrario* raises serious doubts, and it was

3 'Sed si tanta vis navi facta sit, quae temperari non potuit, nullam in dominum dandam actionem' (D. 9,2,29,4).

4 'Sed si fune rupto aut cum a nullo regeretur navis incurrisset, cum domino agendum non esse' (D. 9,2,29,2).

5 Gloss *In dominum* at D. 9,2,29,4: 'Et sic collige hic a contrario in dominum dari, quando non fuit fortuitus casus'. For the same argument, see Ph.J. Thomas, *The development of limited liability in case of maritime collisions in old Dutch maritime law*, Tydskrif vir Hedendaagse Romeins-Hollandse Reg, 67 (2004), p. 229-243, spec. 230. Anticipating on D. 9,2,29,5, Accursius adds that the shipowner (*exercitor*) was liable for faults of his crew not with an *actio in factum*, but – so it seems – with the *actio ex lege Aquilia directa*, see gloss *Sufficere* at D. 9,2,29,4: 'Ut sic ea intenta non detur in factum contra exercitorem'.

6 Gloss *Gubernatorem* at D. 9,2,29,4, which explicitly brings in the *exercitor*.

7 See also D. 4,9,7*pr*. and D. 47,5,1,3.

8 The shipowner's fault could, of course, exist in the appointment of seafarers unsuited for their job. But D. 9,2,29,2-4 does not provide indications for this *culpa in eligendo*, nor for a conclusive presumption of fault (*culpa imputativa*). This presumption is brought forward with regard to the quasi-delictual *actio furti / damni adversus nautas* in I. 4,5,3, D. 4,9,7,4 and D. 47,5,1,5, but this action does not apply here.

not adopted by Roman-Dutch lawyers[9]. It is more likely, rather, that the texts are dealing with a shipmaster who owns his ship, so that the shipowner does not exist as a separate person[10]. This hypothesis accounts for the fact that the Digest uses the word *dominus navis* instead of the more technical term *exercitor*[11]. It renders D. 9,2,29,2 better understandable too, as this text identifies the shipowner and the delinquent as the same person by addressing them both in the second person[12]. It is also not impossible that the texts – if allowing for a different argument *a contrario* – simply envisage shipowner liability if the collision occurred not by *force majeure*, but as a result of the shipowner's own fault[13]. The ambiguity of the phrasings of D. 9,2,29,2-4 may be further explained by the fact that these texts do not only elaborate on the importance of *culpa* for Aquilian liability, but also – and perhaps more heavily – focus on the applicability of the *actio ex lege Aquilia* instead of an *actio in factum* in

9 See e.g. P. Peckius, *Commentaria in omnes pene juris civilis titulos ad rem nauticam pertinentes*, ed. A. Vinnius, Leiden 1647, p. 263-264; S. Groenewegen van der Made, *Tractatus de legibus abrogatis et inusitatis in Hollandia vicinisque regionibus*, Leiden 1649, p. 134 (at D. 9,2,29,2-4); T. van Glins, *Aenmerckingen ende bedenckingen over de zee-rechten uyt het placcaet van koninck Philips uytgegeven den lesten octobris 1563*, Amsterdam 1665, p. 92, who relates D. 9,2,29,4 to the culpable shipmaster only; C. van Bijnkershoek, *Observationum juris Romani libri quatuor*, Leiden 1735, p. 407-410; C. van Bijnkershoek, *Quaestionum juris privati libri quatuor*, Leiden 1744, p. 672 (4.18); A. Schulting, *Notae ad Digesta seu Pandectas*, ed. Smallenburg, Leiden 1809-1832, vol. 2, p. 408 (at D. 9,2,29,2), referring to D. 9,2,52,2. Vinnius and Van Bijnkershoek add that the phrases *cum domino agendum non esse* (D. 9,2,29,2) and *nullam in dominum dandam actionem* (D. 9,2,29,4) address the manifestation of force majeure. As such, they dismiss Faber, who distinguishes a fault of the shipowner and reads *cum domino agendum esse* instead, see note 148.

10 Cf. Thomas, *The development* (*supra*, n. 5), p. 231. Apparently, smaller ships were usually owned by their masters, see A. Földi, *Die Entwicklung der sich auf die Schiffer beziehenden Terminologie im Römischen Recht*, Tijdschrift voor Rechtsgeschiedenis, 63 (1995), p. 1-9, spec. p. 2.

11 In D. 4,9 and D. 47,5, vicarious shipowner liability is connected to the term *exercitor* only, which term is further explained in D. 14,1,1,15. The same goes for I. 4,5,3. Similarly, D. 9,2,29,4 does not mention a separate *magister navis* but only a *gubernator* and *ducator*. Note that the Accursian gloss does employ the terms *dominus navis* and *exercitor* interchangeably, see notes 5, 6 and 12.

12 See D. 9,2,29,2: '(…) navis tua (…) quia parvi refert navem immittendo aut serraculum ad navem ducendo an tua manu damnum dederis, quia omnibus his modis per te damno adficior (…) cum domino agendum non esse'. This idea is supported by the gloss *Item Labeo* at D. 9,2,29,3, which refers to D. 9,2,29,2 as 'supra posuit cum dominus navis vim inferentis dedit damnum'.

13 Cf. the discussion of Faber in note 148.

spite of the damage seemingly not having been directly inflicted by the body of the tortfeasor (*corpore suo*)[14].

Under Roman law, shipowners were thus not vicariously liable in principle for (in)culpable collisions involving their ship. In the early modern Dutch Provinces, however, Roman law only had a subsidiary role to play with regard to ship collision, which was ruled by several customary and statutory instruments through time[15]. Particularly noteworthy are the so-called Laws of Wisbuy (*Wisbuische Zeerechten*). This early sixteenth-century compilation of several medieval maritime laws enjoyed authority in the Netherlands and other parts of Northern Europe and covered a range of topics, including liability for ship collision[16]. According to articles 48 and 71 of the Laws of Wisbuy, the shipmaster who, through his own fault, causes a collision is liable to pay full damages; if the collision occurred without his fault, the damage is to be split in half between the shipmasters involved[17]. If the collision resulted in one of the ships being wrecked, however, a different rule applied under article 68. The provision is of Dutch origin and reads as follows[18]:

14 See gloss *Sufficere* at D. 9,2,29,4 (*supra*, n. 5). Immediately after D. 9,2,29,4, in D. 9,2,29,5, an *actio in factum* is prescribed in case of a ship that sinks after its cables have been cut. See also Noodt, *Opera omnia*, Leiden 1713, p. 213 (*Liber singularis ad legem Aquiliam*, ch. 18); R. Zimmermann, *The law of obligations: Roman foundations of the civil law tradition*, Oxford 1996, p. 979-985.

15 On the Roman-Dutch law of ship collision, see i.a. Ph.J. Thomas, *Contributory fault in maritime collisions in the law of Holland*, Revue Internationale des Droits de l'Antiquité, 48 (2001), p. 345-360; E.G.D. van Dongen, *Contributory negligence: a historical and comparative study*, Leiden 2014, p. 241-255.

16 On the Laws of Wisbuy, see i.a. J.-M. Pardessus, *Collection de lois maritimes antérieures au* XVIII^e *siècle*, Paris 1828-1845, vol. 1, p. 425-524; T. Twiss, *The Black Book of Admiralty, with an appendix*, London 1871-1876, vol. 4, p. xxvi-lxxxix, 263-284; E. Frankot, *Of laws and shipmen: medieval maritime law and its practice in urban Northern Europe*, Edinburgh 2012, p. 21-23. The present study uses the edition that was first published as *Dyt ys dat högeste unde öldeste water recht dat de gemene Kopman und Schippers geordinert unde gemaket hebben tho Wisby* (…), Lübeck 1537 and subsequently translated and printed throughout Northern Europe (including in Amsterdam in 1551). For the applicability of the Laws of Wisbuy in e.g. Amsterdam, see note 24.

17 The latter rule derives from art. 15 of the *Rôles d'Oléron* and art. 12 *Ordinancie*, Frankot, *Of laws and shipmen* (*supra*, n. 16), p. 49. Cf. art. 27, 49, 50 of the Laws of Wisbuy, which lay down the same formula.

18 Cf. art. 2 *Ordinancie* (Pardessus, *Collection* [*supra*, n. 16], vol. 4, p. 30); art. 32 *Ordinancie* (Pardessus, *Collection* [*supra*, n. 16], vol. 1, p. 416-417). See Frankot, *Of laws and shipmen* (*supra*, n. 16), p. 49-50; W.D.H. Asser, In solidum *of* pro parte: *een onderzoek naar de ontwikkelingsgeschiedenis van de hoofdelijke en gedeelde aansprakelijkheid van vennoten tegenover derden*, Leiden 1983, p. 106; Twiss, *The Black Book* (*supra*, n. 16), vol. 4, p. liii, 283-284; T. Goudsmit, *Geschiedenis van het Nederlandsche zeerecht*, The Hague 1882, p. 128, 176-177. In art. 15 *Rôles d'Oléron*, a similar formula is applied to cargo damage only.

> It so happens that one ship sails into another by accident, so that that one ship is lost with its cargo: in that case the value of the cargo of both ships shall be valued (if either ship is lost). The value of the cargoes of both ships (taken together) shall then pay for the lost cargo, pound for pound, mark for mark. Similarly, one shall estimate the value of both ships as it was before the damage occurred: the price of both ships (taken together) shall pay for the lost ship, pound for pound, mark for mark[19].

Both ships are thus to be valued, and the owner of the remaining ship is liable to pay damages in proportion to the value of his ship. This division of damages is (what has been called) *geometrical*[20]. To give a brief example: if ship A (worth ƒ400) collides with ship B (worth ƒ600), which subsequently sinks, the liability of the owner of ship A amounts to (400/(400+600))*600 = ƒ240. The same applies, *mutatis mutandis*, to the cargo involved. Deviating from the shipmaster liability laid down in articles 48 and 71, article 68 treats inculpable ship collision as a common peril at the expense of the *shipowners* (resp. cargo owners) and does so by vesting liability in both shipowners (resp. cargo owners). Some authors have understood this to be a form of general average[21]. Be that

19 *'t Boek der zeerechten*, Amsterdam 1610, p. 22: 'Item het ghevalt dat het eene Schip het ander aen zeylt met onghevalle, alsoo dat dat eene schip met zijne goede verloren blijft: soo salmen dat goedt dat in beyde schepen is (eer dat eenich schip verloren sy) op ghelt setten of warderen, dan sal de waerde vande goeden van beyde schepen (te samen gesommeert) betalen dat verloren goet, pont ponde ghelijck; marck marck ghelijck. Alsoo salmen oock prijseren de waerde van beyde Schepen, eer die schade geschiede: soo sal die prijs van beyde schepen (te samen ghesommeert) betalen dat verloren schip, pont ponde-gelijk; Mark mark-gelijk'.

20 See e.g. Van Bijnkershoek, *Quaestionum* (*supra*, n. 9), p. 689-694 (*QJPr*. 4.20). Troughout legal history, the *proportio geometrica*, as associated with distributive justice, has been understood as a distribution in proportion to certain individual qualities like personal merit (or in the present case: ship value), which must be *measured*. The *proportio arithmetica*, as associated with commutative justice, was then understood as a division not on the basis of individual quality but of mere quantity, which must be *counted*. Although intelligible, strictly speaking the (legal) use of terminology is not mathematically correct, cf. H. Grotius, *Inleidinge tot de Hollandsche rechts-geleerdheid*, ed. S. Groenewegen van der Made, Amsterdam 1706, p. 3 (1.1.13). A sequence of numbers connected through addition of a fixed amount is said to be in arithmetical proportion, whereas a sequence of numbers connected through multiplication by a common ratio is in geometric proportion. As such, the mathematical notion describes the outcome of a (linear resp. exponential) formula, whereas the legal notion defines a key of allocation.

21 Twiss, *The Black Book* (*supra*, n. 16), vol. 4, p. 284; D.R. Owen, *The origins and development of marine collision law*, Tulane Law Review, 51 (1976-1977), p. 759-819, spec. p. 764; Asser, *In solidum of pro parte* (*supra*, n. 18), p. 105, 113. As ship collisions do not occur in order to protect the ship and its cargo, the latter qualification seems flawed, cf. note 165.

as it may, the liability introduced by the provision cannot be subject to limitation to the value of the ship[22]. Due to the geometrical calculation of damages, which divides the common peril between the value of two ships, claims arising under article 68 can never exceed or even equal the value of a ship[23]. As such, limitation of liability for these claims to the value of the ship is unimaginable.

With regard to the law of ship collision, the Laws of Wisbuy were corrected and supplemented by two sovereign Ordonnances: the *Ordonnantie, statuut ende nieuw edict op het faict van der Zee-vaert* of Charles V of July 19th 1551 and the *Ordonnantie, statuyt ende eeuwich edict* (…) *op 't faict van der Zeevaert* of Philip II of October 31st 1563[24]. The Ordonnances impose a uniform, simple rule which disregards the nature and extent of the damage and goes back on articles 48 and 71 of the Laws of Wisbuy: in case of culpable ship collision, the responsible shipmaster is liable for full compensation of the damage; in case of inculpable ship collision, the damage is to be split in two and divided over the shipmasters involved[25]. Article 46 of the Ordonnance of Charles V goes as follows (italics added):

> If it occurs that two Ships, sailing on inland waters or the sea, sail into each other without being able to circumnavigate or avoid each other, and run into each other, ground each other or cause damage to the ships in another way, the damage *of the shipmaster who suffered this* shall then be divided half-and-half: *one half at the expense of him who suffered the damage, and the other half at the expense of him who inflicted the damage*, regardless of whether this accident occurred by day or by night, in a storm or in calm weather, however it happened[26].

22 Contra: P. Rehme, *Die geschichtliche Entwicklung der Haftung des Reeders*, Stuttgart 1891, p. 136. See also Asser, *In solidum of pro parte* (*supra*, n. 18), p. 105, 113.

23 If ship B sinks as a result of an inculpable collision with ship A, the claim of the owner of B is tantamount to $B * \frac{A}{A+B} = A * \frac{B}{A+B} < A$. The value of A thus *always* exceeds the claim of the owner of B. Cf. Van Bijnkershoek, *infra* at note 194.

24 *Ordonnantie* Charles V, 19/7/1551, GPB I, p. 782; *Ordonnantie* Philip II, 31/10/1563, GPB I, p. 796. See A. Verwer, *Nederlants see-rechten, avaryen, en bodemeryen*, Amsterdam 1711, p. 43, 48, 120. Cf. Goudsmit, *Geschiedenis* (*supra*, n. 18), p. 225-226. In other maritime matters, both the Laws of Wisbuy and the Ordonnances were observed, see e.g. art. 20 *Generaale verklaaringe van de costuimen* City of Amsterdam, 9/1/1570, published in *Handtvesten* (…) *der stad Amstelredam*, Amsterdam 1639, p. 92. Both are included in later collections of the customary law of Amsterdam.

25 Goudsmit, *Geschiedenis* (*supra*, n. 18), p. 225, 240-241.

26 Art. 46 *Ordonnantie* Charles V, 19/7/1551, GPB I, p. 793: 'Item, of't gebeurde, dat twee Schepen binnen of buyten 's Landts seylende, ende in 't seylen elck anderen aen boort quamen, niet mogende ontseylen noch ontwijcken, ende de selve Schepen elck anderen

The spaced passages are absent in article 4 of the title *Van Schepen die malkanderen beschadigen* of the Ordonnance of Philip II, which reads:

> If it occurs that two Ships, sailing on inland waters or the sea, sail into each other without being able to circumnavigate or avoid, so that one ship grounds the other or causes damage to it, the damage shall then be half-and-half, regardless of whether this occurred by day or by night, in a storm or in calm weather, or in any other way: but if it occurred through the intent or the fault of that one, he will bear the damage alone[27].

In light of its close relation to the Ordonnance of Charles V, the Ordonnance of Philip II must pertain to the shipmaster as well[28], although the language is rather vague. The shipowner is not mentioned in any way. Perhaps the legislator only envisaged shipowners navigating their own ship, as was common in inland navigation. Nonetheless – and perhaps precisely because of the vague wording – this did not hinder the imposition of subsidiary shipowner liability for inculpable ship collision. As early as 1566, the Court of Muiden ruled that the shipowner was liable to pay half of the damage that resulted from collisions involving his ship[29]. The judgment was upheld in appeal by the High Court (*Hof*) of Holland in 1567 and the Great Council of Malines in 1571. The distribution of damages under the terms of the two Ordonnances is (what has been called) *arithmetical* – that is, not proportionate to or dependent on the value of the ships involved[30]. Unlike under the Laws of Wisbuy, the claim against the defendant shipowner could thus exceed the value of his ship if the total

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aen boort komende, inde gront stootende, oft andere schade aende Schepen doende, soo sal de schade vanden Schipper die alsoo gedaen ende geschiet is, ghereeckent worden half ende half, als de eene helft den geenen die de schade gheleden heeft, ende d'ander helft tot laste van den geenen die alsulcke schade gedaen heeft, soo wel of 't voorschreve ongeluck geschiede by dage, ofte by nachte, deur tempeeste, ofte schoon weder, hoe 't selve soude mogen gebeuren'. Cf. art. 47-49.

27 Tit. *Van Schepen die malkanderen beschadigen* art. 1 *Ordonnantie* Philip II, 31/10/1563, GPB I, p. 817: 'Of 't gebeurde dat twee Schepen binnen oft buyten 's Lants seylende, in 't seylen malkanderen aen boort quamen, niet mogende ontseylen noch ontwijcken, ende sulck d'een d'ander in de gront stiete, oft ander schade aen dede, soo sal die schade zijn half en half, 't zy dat 't selve gebeurde by dage ofte by nachte, in tempeeste, schoon Weder, of andersints: maer gheschiedet met wille, of by schulde van den eenen, die sal de schade alleene gelden'. Cf. art. 2-5.

28 Goudsmit, *Geschiedenis* (*supra*, n. 18), p. 225, 240-241, 428. This finds further support in art. 2-4, which refer to the shipmaster (either explicitly or as the (in)culpable person).

29 Asser, *In solidum of pro parte* (*supra*, n. 18), p. 106, who refers to ARA *Brussel*, reg. 872, no. 42, p. 667-691.

30 Goudsmit, *Geschiedenis* (*supra*, n. 18), p. 428. See note 20.

collision loss was (at least) twice as high. The phrasing of the Ordonnances is not indicative of a limitation of liability to the value of the ship in such a scenario[31]. The defendant argued that he could avoid liability by surrendering his ship to the plaintiff under customary law, but the Great Council dismissed the argument – the defendant simply had to bear half of the damage without further ado[32].

In short, at the start of the seventeenth century Dutch shipowners were liable to pay for half of the damage that resulted from inculpable collisions involving their ship, and could not limit their liability to (the value of) their ship. In Northern Germany and the Baltic area, however, the shipowner's liability for inculpable ship collision was limited to the value of his ship as a rule of trade custom and local statutory law[33]. A good example is provided by the statutes of Hamburg, which had included this limitation since the early fourteenth century[34]. Dutch merchants may have been acquainted with this rule through the Baltic maritime trade, and may have complied with a similar rule in practice[35]. But even if this is true, the rule was not recognised by Dutch

31 Rehme admits that the phrasing of the Ordonnances does not explicitly mention a limitation of liability, but reads this limitation into the phrase 'the culpable ship shall pay the damage', Rehme, *Die geschichtliche Entwicklung* (*supra*, n. 22), p. 136. The Ordonnances do not contain such a sentence, however. In art. 46-48 of the Ordonnance of Charles V and art. 1-5 of the title *Van schepen die malkanderen beschadigen* of the Ordonnance of Philip II, the culpable and liable party is either the shipmaster or remains unidentified. Art. 49 of the Ordonnance of Charles V states that 'the ship will pay' only once, but there, too, the shipmaster features as the culpable and liable party.

32 See note 29.

33 See Rehme, *Die geschichtliche Entwicklung* (*supra*, n. 22), p. 90-92, 136-138. This only applied to shipowners, as cargo-owners were exonerated entirely. Frankot, on the other hand, seems to imply that this regime comprised a geometrical division of damages in the manner of art. 68 Laws of Wisbuy rather than a limitation of liability, see Frankot, *Of laws and shipmen* (*supra*, n. 16), p. 50.

34 *Ibid*. See e.g. art. 2.17.7 of *Der Stadt Hamburg Statuta und Gerichts Ordnung* of 1603: 'Da etwan zwey Schiffe zusammen kommen, in der See oder in der Hafe, bey Tage oder bey Nacht, klein oder groß, und das eine an das ander läufft, also daß eins das ander zerbricht und unterdrücket, das Schif das oben bleibet sol dem andern das untergehet seinen vollen Schaden wieder erlegen, es wäre dann, daß der Schiffer der oben blieben ist schweren wolte mit seinem Steurmann und Schiffmännern, daß es ohne seinen Willen geschehen, so darff er nur den halben Schaden bessern. Wäre aber der Schade des gesunckenen Schifs und Güter grösser als das Schif, so oben bleibet, mit seiner Zubehörunge und Fracht werth ist, zu der Zeit als es den Schaden gethan, so darff der Schiffer und sein Gut ferner kein Schaden darumb leiden, auch darff des Kaufmanns Gut, das mit in dem Schiffe ist welches den Schaden gethan hat, den Schaden nicht mit gelten'.

35 The invocation of a customary rule of limitation of shipowner liability before the Great Council of Malines in 1571 (in the form of physical ship surrender, see *supra* at note 32),

scholars or by the Dutch courts. This is confirmed by Grotius, who regards shipowner liability under the Ordonnance of Philip II as the only example of strict liability (*misdaed door wetduiding*) for inanimate property and does not mention any liability limitation[36].

3 The case *Jansdr. v. Blaeu*

3.1 *Introduction*

Jacob Coren witnessed the case of *Jansdr. v. Blaeu* from close by. He served as a Supreme Court judge in the proceedings until his death in 1631, and prepared the judicial deliberations as rapporteur between 1627 and 1629[37]. Coren was known to be very diligent in his case preparations[38], as is testified by his comprehensive report of the case, published posthumously as no. 40 of his *Observationes*[39]. The *Observationes* are a collection of personal reports of cases in which Coren was involved as a judge. They not only contain the Supreme Court's final decision, but describe the facts and proceedings of the case as well. When setting out the arguments of the parties, Coren refers to sources of Roman law as well as the works of medieval legal scholars, which he may have consulted in the library of the Supreme Court[40]. As such, Coren

in *Jansdr. v. Blaeu* (see *infra* at note 95 *et seq*.) and in the case of Coren's *Observatio* 41 (see *infra* at note 121 *et seq*.) could be indicative of such practice.

36 Grotius, *Inleidinge* (*supra*, n. 20), p. 304 (3.38.16-18); H. Grotius, *De jure belli ac pacis*, The Hague 1680, p. 324 (2.17.21). Some Dutch scholars writing after the case of *Jansdr. v. Blaeu* do not mention a limitation of shipowner liability either, see note 172.

37 See *Resolutie* 15/1/1627 (Jansdr. *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 644/45; *Resolutie* 6/10/1627 (Jansdr. *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 644/71; *Resolutie* 15/4/1628 (Jansdr. *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 644/104; *Resolutie* 21/12/1629 (Jansdr. *c.s.*/Blaeu *c.s.*), NA 3.03.02, no. 644/190.

38 W. Druwé, *Loans and credit in the* Consilia *and* Decisiones *in the Low Countries* (*ca. 1500-1680*), Leiden 2020, p. 126; Coren, *Observationes* (*supra*, n. 1), preface by Coren's widow and children addressed to the judges of the Supreme Court of Holland, Zeeland and West-Friesland.

39 Coren, *Observationes* (*supra*, n. 1), p. 410-419. The publication was taken care of by Coren's widow and children, see W.J. Zwalve and C.J.H. Jansen, *Publiciteit van jurisprudentie*, Deventer 2013, p. 150-152; Druwé, *Loans* (*supra*, n. 38), p. 126-127.

40 It is unlikely that the references in *Observatio* 40 were put forward by the parties, see also A. Wijffels, *Legal books and legal practice*, in: J.G.B. Pikkemaat (ed.), The old library of the Supreme Court of the Netherlands, Hilversum 2008, p. 21-38, spec. p. 26; Zwalve/Jansen, *Publiciteit* (*supra*, n. 39), p. 150-152; Druwé, *Loans* (*supra*, n. 38), p. 127. The cited works of Bartolus de Saxoferrato, Baldus de Ubaldis, Petrus Costalius and Petrus Peckius were (and still are) to be found in the library of the Supreme Court, but the works of Paulus de Castro are absent and the Supreme Court's edition of Benvenuto Straccha only dates from 1669,

shows himself an exponent of the *usus modernus pandectarum* by fitting local (Dutch) law (*jura propria*) into the framework of the learned tradition[41]. The references in *Observatio* 40 will be mentioned in the footnotes here, together with Coren's (Latin) paraphrases. Many procedural documents of the case survive in the archive of the Supreme Court, although the most important document – the *geëxtendeerde sententies* of 1629 – is missing. The study presented here mainly draws on Coren's *Observatio*, and offers some important additions on the basis of this archival material[42].

3.2 *The facts of the case*

On November 30th 1617, two Dutch ships were caught in a storm and collided on the North Sea near the Dogger Bank. As a result, one ship went down with all hands, including shipmaster Frans Claesz. van der Beets. This ship was on its way from Riga to Amsterdam, and belonged to Van der Beets, Willem Cornelisz. van Amelant, Frederick Lechar, Jan Jansz. van Steenwijck and a group of other shipowners[43]. The remaining ship – which seems not to have incurred any notable damage[44] – was on its way from Königsberg to Amsterdam and was navigated by shipmaster Jan IJsbrantsz (alias 'Jonge Jan') van Veenhuijsen[45], who owned the ship together with shipowners Pieter Pietersz. Blaeu, Frerick Heertjesz., Thijs Pietersz. and a group of others. Blaeu and his companions

see P.P. Schmidt, *Oude drukken in de bibliotheek van de Hoge Raad der Nederlanden*, Zwolle 1988, p. 30, 32, 57, 138, 166; J.Th. de Smidt, *Transcriptie van de Germain-Holtrop-catalogus van 1848-1851*, appendix to: Pikkemaat (ed.), *The old library* (*supra*, n. 40), p. 8, 42, 65, 86. It is possible that Coren consulted his own library, or that these books have meanwhile been lost from the library of the Supreme Court.

41 D. Ibbetson and A. Wijffels, *The techniques of judicial records and law reports*, in: A. Wijffels (ed.), Case law in the making: the techniques and methods of judicial records and law reports, Berlin 1997, vol. 1, p. 13-38, spec. p. 23-26; Druwé, *Loans* (*supra*, n. 38), p. 74-75.

42 For other discussions of the case, see G. Diephuis, *Nadere beschouwing van den afstand, dien de eigenaar van zijn schip, of de reeder van zijn scheepsaandeel kan doen, volgens art. 321 Wetb. v. Kooph.*, Opmerkingen en Mededeelingen betreffende het Nederlandsch Regt, 15 (1863), p. 177-213, spec. p. 203-207; Asser, *In solidum of pro parte* (*supra*, n. 18), p. 110-114; Thomas, *The development* (*supra*, n. 5), p. 234-236.

43 Occasionally, the name 'Cornelisz.' appears as Van Steenwijck's patronymic. Van der Beets had passed the Sound on 3 November 1617, see *Sound Toll Registers Online* no. 59/549. The *partenrederij* seems to have consisted of 16 shipowners, see *Vrijwillige condemnatie* 9/3/1640 (Van Amelant *c.s.*/Bosch *c.s.*). NA 3.03.02, no. 1069/415-426.

44 None of the procedural documents mentions a counterclaim or set-off.

45 Van Veenhuijsen had passed the Sound on 2 November 1617, see *Sound Toll Registers Online* no. 59/548.

formed a so-called *partenrederij*, each owning a share (1/16th) in the ship[46]. As to their internal relations, the *partenrederij* qualified as a *societas*[47].

In 1618, Van der Beets' widow Grietje Jansdochter (Jansdr.) and the owners of the sunken vessel initiated proceedings before the Supreme Court against shipmaster Van Veenhuijsen[48]. The Court had a statutory capacity to hear claims arising under the Ordonnance of Philip II in the first instance, with a special focus on maritime collision cases[49]. The plaintiffs claimed compensation in full, and demanded that the remaining vessel, which had arrived in Enkhuizen in the meantime, would be attached until security for the Court's verdict had been provided (*cautio de judicato solvendo*)[50]. The Supreme Court promptly ordered the attachment of the ship. Nonetheless, Van Veenhuijsen was able to unload in Amsterdam, and the owners of the cargo were not involved in the proceedings until 1633 (see par. 3.6)[51]. Moreover, the ship was sold for ƒ4.200 in 1621[52], and there is no indication that the proceeds were surrendered to the plaintiffs. Considering these circumstances, it seems that Van Veenhuijsen was able to find sufficient security. It is also plausible that the attachment – if only concerning Van Veenhuijsen's part in the ship – remained in force, but that the other shipowners successfully applied for permission to continue operation of the ship[53].

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46 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: *de beursvennootschap en haar aandeelhouders in historisch perspectief* , Deventer 2014, p. 14-17.

47 *Ibid*. See also Grotius, *Inleidinge* (*supra*, n. 20), p. 260-261 (3.23).

48 *Rekest* 21/2/1618 (Jansdr. *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 22/536. Both in *Observatio* 40 and the sources mentioned in note 107 it is asserted that Van Amelant, Lechar and Van Steenwijck took part in the proceedings as shipowners. In the archive of the Supreme Court, additionally, they also appear as 'merchants' litigating on behalf of themselves and the shipowners. As such, the three may have had a dual role as shipowners as well as charterers. In any case, the proceedings encompassed the claim of the charterers too, see notes 101 and 102.

49 *Ibid*.; art. 20 *Instructie van den Hoogen Raade van appel in Hollandt*, 31/5/1582, GPB II, p. 792.

50 *Rekest* 21/2/1618 (Jansdr. *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 22/536. See also note 55.

51 *Rekest* 20/10/1633 (Jansdr. *c.s.*/Moens *c.s.*), NA 3.03.02, no. 37/514-515. See also the discussion of *decisio* 49 (ascribed to Neostadius) in note 160.

52 *Conclusie* 19/12/1628 (Jansdr. *c.s.*/Blaeu *c.s.*), NA 3.03.02, no. 502/317. Coren does not mention this sale.

53 This shipowner privilege was confirmed by the High Court in 1623 but may have been acknowledged earlier by the Supreme Court, see S. van Leeuwen, *Verhandelinghe van handt-opleggen ende besetten*, Dordrecht 1659, p. 126; W. van Alphen, *Papegay ofte formulier-boeck*, The Hague 1668, p. 348; P. Bort, *Tractaet van arresten*, in: *Alle de wercken van Mr. Pieter Bort*, The Hague 1688, p. 64-65; P. Vromans, *Tractaet de foro competenti*,

Settlement efforts before rapporteur Coren were unsuccessful[54], and three of Van Veenhuijsen's fellow shipowners (Blaeu, Heertjesz. and Pietersz.) appeared in court to assist him[55]. The proceedings thus continued, the claim now having been set at half of the value of the sunken ship and its cargo because it could not be proven that Van Veenhuijsen had been at fault[56]. Van Veenhuijsen objected that he had hit a different ship than Van der Beets' in 1617[57], but was unable to prove this[58]. In line with the Ordonnances of Charles V and Philip II, Van Veenhuijsen was therefore condemned – in his capacity of shipmaster – to pay half of the value of the sunken ship and its cargo in April 1628[59]. The Supreme Court also ordered that Van Veenhuijsen's ship be sold by execution, which seems unfeasible since the ship had been released and sold in 1621. Unable to pay, Van Veenhuijsen was taken into custody under

Leiden 1721, p. 51. Cf. *Handtvesten* (...) *der stad Amstelredam* (*supra*, n. 24), p. 343. Bort adds that the shipmaster had to provide security for the net worth of the attachee's share in the working capital of the ship.

54 *Resolutie* 15/1/1627 (Jansdr. *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 644/45; *Dictum* 16/1/1627 (Jansdr. *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 889/63; *Dictum* 19/1/1627 (Jansdr. *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 936/24. As appears from the *Resolutie*, the judges anticipated Van Veenhuijsen's condemnation if the negotiations failed.

55 See *Rekest* 7/7/1628 (Jansdr. *c.s.*/Blaeu *c.s.*), NA 3.03.02, no. 32/375-376. In *Rekest* 21/2/1618 (Jansdr. *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 22/536, the plaintiffs ask for a condemnation of Van Veenhuijsen 'and all others, if necessary' (*ende allen anderen, des noot sijnde*). Although the phrasing could be indicative of an invocation of subsidiary shipowner liability at this early stage, such an interpretation is unlikely in light of the independent suit brought against the shipowners after Van Veenhuijsen's condemnation.

56 Coren does not mention the initial claim for compensation in full, Coren, *Observationes* (*supra*, n. 1), p. 410-411.

57 *Akte van dingtalen* 9/6/1627 (Jansdr. *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 441/16; *Resolutie* 6/10/1627 (Jansdr. *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 644/71; *Dictum* 8/10/1627 (Jansdr. *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 889/105; *Dictum* 13/10/1627 (Jansdr. *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 936/44. In Coren, *Observationes* (*supra*, n. 1), p. 410-411 Van Veenhuijsen is only mentioned to deny the collision entirely.

58 *Resolutie* 15/4/1628 (Jansdr. *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 644/104.

59 *Dictum* 15/4/1628 (Jansdr. *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 889/140; *Dictum* 15/4/1628 (Jansdr. *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 936/57. The *Observatio* states that Van Veenhuijsen had been 'guilty' and was condemned for that reason, Coren, *Observationes* (*supra*, n. 1), p. 410-411. Given the arithmetical partition of damages in two equal parts, this cannot be a denial of force majeure, but a mere confirmation that Van Veenhuijsen had indeed been involved in the sinking of Van der Beets's ship in response to the former's assertion that he had hit a different ship. This terminological inaccuracy could be explained by the fact that the publication of the *Observationes* was not taken care of by Coren himself, but by his widow and children.

civil arrest (*gijselinge*)[60], and Blaeu, Heertjesz. and Pietersz. were unwilling to perform on Van Veenhuijsen's behalf[61].

3.3 *The dispute between the litigating parties*

Mindful of the subsidiary shipowner liability for collision damage under the Ordonnances, the plaintiffs summoned the shipowners in their own name. They held the shipowners jointly and severally liable (*in solidum*) to compensate half of their collision damage and demanded that the judgment against Van Veenhuijsen would be executed against them[62]. The archival documents point out that Heertjesz. and Pietersz. represented two other shipowners, amounting to a total of 5 defendants[63].

In their response to the plaintiffs' claim[64], the defendants emphasised that they had each only had a share (1/16th) in the ship at stake[65]. From this, they deduced two defences. They argued, firstly, that their liability was not joint and several but proportionate (*pro parte*); and secondly, that their liability as a whole was to be limited to the value of this ship at the time of the accident, so that their separate liabilities did not extend beyond the value of their individual shares in the ship. Furthermore, the defendants were happy to ensure that the other shipowners would perform as well in order to enable the plaintiffs to enjoy the entire value of their ship, which had been worth ƒ6.600 in November 1617[66]. The two defences, which the plaintiffs rejected as 'captious and insufficient'[67], will be discussed separately below, in conformity with the structure of *Observatio* 40.

60 *Akte van dingtalen* 7/6/1629 (Jansdr. *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 442/60.

61 In *Rekest* 7/7/1628 (Jansdr. *c.s.*/Blaeu *c.s.*), NA 3.03.02, no. 32/375-376, the plaintiffs assert that the shipowners 'preferred to take their hands off the case'.

62 *Rekest* 7/7/1628 (Jansdr. *c.s.*/Blaeu *c.s.*), NA 3.03.02, no. 32/375-376; *Conclusie* 5/9/1628 (Jansdr. *c.s.*/Blaeu *c.s.*), NA 3.03.02, no. 502/316; Coren, *Observationes* (*supra*, n. 1), p. 411.

63 Heertjesz. represented his father-in-law Jan Vrancken, who occasionally appeared on his own behalf. Pietersz. represented Freek Pieters, widow and estate administrator of Pietersz.' late father Pieter Thijsz. The archival sources also mention a certain Sijmon Volckertsz. as shipowner, who would be condemned as well.

64 Coren, *Observationes* (*supra*, n. 1), p. 411-412.

65 *Akte van dingtalen* 21/10/1628 (Jansdr. *c.s.*/Blaeu *c.s.*), NA 3.03.02, no. 442/61; *Conclusie* 19/12/1628 (Jansdr. *c.s.*/Blaeu *c.s.*), NA 3.03.02, no. 502/317. Before answering the claim, the defendants questioned the plaintiffs' active legitimation and demanded proof of ownership of the sunken vessel, *Akte van dingtalen* 21/10/1628 (Jansdr. *c.s.*/Blaeu *c.s.*), NA 3.03.02, no. 442/61.

66 *Conclusie* 19/12/1628 (Jansdr. *c.s.*/Blaeu *c.s.*), NA 3.03.02, no. 502/317.

67 'Captieus ende insuffisant', *ibid.*

3.4 *Defence 1: liability in* solidum *or* pro parte

In their reply[68], the claimants relied on the *actio exercitoria*. Under this Roman legal action, the liability of shipowners for (contractual) acts of their shipmaster was joint and several[69]. This also applied if one of the shipowners acted as shipmaster – in this case, Van Veenhuijsen[70]. The joint and several liability served to prevent a creditor from having to address several persons separately for the performance of (just) one obligation[71]. According to the plaintiffs, this economic rationale still applied in contemporary Dutch society. Since the ownership of a vessel was usually split in many shares, a creditor could otherwise be confronted with a multitude of 32 or even 64 debtors, who could reside in different jurisdictions – a major deterrent against contracting with shipmasters[72]. Besides, joint and several liability would not disproportionately inconvenience the defendant, who could, after all, have recourse against his fellow shipowners[73]. The *actio exercitoria*, so the claimants continued on the

68 Coren, *Observationes* (*supra*, n. 1), p. 412-413.

69 'Si plures navem exerceant, cum quolibet eorum in solidum agi posse' (referring to D. 14,1,1,25, also D. 14,1,2-3, D. 14,3,13*pr*.-1.); 'nec referre quotam quisque portionem in nave habeat' (referring to D. 14,1,3 and Paulus de Castro, *In secundam Digesti Veteris partem commentaria*, Lyon 1583, p. 89 [at D. 14,1,3]).

70 'Idque obtinere sive illi plures exercitores navem exerceant per extraneum, sive per unum de numero suo' (referring to D. 14,1,4,1 and Bartolus de Saxoferrato, *In secundam Digesti Veteris*, Lyon 1523, p. 93; Peckius, *Commentaria* [*supra*, n. 9], p. 159 *et seq*.). According to Peckius, the joint and several liability follows from the 'derivative obligation' that is incurred by one invisible person and is therefore shared by all of the shipowners together. The claimants remarked that the shipmaster generally owned a part in the ship, cf. Punt, *Het vennootschapsrecht* (*supra*, n. 46), p. 75. Considering D. 14,1,1,25 and D. 14,1,4,1, however, it did not matter whether the shipmaster was an *extraneus* or *unus de numero suo*.

71 'Ne in plures adversarios distringatur, qui cum uno contraxerit' (referring to D. 14,1,2, also D. 15,1,27,8, on the *actio de peculio* and a slave in co-ownership); 'neque enim dividenda est in plures obligatio quae in unius persona originem habet' (referring to Baldus de Ubaldis, *In quartum & quintum Codicis libros commentaria*, Venice 1577, p. 71 [at C. 4,25,6, no. 28]; Petrus Costalius, *Adversariorum ex pandectis Justiniani imperatoris liber prior*, Lyon 1554, p. 267 [at D. 14,1,1,25]).

72 See also Punt, *Het vennootschapsrecht* (*supra*, n. 46), p. 74-75; De Jongh, *Tussen societas en universitas* (*supra*, n. 46), p. 14-15. Cf. D. 14,1,1,20.

73 'Cum ea res ipsi qui condemnatur damnosa esse non possit, cum possit rursus ipse judicio societatis, vel communi dividundo, quod amplius sua portione solverit, à socio, sociisve suis consequi' (referring to D. 15,1,27,8, also D. 14,1,3; D. 14,3,13,2; D. 14,3,14). Liability was *pro parte* when recourse (e.g. with the *actio societatis*) was unavailable to the debtor: 'scilicet quia inter eos non habet locum actio societatis vel communi dividendo' (referring to D. 14,3,14 and Costalius' commentary on D. 14,1,1,25, which reads 'Et quod dixi plures gerentes per unum, insolidum teneri, intellige quoties inter eos actio societatis, aut communi dividundo locum habet, alias pro parte sit condemnatio', Costalius, *Adversariorum* (*supra*, n. 71), p. 267). The claimants therefore stressed that the *partenrederij* qualified as a *societas*:

basis of D. 14,1,1,2, could move beyond its contractual context and applied to the delicts of the shipmaster as well[74].

The defendants availed themselves of a tripartite argument[75]. While acknowledging that liability under the *actio exercitoria* was joint and several under Roman law, firstly, the defendants argued that under contemporary mercantile law, partners could not bind each other towards third parties beyond the extent of their share in the partnership[76], and referred to the *actio de peculio* to illustrate this point[77]. If they were to be liable under the *actio exercitoria*,

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'Et navem exercere simul, species quaedam est societatis' (referring to gloss *Societatis* at D. 14,1,3, also D. 14,1,3; D. 14,3,13,2). See also *supra* at note 47.

74 That is, not only 'in casu, ubi agitur ex contractu Magistri navis, verum etiam ubi actio ex ipsius delicto oritur'. The reference to D. 14,1,1,2 is flawed, because the phrase 'quamquam ex delicto cuiusvis eorum, qui navis navigandae causa in nave sint, detur actio in exercitorem' does not refer to the *actio exercitoria* but the quasi-delictual *actio furti/damni adversus nautas*, T. Lubbers, *The capture of the Ponte: the development of vicarious liability of shipowners and its limitation in Roman-Dutch law*, Tijdschrift voor Rechtsgeschiedenis, 90 (2022), p. 177-221, spec. p. 195. This also follows from the phrase 'alia enim est contrahendi causa, alia delinquendi'. The text was also understood as such in the seventeenth century, see e.g. Peckius, *Commentaria* (*supra*, n. 9), p. 78-79. Contra: Asser, *In solidum of pro parte* (*supra*, n. 18), p. 109.

75 Coren, *Observationes* (*supra*, n. 1), p. 415-418.

76 Joint and several liability is restricted to the situation 'quando illi plures exercitores inter se sunt socii' (referring to D. 14,3,14 and Costalius' commentary on D. 14,1,1,25), see note 73. Coren adds: 'Quod quamvis socius ex contractu socii teneatur, et socius à consocio obligari possit, illud tamen recipere hoc temperamentum, ut socius à consocio pro ea summa tantum obligari possit, quam habere in societate compertum fuerit' (referring to B. Straccha, *Tractatus de mercatura*, Venice 1575, p. 103). Cf. Asser, *In solidum of pro parte* (*supra*, n. 18), p. 231. Under Roman law, *socii* could not bind each other towards third parties. This changed in the Middle Ages, albeit that the external liability was now only proportionate, Zimmermann, *The law* (*supra*, n. 14), p. 469. In Roman-Dutch law, there was a discussion as to whether the proportionate and limited contractual liability of shipowners also applied to other forms of partnership, Punt, *Het vennootschapsrecht* (*supra*, n. 46), p. 79-93.

77 'Sicut in simili quis cum servo plurium contraxerit, permittitur ei, cum quo velit dominorum in solidum experiri' (referring to D. 15,1,27,8 and D. 15,1,15); 'Notum tamen est eum qui convenitur non ulterius condemnari posse, nisi quatenus peculium apud ipsum est' (referring to D. 15,1,28, D. 15,1,32*pr*. and the gloss *Hoc iure* at D. 15,1,32*pr*.: 'Ius strictum est, quod unum eligendo quem in solidum convenerat, videtur ab aliis recedere cum ille solvat ei totum, quod debet: non autem plus debet, quam sit in peculio'). The *condemnatio solidi* thus only takes place *quando peculium excedit quod petitur*. D. 15,1,27,8 states that owners of the same slave are each jointly and severally liable for the payment of debts incurred through this slave, but only up to the total amount of the *peculium* that they had given him. Coren employs D. 15,1,28 and D. 15,1,32*pr*. to argue that their liability does not even exceed their separate shares in the *peculium*, but the former text does not support such a general statement. In D. 15,1,28 the liability of a co-owner is only restricted to his

payment of the value of their share in the ship should thus suffice[78]. Secondly, the defendants contended that the *actio exercitoria* only applied to contractual acts of the shipmaster and not to 'quasi-delicts' such as inculpable ship collision[79]. Under Roman law, quasi-delictual liability was not only proportionate[80], but also limited to theft committed and damage inflicted on the ship. In case of inculpable ship collision such as in the present case, nobody could be held liable since nobody was at fault[81]. Adding insult to injury, the defendants continued that the establishment of *force majeure* was a result of the plaintiffs' own litigation strategy since Van Veenhuijsen had only been condemned for half of their collision damage under the Ordonnance of Philip II[82] – a fallacious statement in light of the plaintiffs' initial claim for the entire sum. Thirdly, then, the defendants asserted that the case was not to be judged in accordance with Roman law, but in accordance with the Ordonnances of Charles V and Philip II[83]. They interpreted these Acts in a novel manner by arguing that damage from inculpable ship collision was to be apportioned not among the shipowners, but *among the ships*[84]. Not only did this lead the

share in the *peculium* to the extent that recourse against the estate of the other co-owner, who died without heir, would be impossible.

78 'Quod Exercitores teneantur solidum praestare, modo tantam summam posuerint in Societate; et libererentur à solidi condemnatione praestando totum id quod in Societate habere comperti fuerint'.

79 Coren, *Observationes* (*supra*, n. 1), p. 415-417. 'Cum loquantur de Exercitoribus conveniendis, ex contractu Magistri, secundum legem praepositionis' (referring to D. 14,1,1,2-3 ['si quidem qui magistrum praeponit, contrahi cum eo permittit']; D. 14,1,2 ['qui cum uno contraxerit']); 'non enim ex omni causa Praetor dat in exercitorem actionem, sed ejus rei nomine cujus ibi praepositus sit' (referring to D. 14,1,1,7, also D. 14,1,1,12).

80 'Quo casu plures exercitores non in solidum, sed pro parte qua navem exercent, conveniuntur' (referring to D. 4,9,7,5 as opposed to D. 14,1,1,25; Peckius, *Commentaria* (*supra*, n. 9), p. 157; gloss *Exerceant* at D. 4,9,7,5: 'vel illae leges de exercitoria loquuntur quando ex contractu, hic autem quando ex quasi maleficio').

81 Coren refers to the entire title D. 9,2 and the requirement of *culpa* incorporated there. It is also stated: 'Quod si navis alteram contra se venientem obruerit, si tanta vis navi facta sit, ut temperari non potuerit, nulla in dominum, aut exercitorem, detur actio; nec etiam in alium quenquam' (referring to D. 9,2,29,4, Peckius, *Commentaria* [*supra*, n. 9], p. 264-265 and the gloss *In dominum: nec in alium*). The defendants denied liability on the ground of *force majeure*, but in D. 9,2,29,2 and D. 9,2,29,4 they were not liable for the shipmaster's fault either, see par. 2. Also added is the more general principle that mere accidents cannot in good faith result in legal action: 'Quae enim fortuitis casibus, aut vi majori accidunt, nullo bonae fidei judicio praestantur' (referring to C. 4,24,6; D. 13,6,5,4; D. 13,6,18*pr.*; D. 50,17,23).

82 After all, 'damnum dans culpa aut dolo tenetur integrum damnum resarcire' (referring to D. 9,2 and the *totum jus*).

83 Coren, *Observationes* (*supra*, n. 1), p. 417-418.

84 Coren himself did not agree with this interpretation, see *infra* at note 128.

defendants to believe that the Ordonnances comprised an absolute limitation of liability to their ship (see *infra*, par. 3.5); from this limitation, importantly, they deduced that their liability was proportionate as well. They added that shipowners were only proportionately liable for the contractual acts of their master under (Dutch) customary law[85], and with good economic reason. Maritime investors consciously only put their investment at risk and could be ruined if their individual liabilities exceeded this amount, especially if their partners proved insolvent. Similarly, the defendants would lose more than their mere investment if their liability exceeded the value of their ship – although this argument is supportive of limitation of liability rather than proportionate liability. In the case at hand, the defendants would be even worse off than the owners of the sunken vessel, who had each only lost their shares in the ship.

3.5 *Defence 11: limitation of liability*

In their reply to the defendants' appeal to limitation of liability[86], the claimants contended that the remaining ship could not be abandoned, nor could the liability of the defendants be limited to its value. If this were otherwise, the damages could not be split arithmetically in accordance with the Ordonnances of Charles V and Philip II, and the earlier judgment against Van Veenhuijsen would be rendered ineffective. They also argued that the defendants could not resort to the Roman law of noxal surrender (*noxae deditio*). Under Roman law, one could avoid liability for damage inflicted by his quadruped animal or slave by surrendering them to the claimant, provided that he himself had neither known nor wanted the damage to occur[87]. Parenthetically referring to I. 4,8,2, the claimants reduced the rationale (*summa ratio*) of this 'privilege' to the inequity that would exist if slaves could burden their master beyond their value[88]. Noxal surrender, then, could never be available to shipowners, who owned not slaves but ships, and were liable anyway for the (contractual) acts of their shipmaster under the *actio exercitoria*, regardless of whether these had been performed without their knowledge and consent[89].

85 See note 76.

86 Coren, *Observationes* (*supra*, n. 1), p. 413-415.

87 'Ut noxae dedendo quadrupedem, vel servum, domini liberentur' (referring to D. 9,1 and D. 9,4).

88 'Idque summa ratione; namque erat iniquum, nequitiam servorum ultra ipsorum corpora dominis damnosam esse' (referring to I. 4,8,2).

89 Noxal surrender is thus only available to 'iis dominis, quibus insciis, aut invitis quadrupes damnum intulit, aut servus deliquit' (referring to D. 9,1,1,4-5; D. 9,4,4*pr.*; title D. 9,1 and D. 9,4). It is added: 'Cum è contrà exercitores teneantur etiam ex gestis à Magistro Navis, *ipsis insciis* et invitis' (referring to D. 14,1,1,5-7 ['exercitores teneri ex facto ejus quem Magister ipsis *isciis*, imo & prohibentibus praeposuit, idque propter utilitatem navigantium']).

In their response[90], the defendants objected that noxal surrender, apart from animals and slaves, could also apply to inanimate property that causes damage without fault of the owner[91]. This position was supported with a rather selective quote from D. 39,2,7,1:

> Just like animate things that have caused damage usually cannot burden us beyond our capability to surrender them through *noxae deditio*, so all the more should inanimate things not burden us further[92].

D. 39,2,7,1 deals with damage resulting from collapsing buildings. Under Roman law, the owner of collapsed property that had damaged a neighbouring building was obligated to clean up the debris, but could discharge himself by giving up the ruins. Unless he had provided surety prior to the incident (*cautio damni infecti*), the property owner was not liable for damages[93]. D. 39,2,7,1 provides a rationalisation of this absence of liability by drawing a comparison with noxal surrender: just like owners of slaves and animals are not anymore liable for damages after having lost their slave or animal (through noxal surrender), the owners of ruined buildings should not be anymore liable after loss of the property (due to collapse). This is all the more so – as the last phrase of the text elaborates – because collapsing buildings cease to exist entirely whereas slaves and animals that cause damage do not[94]. The text as such is merely explanatory and does *not* extend the scope of applicability of noxal surrender. Nonetheless, in the proceedings D. 39,2,7,1 is employed to facilitate (analogous) application of noxal surrender to inanimate objects like ships. The last phrase of the text is conveniently omitted to obscure the fact that colliding ships, unlike collapsing buildings, can survive the incident. The maneuver seems to have been based on an equitable principle first discerned in

90 Coren, *Observationes* (*supra*, n. 1), p. 418-419.

91 'Cujus quadrupes' (referring to I. 4,9 and D. 9,1) 'aut alia res inanimata damnum dedit' (referring to D. 39,2,7,1); 'noxae deditione rei quae nocuit'.

92 'Cum enim animalia quae *noxam* commiserunt non ultra nos solent onerare, quam ut *noxę* ea dedamus, multo magis ea quae anima carent, ultra nos non deberent onerare'.

93 D. 39,2,6; D. 39,2,7,2. In D. 39,2,9, however, Ulpian argues, on authority of Julian, that the owner can be forced to either pay damages (through the provision of surety for *praeteritum damnum*) or surrender his property, because those required to provide the *cautio damni infecti* were offered the same choice (eventually pressured by attachment of their property).

94 'Praesertim cum res quidem animales, quae damnum dederint, ipsae extent, aedes autem, si ruina sua damnum dederunt, desierint extare' ('especially because animate things that have caused damage remain in existence, whereas buildings whose ruins have caused damage cease to exist').

I. 4,8,2 and generalised in D. 39,2,7,1: objects of property, whether animate or inanimate, should not burden their owner beyond their value. The defendants argued that the same principle could with good reason (*optima ratione*) also be inferred from the Ordonnances of Charles V and Philip II. In their view, the Ordonnances comprised a partition of damages *among the ships*, limiting liability of the owners to the value of these ships[95]. Similarly, article 68 of the Laws of Wisbuy considered (only) the value of the ships involved, albeit with a different, geometrical formula. This limitation of liability for collision damage, then, allegedly also amounted to a rule of Dutch trade custom.

3.6 *The judgment of the supreme court*

In December 1629, the judges of the Supreme Court unanimously decided in the defendants' favour[96]. The following ruling was pronounced:

> The Court (...) condemns the defendants, each for 1/16 part, to pay the plaintiffs one half of the damage suffered by them as a result of the collision with the ship of Frans Claesz. van der Beets, and such in correspondence with the value of the ship of Jan IJsbrantsz. van Veenhuijsen as it was at the time of the collision with the foresaid ship, at interest of the *penning* sixteen as calculated from the litiscontestation in the lawsuit commenced by the plaintiff against Jan IJsbrantsz. van Veenhuijsen until final payment; also condemns the defendants to perform, in line with their presentation, that their fellow shipowners will also pay half of the foresaid damage in correspondence with the shares which they have had in the foresaid ship of Jan IJsbrantsz., in order that the foresaid plaintiffs will enjoy the whole value of the foresaid ship of Jan IJsbrantsz., at the same interest; denies the plaintiffs the rest of the claim submitted by them against the defendants[97].

95 See also *supra* at note 84. Coren himself did not agree with this interpretation, see *infra* at note 128.

96 Coren, *Observationes* (*supra*, n. 1), p. 419; *Resolutie* 21/12/1629 (Jansdr. *c.s.*/Blaeu *c.s.*), NA 3.03.02, no. 644/190.

97 *Dictum* 22/12/1629 (Jansdr. *c.s.*/Blaeu *c.s.*), NA 3.03.02, no. 936/108: "t Hof (...) condemneert de gedaechden elck voor een sestiende paert aende Impetranten te betalen d'eene helfte vande schade bij henluyden door het overseylen van 't schip van Frans Claesz. vander Beets geleden, ende dat naer advenant de waerde van het schip van Jan IJsbrantsz. van Veenhuijsen sulcx die geweest is ten tijde van het overseylen vande voorsz. scepe, metten interesse vandien jegens den penning XVI zedert de litiscontestatie in den processe by d'impetranten jegens de voorsz. Jan IJsbrantsz. geïntenteert totte effectuele voldoeninge toe; condemneert mede de gedaechden volgende haere presentatie te presteren dat haere medereeders naer advenant vande paerten die zij in 't voorsz. schip van Jan IJsbrantsz.

At rapporteur Coren's proposal, the Supreme Court unanimously condemned the defendants to pay half of the damage in proportion to their separate shares in the ship, with a limitation to the value of these shares[98]. In addition, they were obligated to make sure that the other shipowners would pay up as well, so as to enable the plaintiffs to recover the total value of this ship. Coren writes that the defendants 'could not be engaged beyond their share in the ship' and that it was sufficient to pay the value of this ship, without being liable any further[99]. As such, the plaintiffs could only recover 5/16th (ƒ2.063) of the value of Van Veenhuijsen's ship (ƒ6.600) from the defendants, and their claim as a whole could not be recovered beyond the value of this ship[100]. Apparently, it did not matter that the ship itself did not belong to the defendants anymore.

The proceedings for the determination of damages commenced in 1630, and encompassed the claims of both the shipowners and the charterers of

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hebben gehadt mede betalen sullen de helft vande voorsz. schade, in vougen dat d'voorsz. impetranten genieten sullen de geheele waerde van 't voorsz. scip van Jan IJsbrantsz., metten interesse vandyen als voren; ontseyt d'impetranten heuren vorderen eysch ende conclusie by hen jegens de gedaegden gedaen ende genomen'. The draft of the judgment in *Dictum* 21/12/1629 (Jansdr. *c.s.*/Blaeu *c.s.*), NA 3.03.02, no. 889/254 contains a few textual differences, which are irrelevant here. The 'presentation' mentioned in the judgment is laid down in *Conclusie* 19/12/1628 (Jansdr. *c.s.*/Blaeu *c.s.*), NA 3.03.02, no. 502/317. It might seem that the interest, which was set at 6,25% a year (the *zestiende penning*), is not subject to limitation. In the (later) judgment against Van Veenhuijsen, however, the interest was explicitly considered within the scope of limitation, see note 102.

98 For Coren's opinion, see *Resolutie* 21/12/1629 (Jansdr. *c.s.*/Blaeu *c.s.*), NA 3.03.02, no. 644/190: 'de gedaechden te condemneren elck voor een 1/16 te betalen de helft van de schade van het verongelucte schip, sulcx 'tselve waerdich is geweest ten tijde van 't ongeluck, cum interesse ende dat de gedaagden nopende 't vorder met hare presentatie mogen volstaan'. Coren refers to *Conclusie* 19/12/1628 (Jansdr. *c.s.*/Blaeu *c.s.*), NA 3.03.02, no. 502/317. His opinion was supported by Justices Van den Honert, Schotte, Van Asperen, Fagel, Pauw, De Casembroot, Van Reygersberge, De Jonge and president Van Brederode. See also Asser, *In solidum of pro parte* (*supra*, n. 18), p. 113; Punt, *Het vennootschapsrecht* (*supra*, n. 46), p. 92.

99 Coren, *Observationes* (*supra*, n. 1), p. 419: 'dat de voorsz. Gedaegdens niet verder en konden aen-gesproken werden in 't cas subject, als naer advenant elcx portie, daer mede sy aen 't voorsz. schip waren haerederende; Item dat sy mede mochten vol-staen, mits de voorsz. schade vergoedende, naer advenant de waerde van 't voorsz. schip, sonder in verder gehouden te zijn'.

100 The language of the above sources is confusing at times. The liability of the defendants is sometimes limited to the value of their *shares* in the ship, sometimes to the value of the ship. The best explanation of the confusion is that only *part* of the shipowners had been summoned, so that in their regard 'the value of the ship' is understood to mean 'the value of the shares in the ship'.

Van der Beets' ship[101]. Although the records of the proceedings do not render a specific and definite amount, the claim at stake is likely to have exceeded the value of the defendants' ship (ƒ6.600)[102]. During these proceedings, the Supreme Court decided in 1631 and 1632 that irrespective of the value of the claim, execution on the judgment against shipmaster Van Veenhuijsen could not extend beyond the total value of the ship and its cargo[103]. The contrast to the judgment of 1628, in which Van Veenhuijsen had simply been held liable to pay the claim in full, implies that the Supreme Court has changed its view on collision liability during the proceedings against Blaeu and his companions. Nevertheless, this alleviation was not much to Van Veenhuijsen's avail. Still unable to comply with the Court's decision, he remained in custody and

101 *Akte van dingtalen* 16/7/1630 (Van Amelant/Van Veenhuijsen), NA 3.03.02, no. 444/27. In these proceedings, Van Amelant and Van Steenwijck appear as 'merchants' litigating on their own and the shipowners' behalf. See, however, note 48.

102 The proceedings for the determination of damages were finalised before a supervisory judge (Schotte), whose sessions have not been recorded in the Court's archive. See *Resolutie* 20/2/1631 (Van Amelant *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 645/66; *Dictum* 20/2/1631 (Van Amelant *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 890/84-85; *Dictum* 26/2/1631 (Van Amelant *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 936, 138; *Resolutie* 13/10/1632 (Van Amelant *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 645/127; *Dictum* 13/10/1632 (Van Amelant *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 890/199-200; *Dictum* 22/12/1632 (Van Amelant *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 937/47. The plaintiffs had estimated their ship at ƒ8.000 and thus claimed ƒ4.000. Taking into account the shipmaster's working capital (ƒ880), the Supreme Court reached an estimate of ƒ4.500 in the *Resolutie*, which was subsequently cut down to ƒ3.500 before the dictum was pronounced. The freightage from Amsterdam to Riga had been estimated by the plaintiffs at ƒ1.501 and 17 *stuivers*, but the judges of the Supreme Court left this out of consideration (except judge Schotte, who was willing to be informed whether the payment of freightage had been affected by the collision). As to the charterers, then, the cargo had been estimated at ƒ2.990 and 12 *stuivers* by the plaintiffs (or ƒ1.495 and 6 *stuivers* if divided into halves), but the Supreme Court does not provide its own estimation and refers to a statement of the plaintiffs which is not included in the archives of the Court. This amount was to be set off against the freightage for the fatal return journey from Riga to Amsterdam and the 'usual expenses' that would have been due had the voyage been successfully completed. Taking everything into consideration, the principal sum is likely to have been lower than the value of the ship of the defendants (ƒ6.600), contrary to the plaintiffs' statement that the value of the defendants' ship was 'far from sufficient', Coren, *Observationes* (*supra*, n. 1), p. 414. Nonetheless, with interest the claim must have exceeded this amount. Both against Van Veenhuijsen and the shipowners, after all, the interest was set at 6,25% a year (the *penning zestien*) from the start of the proceedings against Van Veenhuijsen in 1618, and this amount was made subject to limitation like the other items. See also note 97.

103 *Ibid*. Van Veenhuijsen had made a statement to the same effect, *Resolutie* 20/2/1631 (Van Amelant *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 645/66. The fact that Van Veenhuijsen's liability was not limited to his share in the ship further underscores his position in the proceedings as shipmaster rather than shipowner.

died in 1632 or 1633. Coren himself had passed away in the council chamber of the Supreme Court in October 1631[104], without having included the sentence against Van Veenhuijsen in his *Observatio* 40. It remains uncertain whether any of the other shipowners came forward in response to the Supreme Court's judgment in *Jansdr. v. Blaeu*.

After Van Veenhuijsen's death, the plaintiffs started proceedings against the merchants who owned the cargo that Van Veenhuijsen had been transporting[105]. Before offloading in Amsterdam, these merchants had promised by letter to indemnify Van Veenhuijsen for any damage arising from the collision. It seems that this letter had been assigned to the plaintiffs at some point in the proceedings. Both on the basis of this indemnity promise and of their own interest, the plaintiffs demanded payment of half of their collision damage, albeit with a limitation to the value of the separate shares in the cargo at stake. In 1637, the Supreme Court condemned the merchants in accordance with this demand, without identifying the basis of their liability[106]. Arbitration was commenced for the purposes of valuating the defendants' shares in the cargo and finalising the case[107], and a final order of execution was issued in 1640[108].

3.7 *Possible* rationes decidendi

In *Jansdr. v. Blaeu* – the first Dutch Supreme Court case of its kind[109] – the Supreme Court ruled that the (subsidiary) liability of shipowners for collision damage is proportionate and limited by the value of their ship, blocking

104 P.J. Blok and P.C. Molhuysen, *Nieuw Nederlands Biografisch Woordenboek*, Leiden 1911-1937, vol. 2, p. 332-333.

105 *Rekest* 20/10/1633 (Jansdr. *c.s.*/Moens *c.s.*), NA 3.03.02, no. 37/514-515; *Conclusie* 2/12/1633 (Jansdr. *c.s.*/Moens *c.s.*), NA 3.03.02, no. 503/16.

106 *Resolutie* 12/10/1637 (Jansdr. *c.s.*/Moens *c.s.*), NA 3.03.02, no. 646/201; *Dicta* 15/10/1637 (Jansdr. *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 891/272-274 (279-281); *Dicta* 22/12/1637 (Jansdr. *c.s.*/Moens c.s.), NA 3.03.02, no. 938/46-48. As the basis of the claim cannot be identified with certainty, the liability of cargo owners and its limitation (the topic of Coren's *Observatio* 41) will not be discussed here.

107 *Vrijwillige condemnatie* 9/3/1640 (Van Amelant *c.s.*/Bosch *c.s.*). NA 3.03.02, no. 1069/415-426. See also *Notariële akte* 24/2/1638, *Notariële Archieven Amsterdam* 5075, inv. 953A, no. 600843/187-188; *Notariële akte* 17/5/1638, *Archieven van de Notarissen te Rotterdam* (ONA) 18, inv. 151, p. 639 (no. 387); *Notariële akte* 23/7/1638, ONA 18, inv. 151, p. 681-682 (no. 419); *Notariële akte* 23/7/1638, ONA 18, inv. 138, p. 534-535 (no. 339).

108 *Akte van dingtalen* 9/10/1640 (Jansdr. *c.s.*/Moens *c.s.*), NA 3.03.02, no. 454/41.

109 Thomas writes about 'new law', see Thomas, *The development* (*supra*, n. 5), p. 23; Ph.J. Thomas, *The interests of commerce or the fourth pillar*, Fundamina 9 (2003), p. 187-196, spec. p. 190. Cf. Delwaide, *Considérations* (*supra*, n. 2), p. 196; Rehme, *Die geschichtliche Entwicklung* (*supra*, n. 22), p. 114; R. Wagner, *Handbuch des Seerechts*, Leipzig 1884, vol. 1, p. 179; Asser, *In solidum of pro parte* (*supra*, n. 18), p. 113-114.

recovery of damages beyond their individual shares in the ship. The limitation is thus twofold: in relative and in absolute terms respectively. According to the defendants, the relative limitation to shares was a necessary consequence of the absolute limitation to the value of the ship[110]. Given the phrasing of the verdict in Coren's *Observatio* 40 and the final sentence against Van Veenhuijsen, moreover, the limitation seems to be effectuated *ipso jure* rather than through an invocation by the shipowners[111]. As such, the verdict is reminiscent of the 1603 verdict in the *Ponte* case, in which vicarious shipowner liability for the shipmaster's delicts was similarly limited *ipso jure*[112]. Given that Coren attached a summary of the *Ponte* case at the end of his *Observatio* 40[113], it is not unreasonable to suppose some influence here, although not many Roman-Dutch authors mooted this possibility[114]. It is remarkable as well that the limitation was monetary – physical ship surrender was not required.

The text of *Observatio* 40 does not describe a particular argument as decisive. This must be understood against the background of the secrecy of judicial deliberations, which was strictly complied with by early modern courts like the Supreme Court[115]. Nonetheless, an analysis of the arguments exchanged in the course of *Jansdr. v. Blaeu* may indicate that some arguments have been more convincing than others. What could have moved the Supreme Court to decide the case of *Jansdr. v. Blaeu* as it did?

It is unlikely that the *actio exercitoria* played a decisive role. Originally restricted to contracts, this action was also applied to the shipmaster's delicts by the seventeenth century but the (inculpable) collision at stake could hardly qualify as such[116]. Neither could collision be gathered among the incidents covered by the *actio furti / damni adversus nautas*, even if the

110 See par. 3.4.

111 See *supra* at notes 99 and 103. See also Diephuis, *Nadere beschouwing* (*supra*, n. 42), p. 206.

112 Lubbers, *The capture* (*supra*, n. 74), p. 190-191.

113 Coren, *Observationes* (*supra*, n. 1), p. 419-420.

114 See e.g. J.P. Taunay, *Disputatio juridica inauguralis an et quousque exercitores navium ex magistrorum factis obligentur*, Leiden 1802, p. 42: 'At vero cum ex delicto magistri non teneamur ultra id, quod ejus fidei permissum fuit, non puto ex casu fortuito nos ultra id posse obligari, quod fortunae fortisque vicisitudinibus exponere vovimus'.

115 Art. 12 *Instructie van den Hoogen Raade van appel in Hollandt*, 31/5/1582, GPB II, p. 790; P. Merula, *Synopsis praxeos civilis*, The Hague 1646, p. 500 (4.88.1.13); Druwé, *Loans* (*supra*, n. 38), p. 56-57, 127 (mentioning *Observationes* 1, 3 and 15 as exceptions).

116 Lubbers, *The capture* (*supra*, n. 74), p. 188-194, 204-214. Note that this application of the *actio exercitoria*, contrary to the plaintiffs' plea, could not be rooted in D. 14,1,1,2, see note 74.

proportionate nature of Roman quasi-delictual liability may have provided some inspiration[117].

The defendants referred to Dutch trade custom twice. The first invoked rule – that a shipmaster can only bind the shipowner in proportion to his share in the venture and not beyond the value of this share – is an exception to joint and several liability under the *actio exercitoria* and is confirmed by Grotius[118]. However, this rule of contract law can hardly have been applied to collision damage, other than by analogy. The second rule to which the defendants appealed – that the liability of a shipowner to compensate only half of the collision damage was limited to the value of his ship – is more complicated. Such a rule did exist in Northern Germany and the Baltic area and may have been taken up by Dutch merchants to some extent, but its existence as a binding rule of customary law had not been acknowledged by the High Court of Holland and the Great Council of Malines under the Ordonnances of Charles V and Philip II[119]. The rule was not raised in the case against Van Veenhuijsen, and it is not mentioned by contemporary Dutch scholars either[120]. The archival documents are not indicative of an order to produce evidence of the existence of the rule. Moreover, Coren presents this part of the argumentation as of secondary interest, and even brings out that the Supreme Court did not take it into consideration at all[121]. In contrast, Coren (or his editor) briefly mentions that this customary rule was only proven through a large group of witnesses (*turbe*) in the case of his *Observatio* no. 41, but it should be added that the legal dispute there boiled down to the liability of charterers, not shipowners.[122] The specific custom at stake must have been Dutch, as in Northern Germany and the Baltic area charterers were not liable for collision damage at all.[123] The legal position of charterers was not arranged for in the collision articles of

117 D. 4,9,7,5. Asser, *In solidum of pro parte* (*supra*, n. 18), p. 113 regards this as the most likely scenario.

118 Grotius, *Inleidinge* (*supra*, n. 20), p. 187-188 (3.1.31-32); Grotius, *De jure belli* (*supra*, n. 36), p. 247-248 (2.11.13); Punt, *Het vennootschapsrecht* (*supra*, n. 46), p. 81-82. Note that the *Inleidinge* mentions the entire share in the venture (*redinghe*), whereas in *De jure belli ac pacis* only the value of the ship and its cargo is mentioned.

119 See par. 2.

120 See *supra* at note 36.

121 Coren, *Observationes* (*supra*, n. 1), p. 419; Thomas, *The development* (*supra*, n. 5), p. 236.

122 Coren, *Observationes* (*supra*, n. 1), p. 419 ('hoc etiam vero probari per enquestam cujus fit mentio in sequendo observatione'). For *Observatio* 41, see p. 420-430. More specifically, the parties disagreed as to whether the charterers were liable if the sunken vessel had not been transporting any cargo. Further investigation of the archival materials underlying this *Observatio* is warranted.

123 Rehme, *Die geschichtliche Entwicklung* (*supra*, n. 22), p. 91-92, 138.

the Ordonnances of Charles V and Philip II[124], creating less obstruction to the application of customary rules. Influence from the proceedings of *Observatio* 41 becomes more implausible as the liability of shipowners and charterers for half of the collision damage was not only limited to the value of their ship and cargo, but also apportioned between them in proportion to the values of ship and cargo as a matter of customary law, whereas no such principle applied in the case of *Jansdr. v. Blaeu*[125]. Furthermore, in *Observatio* no. 41 the liability of the shipmaster is limited to his wage, rather than to the value of the ship like in the case against Van Veenhuijsen. The case of *Observatio* 41 was only decided 4 months after the judgment against the shipowners in *Jansdr. v. Blaeu* (in May 1630), and the preceding evaluation of the testimonial evidence was not carried out by Coren but by rapporteur and supervisory judge Van den Honert[126]. Thus, it is unlikely that the Supreme Court considered the procedure of *Observatio* 41 to arrive at the outcome of *Jansdr. v. Blaeu*[127].

Given the arithmetical partition of damages under the Ordonnances of Charles V and Philip II, it is improbable that the Supreme Court was guided by these statutory instruments to arrive at its judgment. Under the Ordonnance, the damage was to be split in half between the shipmasters (and, subsidiarily, the shipowners), *irrespective* of the value of the ships. Coren explicitly states that the Ordonnances do *not* refer to a partition 'among the ships' as put forward by the claimants[128]. As discussed, the High Court of Holland and the Great Council of Malines similarly had not seen any room for liability limitation under the Ordonnance of Philip II[129]. The defendants' appeal to article 68 of the Laws of Wisbuy is of limited avail as well. As to the law of collision, the Laws of Wisbuy had been superseded by the Ordonnances of Charles V and Philip II, and the geometrical partition of damages it prescribed was irreconcilable with a limitation of liability to the value of the ship[130].

The Supreme Court may have given some weight to the economic arguments put forward by the parties. The claimants argued that proportionate

124 See e.g. Van Leeuwen, *Bellum juridicum ofte den oorlogh der advocaten*, Amsterdam 1683, p. 382 (case 49).

125 See also note 165.

126 Except for Justice Van Asperen, the judges who decided the case of *Observatio* 41 were the same as in the case of *Jansdr. v. Blaeu*, see Resolutie 17/5/1630 (*Musch c.s./Pauwelsz. c.s.*), NA 3.03.02, no. 645/24; note 98.

127 Extrapolating backward, Asser thinks that the 'prevailing legal practice' did play a role in the Supreme Court's judgment, Asser, *In solidum of pro parte* (*supra*, n. 18), p. 113. Cf. Taunay, *Disputatio* (*supra*, n. 114), p. 32.

128 Coren, *Observationes* (*supra*, n. 1), p. 417. See also note 31.

129 See par. 2.

130 See *supra* at note 23.

liability with a limitation to the value of the ship would force creditors to go through the arduous process of addressing each debtor separately to collect no more than the latter's share, whereas the defendants objected that unlimited joint and several liability would expose a maritime investor to greater risks than the mere loss of his investment, especially if his partners proved insolvent. Stressing the deterring effects of these scenarios, both parties thus attached great importance to the maritime investment climate, from the perspective of the creditor and the debtor respectively – which in the end are two sides of the same coin[131]. The creditor argument goes back to the *actio exercitoria* and is of some weight in favour of an undivided liability[132], although the Supreme Court's competence to hear collision cases in first instance simplifies the issue of jurisdiction. Still, the economic argument does not work against limitation of liability for collision claims. Such claims do not exceed the value of the sunken or damaged ship, and this vessel had already been exposed to other real risks (like shipwreck) which did not impede maritime investments either. Besides, it seems that both shipwreck and collision damage could be insured against[133]. The debtor argument appears to be stronger. After all, limitation of liability for collisions restricts the debtor's risk to the value of his (share in the) ship as well and offers economic security, in evocation of the well-known axiom 'one cannot lose more to the sea than one has entrusted to her'[134]. This line of reasoning may have been inspired by Grotius, who applies a similar line of reasoning in support of limited liability under the *actio exercitoria* as a matter of Dutch customary law[135]. Nonetheless, in *Observatio* 40 the argument is only adduced in the discussion of proportionate liability, without being developed to its fullest extent.

131 This ambiguity is also noticed by Zimmermann, *The law* (*supra*, n. 14), p. 470. Cf. 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. 18 (3.31.2); Asser, *In solidum of pro parte* (*supra*, n. 18), p. 111, 153-154.

132 See D. 14,1,1,25 and D. 14,1,2.

133 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. 353-58, 372-374, 383-386.

134 This argument is stressed by Asser, who seems to regard it as decisive, Asser, *In solidum of pro parte* (*supra*, n. 18), p. 111, 113. Cf. Van Dongen, *Contributory negligence* (*supra*, n. 15), p. 248.

135 Grotius, *De jure belli* (*supra*, n. 36), p. 247-248 (2.11.13): 'Absterrentur enim homines ab exercendis navibus, si metuant ne ex facto magistri quasi in infinitum teneantur. Atque adeo apud Hollandos, ubi mercatura pridem maxime viguit, et nunc et olim lex illa Romana observata non est: imo contra constitutum, ne exercitoria etiam universi amplius teneantur, quam ad aestimationem navis, et eorum qui in navi sunt'. Cf. Grotius, *Inleidinge* (*supra*, n. 20), p. 187-188 (3.1.31-32).

Among all the arguments which feature in Coren's case report, a remarkable but important position is taken by the legal construct of noxal surrender[136]. At first sight this appears odd. Noxal surrender had fallen into disuse in the Middle Ages together with slavery and was generally thought not to be a part of the *jus commune*[137]. Yet the judges mention the ship (not storm) 'that had inflicted the damage', which Coren phrases in noxal terms as *res quae nocuit* – even if the noxal surrender of Roman law only applied to (quadruped) animals and slaves, not to inanimate objects like ships[138]. It is unlikely that Coren considered noxal surrender applicable *as such*. Had he done so, the new owner(s) (who had acquired the ship in 1621) should have been liable due to the *droit de suite* associated with noxal liability[139]; liability should have been joint and several instead of proportionate[140]; liability should have been limited not to the *value* of the ship but to the ship itself; this limitation should not have occurred *ipso jure* but through invocation by the shipowners[141]; and limitation could only have been effectuated by *all* shipowners together[142]. Paraphrasing I. 4,8,2, Coren instead stressed an equitable principle that he considered to be the very basis (*summa* or *optima ratio*) of noxal liability: inculpable owners should not be burdened by their property beyond its value[143]. Although non-contractual, it bears a striking resemblance to the principle brought forward to rationalise limited shipowner liability under the *actio exercitoria*, namely that shipowners should not be exposed to greater perils than the mere loss of the investment that they put at risk. The reference to D. 39,2,7,1 then served to show

136 Thomas, *The development* (*supra*, n. 5), p. 235-236 seems to regard the noxal argument as the most important.

137 Zimmermann, *The law* (*supra*, n. 14), p. 118.

138 *Resolutie* 13/10/1632 (Van Amelant *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 645/127; *Dictum* 13/10/1632 (Van Amelant *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 890/199-200; *Dictum* 22/12/1632 (Van Amelant *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 937/47; Coren, *Observationes* (*supra*, n. 1), p. 418. See also Zimmermann, *The law* (*supra*, n. 14), p. 1099-1100. Cf. notes 186 and 190.

139 'Noxa caput sequitur' (D. 9,1,1,12; D. 9,4,43).

140 D. 9,4,8.

141 D. 9,4,1.

142 D. 9,4,8.

143 This understanding of the reference to I. 4,8,2 is also bolstered by the text's limited usefulness for the argument of the plaintiffs, see *supra* at note 88. Other Roman texts similarly adduce the principle as a matter of equity in support of noxal surrender, see Gai. 4,75; I. 4,8,2; D. 9,4,2*pr.*; D. 39,2,7,1; D. 50,17,133. Nonetheless, most modern authors agree that in Roman law, noxal surrender served to enable the damaged party to take revenge on the slave or animal that caused damage, Zimmermann, *The law* (*supra*, n. 14), p. 1099; Delwaide, *Considérations* (*supra*, n. 2), p. 121; A.J.B. Sirks, *Delicts*, in: D. Johnston (ed.), The Cambridge companion to Roman law, Cambridge 2015, p. 246-271, spec. p. 265.

that this noxal principle also applied to inanimate property – in opposition to the Accursian gloss, which denied noxal liability for inanimate objects entirely and vetoed an extensive interpretation of this text, *in particular* with regard to ships[144]. Coren thus went to great lengths to provide limitation of shipowner liability with an authoritative (i.e. Roman) legal basis[145]. This perception of liability limitation might well account for the proportionate nature of collision liability too, in line with the argument of the defendants[146]: if damages must be recovered from (the value of) the ship, this may only concern the shipowners in proportion to their share in that ship.

The French scholar Hugo Donellus (1527-1591) seems to have been the first to transcend specific Roman sources and formulate the above equitable principle as a general, overarching principle of equity[147]. Donellus does not apply the principle to ships, but may have influenced Coren's ideas. In 1619, the illustrious Savoyard jurist Antonius Faber (1557-1624) did find a link between noxal liability and ship collision. Commenting on D. 9,2,29,2, Faber argued that shipowners whose ships have been sent out badly manned or equipped are guilty of negligence and liable for resulting ship collision with an *actio in factum* that is '*quasi noxalis*'[148]. Hence, instead of paying damages, they may opt to

144 See gloss *Non esse* at D. 9,2,29,2 (on ship collision as a result of force majeure): 'Nam nec pro rebus inanimatis agitur noxaliter, vel lege Aquilia, nisi in casu ut [D. 39,2,7,1]'. Accursius refers to D. 39,4,16,8, which similarly discharges shipowners in case of heavy weather.

145 Asser does not think that the Supreme Court took the law of noxal surrender into consideration, see Asser, *In solidum of pro parte* (*supra*, n. 18), p. 113. He regards the noxal reasoning as an argument *ex post*, not invoked by the defendants themselves. This is improbable, however. The *Observatio* does ascribe the noxal argumentation to the litigating parties, and Coren likely collected the commentaries and references in his *Observationes* (including those pertaining to the law of noxal surrender) during his research activities as rapporteur in preparation of the Court's deliberations, see par. 3.1.

146 See par. 3.4.

147 H. Donellus, *Commentarii de jure 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. 4,8,2; D. 9,1,1; D. 9,4,2*pr*.; D. 39,2,7,1. See also D. Johnston, *Limiting liability: Roman law and the civil law tradition*, Chicago-Kent Law Review, 70 (1995), p. 1515-1538, spec. p. 1536. This abstraction is not yet found in the works of Donellus' teachers, cf. e.g. F. Duarenus, *Opera omnia*, Frankfurt am Main 1607, p. 602 (at D. 39,2); J. Cujacius, *Opera omnia*, Paris 1658, vol. 1, p. 1567 (*Ad Africanum tractatus* no. 9, at D. 39,2,44*pr*.) and vol. 10, p. 687 (*In libros* IV *priores Codicis Justiniani*, no. 41).

148 A. Faber, *Rationalia in secundam partem Pandectarum*, Geneva 1619, p. 887 (at D. 9,2,29,2). Unlike Accursius, Faber imputes the broken cables or the absence of a capable shipmaster mentioned in D. 9,2,29,2 ('fune rupto aut cum a nullo regeretur') to the shipowner's

surrender their ship. Faber is aware that (noxal) liability for inanimate objects like ships is denied by Accursius and goes against D. 39,2,7,1[149], but trivialises these complications on the ground that nominate actions may be 'quasi-noxal' too, such as the *actio communi dividendo*, which is ascribed with noxal features under certain circumstances[150]. It cannot be ruled out that Faber may have inspired Coren to some extent, although he is not mentioned in *Observatio* 40. Even so, Faber's argument cannot have served as a basis of limitation of shipowner liability for a number of reasons. Firstly, Faber keeps the idea of 'quasi-noxality' separate from inculpable ship collision, which under Roman law does not result in liability at all[151]. Rather, he limits it to situations where a degree of *culpa* of the shipowner is present, which in itself runs counter to the law of noxal surrender[152]. A manifestation of the *mos gallicus*, secondly, Faber's reasoning primarily seems to be aimed at a refutation of Accursius' denial of noxal liability for inanimate objects as a matter of (historical) Roman law, and not so much at an active legitimation of limitation of shipowner liability under

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fault and thus rejects the negation in *cum domino agendum non esse*, see also A. Faber, *Conjecturarum juris civilis libri viginti*, Geneva 1609, p. 121-122 (5.17). An *actio in factum* applies and not the *actio ex lege Aquilia directa*, because the shipowner cannot be said to have inflicted damage (*quasi*) *corpore suo*, cf. *supra* at notes 5 and 14. In Faber, *Rationalia* (*supra*, n. 148), p. 888 (at D. 9,2,29,4), Faber discerns an *actio in factum* against the shipowner on the same basis, with referral to I. 4,5,3 and its implication of *culpa in eligendo*, cf. note 6. Like Accursius, Faber thus renders the shipowner liable next to the *ducator* and *gubernator*, albeit not on the basis of vicarious liability (as one would expect under the law of quasi-delict) but on the basis of *culpa* on his own.

149 See also Faber, *Conjecturarum* (*supra*, n. 148), p. 121-122 (5.17). When referring to D. 39,2,7,1, Faber is pondering on strict liability of owners of inanimate objects and not so much on the limitation of that liability through noxal surrender. After all, the noxal comparison in D. 39,2,7,1 only serves to rationalise the *absence* of liability of property owners for compensation after their property has collapsed and ceased to exist, rendering noxal surrender of that property technically impossible, see par. 3.5.

150 Faber refers to the application of this action to the case of a co-owned slave who has committed a delict against one of the owners in D. 9,4,8, D. 9,4,41 and D. 47,2,62*pr*. The plaintiff can sue the other co-owners with the *actio communi dividundo* instead of a noxal action, and it is up to the judge's discretion to decide whether they can surrender their parts in the slave instead of monetary compensation. This also goes for new owners, which is explained in D. 47,2,62*pr*. as a manifestation of *noxa caput sequitur*. The 'quasi-noxal' qualification is probably borrowed from Cujacius, see e.g. Cujacius, *Opera* (*supra*, n. 147), vol. 1, p. 1487-1488 (*Ad Africanum tractatus* no. 8, at D. 30,110) and vol. 9, p. 654-656 (at C. 6,2). D. 39,4,16,8 is then set apart by Faber. This text had been adduced by Accursius in the context of D. 9,2,29,2, but does not fit Faber's quasi-noxal narrative, see note 144.

151 Faber, *Rationalia* (*supra*, n. 148), p. 887-888 (at D. 9,2,29,2 resp. D. 9,2,29,4).

152 See e.g. D. 9,4,2.

contemporary maritime law[153]. Lastly, Faber does not arrive at a general equitable principle in support of noxal ship surrender[154].

Coren also distinguishes himself from the aforementioned authors by putting particular emphasis on the absence of guilt (*sine injuria, aut culpa*), a requirement which is not highlighted in I. 4,8,2 or D. 39,2,7,1 and is not (explicitly) mentioned by Donellus either[155]. The accentuation is of some importance. In the jurisprudence of the seventeenth century, Roman and natural law perspectives dictated a requirement of *culpa* for delictual liability[156], which raised scepticism towards strict liability. Instances of quasi-delictual liability in Roman law were therefore sometimes explained through a (conclusive) presumption of guilt (*culpa imputativa*)[157]. In the same spirit, Grotius regards the partition of damages in case of inculpable ship collision as a mere pragmatic answer to the near impossibility of proving *culpa* at sea and explains the division of damages as a matter of civil law, not natural law[158]. Although not yet providing for the possibility of (noxal) ship surrender, he holds collision damage on the same footing as the Roman rules on noxal liability since both depart from *ownership* (not *culpa*) as a cause for liability[159]. The phrasing of D. 39,2,7,1, then, could comfortably be fit into this narrative. In his report of *Jansdr. v. Blaeu*, Coren accommodates the *culpa*-centered paradigm with a novel solution that

153 In his polemical dedication of the *Rationalia* (*supra*, n. 148) to Maurice of Savoy, Faber goes on at Accursius and his followers. He takes it as his task to cleanse the learned jurisprudence of their 'errors' and 'barbarisms' and protect the integrity of the original Roman texts. A similar approach, he adds, also stands at the basis of his *Conjecturae*, cf. note 9 and 148. Note that Faber does not treat the law of ship collision in his *Codex Fabrianus*, a collection of decisions rendered during his presidency of the *Sénat de Savoie*.

154 Faber's reference to D. 39,2,7,1 serves a different purpose, see note 149.

155 It is found in D. 9,4,2*pr*., but Coren does not refer to this text.

156 See Grotius, *De jure belli* (*supra*, n. 36), p. 319 (2.17.1); Zimmermann, *The law* (*supra*, n. 14), p. 1004, 1032-1034; J. Sampson, *The historical foundations of Grotius' analysis of delict*, Leiden 2018, p. 25-28, 233.

157 H. Wicke, *Respondeat Superior: Haftung für Verrichtungsgehilfen im römischen, römisch-holländischen, englischen und südafrikanischen Recht*, Berlin 2000, p. 124-125; Zimmermann, *The law* (*supra*, n. 14), p. 19, 1129.

158 Grotius, *De jure belli* (*supra*, n. 36), p. 324 (2.17.21). See also Van Bijnkershoek, *Quaestionum* (*supra*, n. 14), p. 672-673 (4.18), cf. p. 688 (4.20).

159 Grotius, *De jure belli* (*supra*, n. 36), p. 324 (2.17.21); Sampson, *The historical foundations* (*supra*, n. 156), p. 27-28. Cf. Van Dongen, *Contributory negligence* (*supra*, n. 15), p. 246; J. Sampson, *The limits of natural law: liability for wrongdoing in the Inleidinge*, Grotiana, 40 (2019), p. 7-27, spec. p. 14-16, 25-27. The *Inleidinge*, too, discusses liability for ship collision immediately after liability for damage inflicted by animals, both as a matter of *misdaed door wetduiding*, see Grotius, *Inleidinge* (*supra*, n. 20), p. 304 (3.38.16-18). Both texts do not discuss the Roman quasi-delicts, because in those cases the cause of damage is not among the property of the defendant. See also *supra* at note 36.

is both elegant and equitable, at least to Roman law standards. Although a shipowner is still held to be strictly liable for damage inflicted by his ship in the absence of any *culpa* of his own, this 'inequity' is mitigated by limiting his liability to the value of that ship. Coren's appeal to noxal surrender thus serves to align the application of the Ordonnances of Charles V and Philip II with natural equity.

After having decided on the liability of the shipowners, the Supreme Court limited the liability of shipmaster Van Veenhuijsen to the value of the ship and its cargo. The decision is not described in *Observatio* 40, and its underlying reasons cannot be clearly deduced from the archival documents. Perhaps the Supreme Court, mindful of the limitation of subsidiary shipowner liability (and possibly already pondering on the position of cargo owners), aimed to limit the overall recoverability of inculpable collision claims to the value of the ship and its cargo as a general rule. If so, this would have benefitted shipmaster Van Veenhuijsen as the bearer of primary liability. It is not unthinkable either that the Supreme Court merely aimed to counter circumvention of the limitation of liability of shipowners and cargo owners through legal action against the shipmaster. Given their contractual relation to the shipmaster, the shipowners and cargo owners might otherwise have been exposed to unlimited recourse action.

4 Reception of *Jansdr. v. Blaeu*

Jansdr. v. Blaeu appears to be the first published judgment limiting shipowner liability for ship collision in Roman-Dutch law[160]. Published collections of

160 See note 109. Some authors casually refer to the (undated and anonymised) *decisiones* 48 and 49 in a collection of case law of the Supreme Court and the High Court of Holland, which has (contestedly) been attributed to Supreme Court judge Cornelis Neostadius: *Curiae Hollandiae, Selandiae & West-Frisiae decisiones, tam Supremae quam Provincialis*, Leiden 1627, p. 166-168 (for a Dutch translation, see A. van Nispen, *Hollandse praktijk in rechten*, Rotterdam 1655, p. 130-132); Druwé, *Loans* (*supra*, n. 38), p. 118-125. See e.g. Van Leeuwen in: Q. Weytsen, *Een tractaet van avarien*, ed. Van Leeuwen, The Hague 1651, p. 15; Van Glins, *Aenmerkcingen* (*supra*, n. 9), p. 92, 99; S. van Leeuwen, *Censura forensis theoretico-practica*, Amsterdam 1685, p. 552 (5.31.8); J. Voet, *Observationes ad Hugonis Grotii manudictionem*, ed. P. van Warmelo and C.J. Visser, Praetoria 1987, vol. 1, p. 227-228 (at 3.38.18); E. van Zurck, *Codex Batavus*, Delft 1711, p. 661-662; J. Munniks, *Handleiding tot de hedendaagsche rechtsgeleerdheid, volgens order van het Romeinse recht*, Amsterdam 1776, vol. 1, p. 48; F.L. Kersteman, *Hollandsch rechtsgeleerd woorden-boek*, Amsterdam 1777, p. 342-343. Both *decisiones* first appear in the second edition of 1627 and thus predate the case of *Jansdr. v. Blaeu*. The content of these verdicts, however, is fairly specific. In

decisiones like Coren's *Observationes* were influential in the development of early modern (commercial) law, despite seldomly providing a clear *ratio decidendi*. After all, they could express a custom of the court (*consuetudo judicandi*)[161] or formulate clear legal rules with a certain degree of precedential force[162]. As such, Coren's *Observationes* were well-known among Roman-Dutch scholars[163]. The influence of *Observatio* 40, however, is not limited to the mere introduction of limitation of collision liability – Coren's treatment of the case also shaped the way this legal figure was framed and understood by later scholars. Incidentally, limited liability for inculpable ship collision was explained by reference to the Dutch custom of limited liability under the *actio exercitoria*, and rationalised through the principle that shipowners should not be exposed to greater risks than the mere loss of their investment, as specified by Grotius

decisio 48, the Supreme Court decides that goods lost as a result of ship collision can only be estimated in accordance with the price of these goods at the place of destiny (i.e. including loss of profit) if no other marine risks were to be expected for the rest of the journey. In *decisio* 49, the Supreme Court decided that if a ship that was involved in a collision is arrested, the plaintiff cannot attach its cargo without summoning the cargo owners too – unlike jettison of cargo, in which case the shipmaster can simply retain the remaining cargo in order to compel the owners to contribute in the loss under general average. Both *decisiones* concern inculpable ship collision and liability was therefore for only half of the total damage. The texts do not indicate that this liability exceeded the value of the remaining ship. In both cases, the remaining ship had been attached – and in *decisio* 49 the High Court had declared that ship and cargo were to be sold by execution – but this does not mean *per se* that the ship served as an *exclusive* object of recourse. Cf. Van Dongen, *Contributory negligence* (*supra*, n. 15), p. 250-251. Further investigation of the archival materials underlying these *decisiones* is warranted, but for the moment all that can be said is that they may not necessarily comprise a limitation of liability.

161 Reference was therefore made to D. 1,3,34; D. 1,3,38. In the preface to Coren, *Observationes* (*supra*, n. 1), Coren's widow and children state that some *Observationes* could be interpreted as customs of the court, others as *prudentum responsa*, Druwé, *Loans* (*supra*, n. 38), p. 73-74, 126.

162 A.J.B. Sirks, *Sources of commercial law in the Dutch Republic and Kingdom*, in: H. Pihlajamäki e.a. (ed.), Understanding the sources of early modern and modern commercial law: courts, statutes, contracts, and legal scholarship, Leiden 2018, p. 174. Although precedents did not have binding force in principle (under reference to C. 7,45,13), this could be different for sovereign courts like the Supreme Court (under reference to C. 1,14,12), see C.H.O. Verhas, *Le Hoge Raad* (*1582-1795*), in: B. Diestelkamp (ed.), Oberste gerichtsbarkeit und zentrale Gewalt im Europa der frühen Neuzeit, Cologne 1996, p. 127-152, spec. 129; C.H.O. Verhas, *De beginjaren van de Hoge Raad van Holland, Zeeland en West-Friesland*, The Hague 1997, p. 33; Ibbetson/Wijffels, *The techniques* (*supra*, n. 41), p. 16-20; Zwalve/Jansen, *Publiciteit* (*supra*, n. 39), p. 143, 151; Druwé, *Loans* (*supra*, n. 38), p. 73-74.

163 E.M. Meijers, *Uitgegeven en onuitgegeven rechtspraak van den Hoogen Raad en van het Hof van Holland, Zeeland en Westfriesland*, Tijdschrift voor Rechtsgeschiedenis, 1 (1919), p. 400-421, spec. p. 403; Zwalve/Jansen, *Publiciteit* (*supra*, n. 39), p. 151.

and the defendants in *Jansdr. v. Blaeu*[164]. Given the non-contractual nature of collision liability, however, it was the noxal analogy in Coren's case report in particular that turned out to be widely influential. Taco van Glins, who wrote an important commentary on the Ordonnance of Philip II in 1665, writes that collision damage falls upon the ships and their cargo[165]. Repeating Coren's words, he clarifies that the shipowners 'cannot be engaged' beyond the value of (their share in) the ship[166], thus similarly envisaging a limitation of liability by operation of law. Van Glins then rephrases this as 'letting the plaintiff keep the ship for his damage' and applies the term *noxae dedere*, that is, 'to surrender the object that caused the damage for that damage'[167]. The first Dutch

164 See e.g. Groenewegen van der Made in: Grotius, *Inleidinge* (*supra*, n. 20), p. 304 (note 19, at 3.38.16), referring to Groenewegen van der Made, *Tractatus* (*supra*, n. 9), p. 62 (at I. 4,7); Van Glins, *Aenmerkcingen* (*supra*, n. 9), p. 92, referring to Vinnius in Peckius, *Commentaria* (*supra*, n. 9), p. 155. Cf. Van der Keessel, *Praelectiones* (*supra*, n. 131), vol. 5, p. 383. Taunay eventually merges this principle with the equitable principle derived from I. 4,8,2 and D. 39,2,7,1, see note 114.

165 Drawing on Coren's *Observatio* 41, Van Glins regards the partition of collision damage as a form of general average, see Van Glins, *Aenmerkcingen* (*supra*, n. 9), p. 91-92. In this *Observatio*, the liabilities of shipowners and charterers for half of the collision damage are proportionate and limited to the value of their ship and cargo respectively, and the shipmaster and the crew are held to be liable for damage resulting from inculpable ship collision with a limitation to the freightage and wages plus portage, see *supra* at note 125. As to the shipmaster, this rule is incompatible with the Ordonnances of Charles V and Philip II and the outcome of the case of *Jansdr. v. Blaeu*. The position of the crewmembers was however not regulated under the Ordonnances of Charles V and Philip II and could thus be shaped by customary law, just like the position of the charterers. To elucidate these positions, then, Coren refers – merely by way of comparison, as it seems – to the obligation of shipmaster and crew to contribute in general average as set forth in Quintijn Weytsen's influential *Tractaet van avarien*, see Coren, *Observationes* (*supra*, n. 1), p. 422-424. Coren similarly refers to the law of jettison in order to explain the estimation of the value of the cargo in the remaining ship. The law of general average, however, was not considered applicable to ship collision as such damage does not serve to protect ship or cargo, see Peckius, *Commentaria* (*supra*, n. 9), p. 262-264; Weytsen, *Een tractaet* (*supra*, n. 160), p. 8. Besides, the arithmetical partition of collision damages does not correspond with the calculation of contributions in general average. Cf. Verwer, *Nederlants see-rechten* (*supra*, n. 24), p. 123 (wrongly referring to D. 14,2,2*pr*. (at *aequissimum*) and D. 14,2,2,2 (at *placuit*)); art. 255 *Ordonnance* City of Rotterdam, 28/1/1721 (reprint *Ordonnantie op het stuck van asseurantie ende avarye, mitsgaders zee-zaken*, Rotterdam 1748); Van Bijnkershoek, *Quaestionum* (*supra*, n. 14), p. 691 (4.20); D.G. van der Keessel, *Theses selectae juris Hollandici et Zelandici*, Leiden 1800, p. 277-278 (nr. 812-813); Van der Keessel, *Praelectiones* (*supra*, n. 131), vol. 5, p. 404-405 (3.38.16, at *half ende half*).

166 Van Glins, *Aenmerkcingen* (*supra*, n. 9), p. 91-92. Cf. *supra* at note 99.

167 Van Glins, *Aenmerkcingen* (*supra*, n. 9), p. 99. Van Glins refers to title I. 4,8.

codification of limitation of liability for collision damage, in the Rotterdam Maritime Ordonnance of 1721, similarly provides for an *ipso jure* effect[168].

In Roman law, however, the noxal liability of owners of slaves and quadruped animals was not *ipso jure* limited to the value of the slave or animal that had caused the damage. Rather, the owner was liable for the entire sum, but could opt to surrender the slave or animal to the plaintiff instead of paying damages[169]. One could think of this optional right as a secondary obligation, fulfilment of which would cancel the first, or as a *facultas solvendi*. Under the influence of the noxal framework of Coren's *Observatio* 40, shipowner liability for collision damage came to be understood in the same manner[170]. As early as 1644, Simon Groenewegen van der Made pointed out that shipowners could opt to avoid liability either by surrendering their ship or paying its value[171]. Many later Roman-Dutch authors pursued this line of thought, arguing that shipowners are liable for half of the damage resulting from inculpable ship collision but may discharge themselves by 'noxally' surrendering (the value of) their ship[172]. Among them is Johannes Voet[173], who even uses liability for

168 Art. 255, 256, 259 & 268 *Ordonnance* City of Rotterdam, 28/1/1721 (reprint *Ordonnantie* [*supra*, n. 165]). Unlike *Jansdr. v. Blaeu*, art. 268 restricts the liability of shipmasters who own a share in the ship to their share.

169 See e.g. D. 9,4,1.

170 Cf. Delwaide, *Considérations* (*supra*, n. 2), p. 196; R. Wagner, *Handbuch* (*supra*, n. 109), vol. 1, p. 179.

171 Grotius, *Inleidinge* (*supra*, n. 20), p. 304 (note 19, at 3.38.16). Groenewegen van der Made does not explicate the noxal argumentation from Coren's *Observatio* 40, however.

172 See e.g. Van Leeuwen, *Censura* (*supra*, n. 160), p. 552 (5.31.8); Van Zurck, *Codex* (*supra*, n. 160), p. 661-662; Van Bijnkershoek, *Quaestionum* (*supra*, n. 14), p. 688 (4.20); Van der Keessel, *Praelectiones* (*supra*, n. 131), vol. 5, p. 404 (3.38.16, at *half ende half*), cf. vol. 4, p. 18 (3.1.31, at *elk voor haar aandeel*) and vol. 5, p. 382 (3.37.7, at *den gebrekkigen*). In his formulation of *noxae deditio* as applied to ship collision, Van Glins gives a hint in the same direction, Van Glins, *Aenmerkcingen* (*supra*, n. 9), p. 99. Oddly, Van Leeuwen does not mention any liability limitation in Weytsen, *Een tractaet* (*supra*, n. 160), p. 15; S. van Leeuwen, *Het Rooms-Hollandse Regt*, Amsterdam 1664, p. 439-440 (4.39.7). Neither so does Vinnius in Peckius, *Commentaria* (*supra*, n. 9), p. 263-264. Kersteman, *Woorden-boek* (*supra*, n. 160), p. 342 asserts that the understanding of collision liability in terms of the *actio de pauperie* was common among legal scholars but had not gained force of law for the sake of maritime commerce, cf. *infra* at note 192. On p. 343, however, he does acknowledge the possibility of noxal ship surrender.

173 Voet, *Observationes* (*supra*, n. 160), vol. 1, p. 227-228 (at 3.38.18); J. Voet, *Commentarius ad Pandectas*, The Hague 1707, vol. 1, p. 302 (4.9.10), 689 (14.1.7). The latter passages, however, only deal with *culpable* ship collision. In Voet's construction of it, culpable ship collision, even if a delict, still falls under the shipmaster's *praepositio* and therefore triggers shipowner liability. Inculpable ship collision is treated within the context of the *lex Aquilia* in vol. 1, p. 543-544 (9.2.15-16), but this text only states that inculpable collision damage should be 'borne by both sides' and does not provide indications of liability limitation. In

ship collision to prove that the figure of noxal surrender still existed in law and accuses those who think otherwise of making a 'heaven-wide' mistake, even if slavery had fallen into disuse on the European continent[174]. That limitation of collision liability was also understood this way by practitioners is testified by Adriaan Verwer, whose personal experiences as a merchant must have provided him with good insight into maritime legal practice[175]. Stressing the facultative nature of noxal surrender, Verwer states that liability limitation only becomes relevant once the defendant's liability for half of the collision damage has first been established by verdict[176]. It is only then that the defendant, under 'the general maritime law of our country', may choose to abandon his ship and, by doing so, secure his other property against recourse by the plaintiff[177]. Verwer specifies that it is only this particular ship with its cargo – the physical cause of damage, which he terms *corpus noxium* – that should be surrendered, and not (the profits of) his maritime investment *as such*. This is an important point. The liability of the shipowner under the *actio exercitoria* was limited to his (entire) investment under Dutch custom[178], but Verwer insists that this rule of contract law be kept apart from the law of ship collision, which he regards as quasi-delictual[179]. This is another indication that limitation of collision liability was not simply borrowed from contemporary contract law.

The conceptualisation of limitation of collision liability as a form of *noxae deditio*, so complete as to induce a technical transformation from a limitation

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vol. 1, p. 557 (9.4.10), however, Voet insists that his treatment of the *lex Aquilia* does cover limitation of shipowner liability for collision damage as a form of *noxae deditio*. See also Lubbers, *The capture* (*supra*, n. 74), p. 204-210.

174 Voet, *Commentarius* (*supra*, n. 173), vol. 1, p. 557 (9.4.10). Groenewegen van der Made was of the same view, see *infra* at note 183.

175 Even so, Van Bijnkershoek mocks Verwer's lack of legal education, see e.g. Van Bijnkershoek, *Quaestionum* (*supra*, n. 14), p. 595-506 (3.16), 519 (4.1), 691 (4.20), 698-699 (4.21).

176 Verwer refers to D. 9,4,1, Verwer, *Nederlants see-rechten* (*supra*, n. 24), p. 122-123.

177 Interestingly, Verwer asserts that collision damage had to be borne by the 'mass' of the two ships involved under the Ordonnance of Philip II, see Verwer, *Nederlants see-rechten* (*supra*, n. 24), p. 120. Contrary to Coren (see *supra* at note 128), he thus implies that the Ordonnance already provided for an *ipso jure* limitation of shipowner liability by itself.

178 See note 118.

179 Verwer, *Nederlants see-rechten* (*supra*, n. 24), p. 122-123, where a distinction is made between obligations 'uit Toeseggінge' and *ex maleficio aut quasi*. In addition, Verwer argues that claims arising from collision are not secured with a security interest in the surviving ship, whereas claims arising from contract sometimes are. A further elaboration of this 'general rule' of limitation of contractual liability, which Verwer discerns in bottomry and wage claims of the crewmembers, is offered in Verwer, *Nederlants see-rechten* (*supra*, n. 24), p. 115-116.

by operation of law into an optional right[180], was not merely the product of the Roman law-oriented jurisprudence of the day. Rather, this process seems to have been inspirited by the equitable principle that Coren saw at the basis of the law of noxal surrender, thus demonstrating its attractive power. The principle is reiterated by numerous scholars. Authors like Simon van Leeuwen and Johannes Voet allude to it merely implicitly through a reference to D. 39,2,7,1[181], but others are more explicit. In a consultation on collision liability from 1717, the Amsterdam lawyer Abraham van den Ende centers his legal advice around noxal surrender, or 'the abandonment of the object which has caused the damage', as explained by Simon Groenewegen van der Made[182]. Groenewegen had argued that the law of noxal surrender had not fallen into disuse – on the contrary, he adduced D. 39,2,7,1 to point out that the principle that objects should not burden their owner beyond their value was based on 'the highest form of equity' and therefore universally applicable[183]. According to Van den Ende, this doctrine only applied when a shipowner was subjected to a 'true and real' legal claim for compensation, such as under the Ordonnance of Philip II[184]. As defendant in such a legal action, the shipowner could then choose to discharge himself by abandoning his ship, in the manner of a noxal action. Van den Ende's editor Barels – perhaps inspired by Groenewegen's argument of 'equitability' – appears to have misread 'noxal action' as 'moral action' (*ad exemplum moralis actionis*, then translated as *zedelyke aenspraek*) as opposed to legal action[185]. In his creative misreading, Barels emphasised the independent, equitable nature of limitation of collision liability. The consultation therefore not only illustrates

180 This development has also been hypothesised by Diephuis, *Nadere beschouwing* (*supra*, n. 42), p. 202-203, 206. Van Dongen, *Contributory negligence* (*supra*, n. 15), p. 242 (at note 276) makes a similar distinction.

181 Van Leeuwen, *Censura* (*supra*, n. 160), p. 552 (5.31.8); Voet, *Commentarius* (*supra*, n. 173), p. 302 (4.9.10).

182 J.M. Barels (ed.), *Advysen over den koophandel*, Amsterdam 1780-1781, vol. 1, p. 213 (no. 51). Unlike most other authors discussed here, Van den Ende does not mention Coren's *Observatio* 40.

183 Groenewegen van der Made, *Tractatus* (*supra*, n. 9), p. 62 (at I. 4.9).

184 Van den Ende makes a distinction between a *waere en reële actie tot vergoeding de jure* (*naer Rechten*, transl. Barels) and a *noxalis actio*. The emphasis on the legal claim being 'true and real' fits the general conclusion of Van den Ende's advice. In the case at hand (a ship had been cut from its anchors in order to prevent it from sinking in a storm and subsequently damaged a dyke) Van den Ende rejects shipowner liability for compensation altogether on the basis of the *Lex Aquilia*. Without such liability, the shipowner cannot be liable to abandon his ship either.

185 In eighteenth-century Dutch handwriting, the letters 'n' and 'x' are easily confused with the letters 'm' and 'r' respectively.

the facultative nature of limitation of collision liability, but also stresses that its roots lay in equity rather than in (statutory) law.

Coren's equity-based reasoning gained more authority as it was adopted by Cornelis van Bijnkershoek (1673-1743)[186]. Van Bijnkershoek stresses that as a rule of equity, one should not be burdened by property beyond its value, provided that one has not acted culpably oneself[187]. Shipowners may therefore choose to surrender their ship with its cargo and thereby avoid liability for collision damage. Although not a part of the historical Roman law of ship collision[188], Van Bijnkershoek did regard this rule in perfect conformity with the general principles of Roman law in view of noxal liability and the legal position of owners of collapsed buildings[189]. Van Bijnkershoek's accentuation of this equitable principle likely also accounts for his dismissal of limitation of shipowner

186 Through Van Bijnkershoek, Coren's theory was embraced by i.a. Schorer, Van der Linden and Taunay, see H. Grotius, *Inleiding tot de Hollandsche rechtsgeleerdheid*, ed. Schorer, Middelburg 1767, p. 722 (3.38.16); J. van der Linden, *Johannis Voet* (…) *commentarii ad Pandectas* (…) *tomus tertius, ejusdem commentarii continens supplementum*, Utrecht 1793, p. 155; Taunay, *Disputatio* (*supra*, n. 114), p. 42-43. See also Kersteman, *Woorden-boek* (*supra*, n. 160), p. 342; Munniks, *Handleiding* (*supra*, n. 160), vol. 1, p. 47-48. Kersteman explains noxal surrender under the *actio de pauperie* – as applied to ship collision – by the 'danger of impoverishment' that would otherwise materialise. Schorer adds that a shipowner is liable *in solidum* instead of *pro parte* if the other defendants are insolvent, referring to Pufendorf, *De officio hominis et civis secundum legem naturalem libri duo*, ed. Otto, Utrecht 1728, p. 125 (1.6.8), on delicts committed through conspiracy. This reference hardly supports his comment, which cannot be grounded on *Jansdr. v. Blaeu* either. It should be noted that Schorer, unlike most other Roman-Dutch scholars, does not always distinguish between separate grounds for liability and easily confounds the law of vicarious shipowner liability and liability for inculpable ship collision, cf. Grotius, *Inleiding*, ed. Schorer (*supra*, n. 186), p. 441-442 (3.1.31); Lubbers, *The capture* (*supra*, n. 74), p. 210-211. Although siding with Van Bijnkershoek, Taunay rejects direct application of noxal surrender to inculpable ship collision because of the absurdity which supposedly arises from its application in case of mutual damage as well as the circumstance that such collision damage was caused by force majeure and not by the ship, Taunay, *Disputatio* (*supra*, n. 114), p. 35-36. See also notes 114, 164 and 190.

187 Van Bijnkershoek, *Quaestionum* (*supra*, n. 14), p. 688 (4.20). Cf. p. 703 (4.22).

188 In his discussion of the Roman law of ship collision, Van Bijnkershoek even asserts that one can only bind himself by his own acts and should not incur liability through his property at all, Van Bijnkershoek, *Observationum* (*supra*, n. 9), p. 409-410. He compares the position of the shipowner to the absence of liability for collapsing buildings in D. 39,2,7,2 and D. 39,2,7,8. See also note 190.

189 Van Bijnkershoek, *Quaestionum* (*supra*, n. 14), p. 672-673 (4.18), 688 (4.20). Cf. p. 703 (4.22). Van Bijnkershoek refers to D. 39,2,7,1-2 and D. 39,2,8-9. Given the latter text, it is well possible that Van Bijnkershoek not only refers to the explanation of the absence of liability offered in D. 39,2,7,1, but also to the concurring views of Ulpian and Julian. After all, they were of the opinion that the property owner could in fact be forced to either pay damages or surrender his property – a strong parallel with noxal liability. See also note 93.

liability for damage culpably inflicted by the shipmaster, as such damage was not caused by the ship itself but by an act of the shipmaster[190]. According to Van Bijnkershoek, then, this solution of 'noxal' ship surrender was first introduced in the case of *Jansdr. v. Blaeu*, and even accounts for the Supreme Court's approval of proportionate shipowner liability[191]. The Ordonnances of Charles V and Philip II had not yet provided for ship surrender as an alternative to indemnification because of its alleged 'commercial undesirability', and codified a mere partition of damages in halves instead – the commercial 'middle way'[192]. Acknowledging that this arithmetical division has been maintained in the case law of the Supreme Court[193], Van Bijnkershoek cannot help but express his personal preference for a geometrical partition in the manner of general average and art. 68 of the Laws of Wisbuy, which – perhaps even better than under the rule of *Jansdr. v. Blaeu* – takes into consideration the proportional relationship between the parties and by itself ensures that one's liability never exceeds the value of his ship as a matter of equity[194].

190 Van Bijnkershoek, *Quaestionum* (*supra*, n. 14), p. 672-673 (4.18), 688 (4.20), 710-712 (4.23); Taunay, *Disputatio* (*supra*, n. 114), p. 29. In his discussion of vicarious liability of shipowners, Van Bijnkershoek therefore asserts that the law of noxal surrender has an 'entirely different rationale', see C. van Bijnkershoek, *Quaestionum juris publici libri duo*, Leiden 1737, p. 144-145 (1.19). Van Bijnkershoek excludes culpable ship collision from the scope of the shipmaster's *praepositio* and therefore dismisses shipowner liability entirely, see Lubbers, *The capture* (*supra*, n. 74), p. 205-210. In his discussion of the Roman law of ship collision, Van Bijnkershoek states that inculpable ship collision is not caused by the ship itself but by external forces (like the weather) and should thus by no means be imputed to the shipowner, Van Bijnkershoek, *Observationum* (*supra*, n. 9), p. 409.

191 Van Bijnkershoek, *Quaestionum* (*supra*, n. 14), p. 688 (4.20). The defendants in *Jansdr. v. Blaeu* similarly derived the proportionate nature of their liability from its very limitation, see *supra*, par. 3.4.

192 Van Bijnkershoek, *Quaestionum* (*supra*, n. 14), p. 672-673 (4.18).

193 Van Bijnkershoek refers to Coren's *Observationes* 40 and 41 and Neostadius' *Decisiones* 48 and 49. Cf. Van Dongen, *Contributory negligence* (*supra*, n. 15), p. 250.

194 Van Bijnkershoek, *Quaestionum* (*supra*, n. 14), p. 689-694 (4.20); Van der Linden, *Supplementum* (*supra*, n. 186), p. 155-156; Munniks, *Handleiding* (*supra*, n. 160), vol. 1, p. 47-48; Taunay, *Disputatio* (*supra*, n. 114), p. 43-45. See also note 23. Contra: Van der Keessel, *Praelectiones* (*supra*, n. 131), vol. 5, p. 400-405 (3.38.16, at *half ende half*), but see also Van der Keessel, *Theses* (*supra*, n. 165), p. 279 (nr. 815). Somewhat artificially, Van Bijnkershoek advocates an interpretation of the term 'half and half' from the Acts of 1551 and 1563 in light of art. 68 of the Laws of Wisbuy so as to effectuate a geometrical partition under these Acts. He also expressed this preference in front of his fellow judges at the Supreme Court in 1711 and 1720, see C. van Bijnkershoek, *Observationes tumultuariae*, Haarlem 1926-1962, vol. 1, p. 377-378 (no. 686), vol. 2, p. 463-464 (no. 1689).

5 Conclusion

The Supreme Court case of *Jansdr. v. Blaeu* appears to be the first instance of limitation of shipowner liability for inculpable ship collision in Roman-Dutch law. Justice Jacob Coren's published report of the case (*Observatio* 40) shows that one argument in particular stands out among the many arguments put forward in favour of and against this limitation. In the Roman legal figure of *noxae deditio* and its normative generalization in D. 39,2,7,1, Coren discerned a broader equitable principle: objects of property should not burden their owner beyond their value if the owner bears no fault for the damage caused by his property. The invocation of this principle served to place a statutory strict liability of shipowners for inculpable ship collision within the framework of both Roman legal theory and natural legal thought, which, after all, were both principally against the imposition of liability without *culpa*. Later authors found this line of reasoning quite attractive, and even came to identify this liability limitation as a form of *noxae deditio*[195]. This identification was so complete for some authors that they analysed in how far the rules of *noxae deditio* applied to ship surrender. This, in turn, led to a changing perception of liability limitation, not as taking effect *ipso jure* but as an optional right.

The final stage in the development of Coren's conceptualisation and justification of limitation of shipowner liability, was that it was extended from inculpable ship collision to noncontractual strict liability in general[196]. In that process, it came to apply to shipowner liability for his shipmaster's delicts and its limitation, including culpable ship collision. Coren had already added a brief summary of the most important case on vicarious shipowner liability and its limitation (the *Ponte* case) at the end of his *Observatio* 40, and this too may have contributed to the development of the two cases in tandem. As such, the case of *Jansdr. v. Blaeu* marks a turning point in the limitation of liability for maritime claims under Roman-Dutch law. As its further reception shows,

195 Although the foreign influence of the case goes beyond the scope of this article, it should be noted that Coren's argument was even taken up by scholars abroad, see e.g. Chr.N. Hoppe, *Dissertatio inauguralis juridica de collisione navium*, Halle an der Saale 1708, p. 60. Hoppe states that the law of *noxae deditio* can be applied to inanimate things under reference to both Coren's *Observatio* 40 and its invocation of D. 39,2,7,1. The passage 'ex quo optima ratione (…) & non naves ipsae obligatae sint' is a literal translation of 'daer uyt optima ratione geïnfereert kan worden (…) niet komen over de schepen, maer op de eyghenaers van dien', Coren, *Observationes* (*supra*, n. 1), p. 418.

196 Johannes Voet seems to have been the first to do so, see Lubbers, *The capture* (*supra*, n. 74), p. 204-210. In Voet, *Commentarius* (*supra*, n. 173), p. 302 (4.9.10) he refers to Coren's *Observatio* 40, D. 39,2,7,1 (note that *hoc edicto* should be *hoc edictum*) and D. 39,2,9*pr*. See also notes 93 and 189.

limitation of shipowner liability was not exclusively based on arguments of economic utility, but had strong roots in early modern conceptions of equity.

Appendix – Archival documents of the case of *Jansdr. v. Blaeu*

Supreme Court

The following documents are to be found in the archive 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).

Rekesten:

Rekest 21/2/1618 (Jansdr. *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 22/536.
Rekest 7/7/1628 (Jansdr. *c.s.*/Blaeu *c.s.*), NA 3.03.02, no. 32/375-376.
Rekest 20/10/1633 (Jansdr. *c.s.*/Moens *c.s.*), NA 3.03.02, no. 37/514-515.

Akten van dingtalen:

Akte van dingtalen 7/10/1622 (Jansdr. *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 436/82.
Akte van dingtalen 12/11/1622 (Lechar *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 436/83.
Akte van dingtalen 3/4/1623 (Lechar *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 437/70.
Akte van dingtalen 7/2/1623 (Lechar *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 437/70.
Akte van dingtalen 20/3/1624 (Lechar *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 438/53.
Akte van dingtalen 17/1/1624 (Lechar *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 438/55.
Akte van dingtalen 1/3/1624 (Lechar *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 438/55.
Akte van dingtalen 19/3/1627 (Jansdr. *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 441/16.
Akte van dingtalen 9/6/1627 (Jansdr. *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 441/16.
Akte van dingtalen 7/6/1629 (Jansdr. *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 442/60.
Akte van dingtalen 21/10/1628 (Jansdr. *c.s.*/Blaeu *c.s.*), NA 3.03.02, no. 442/61.
Akte van dingtalen 7/12/1628 (Jansdr. *c.s.*/Blaeu *c.s.*), NA 3.03.02, no. 442/61.

Akte van dingtalen 8/2/1629 (Jansdr. *c.s.*/Blaeu *c.s.*), NA 3.03.02, no. 443/14.
Akte van dingtalen 16/7/1630 (Van Amelant/Van Veenhuijsen), NA 3.03.02, no. 444/27.
Akte van dingtalen 10/10/1630 (Van Amelant/Van Veenhuijsen), NA 3.03.02, no. 444/27.
Akte van dingtalen 30/1/1632 (Van Amelant/Van Veenhuijsen), NA 3.03.02, no. 446/14.
Akte van dingtalen 1/2/1635 (Jansdr. *c.s.*/Hoeck *c.s.*), NA 3.03.02, no. 449/2.
Akte van dingtalen 28/2/1635 (Jansdr. *c.s.*/Hoeck *c.s.*), NA 3.03.02, no. 449/4.
Akte van dingtalen 10/7/1635 (Jansdr. *c.s.*/Hoeck *c.s.*), NA 3.03.02, no. 449/18.
Akte van dingtalen 27/10/1635 (Jansdr. *c.s.*/Hoeck *c.s.*), NA 3.03.02, no. 449/39.
Akte van dingtalen 23/11/1635 (Jansdr. *c.s.*/Hoeck *c.s.*), NA 3.03.02, no. 449/39.
Akte van dingtalen 9/10/1640 (Jansdr. *c.s.*/Moens *c.s.*), NA 3.03.02, no. 454/41.

Conclusies (engrossed)
Conclusie 5/9/1628 (Jansdr. *c.s.*/Blaeu *c.s.*), NA 3.03.02, no. 502/316.
Conclusie 19/12/1628 (Jansdr. *c.s.*/Blaeu *c.s.*), NA 3.03.02, no. 502/317.
Conclusie 2/12/1633 (Jansdr. *c.s.*/Moens *c.s.*), NA 3.03.02, no. 503/16.

Resoluties tot de sententies
Resolutie 15/1/1627 (Jansdr. *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 644/45.
Resolutie 6/10/1627 (Jansdr. *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 644/71.
Resolutie 15/4/1628 (Jansdr. *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 644/104.
Resolutie 21/12/1629 (Jansdr. *c.s.*/Blaeu *c.s.*), NA 3.03.02, no. 644/190.
Resolutie 20/2/1631 (Van Amelant *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 645/66.
Resolutie 13/10/1632 (Van Amelant *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 645/127.
Resolutie 12/10/1637 (Jansdr. *c.s.*/Moens *c.s.*), NA 3.03.02, no. 646/201.

Register der dictums (as they were resolved)
Dictum 16/1/1627 (Jansdr. *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 889/63.
Dictum 8/10/1627 (Jansdr. *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 889/105.
Dictum 15/4/1628 (Jansdr. *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 889/140.
Dictum 21/12/1629 (Jansdr. *c.s.*/Blaeu *c.s.*), NA 3.03.02, no. 889/254.
Dictum 20/2/1631 (Van Amelant *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 890/84-85.
Dictum 13/10/1632 (Van Amelant *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 890/199-200.
Dicta 15/10/1637 (Jansdr. *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 891/272-274 (279-281).

Register der dictums (as they were pronounced)
Dictum 19/1/1627 (Jansdr. *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 936/24.
Dictum 13/10/1627 (Jansdr. *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 936/44.
Dictum 15/4/1628 (Jansdr. *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 936/57.
Dictum 22/12/1629 (Jansdr. *c.s.*/Blaeu *c.s.*), NA 3.03.02, no. 936/108.
Dictum 26/2/1631 (Van Amelant *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 936, 138.
Dictum 22/12/1632 (Van Amelant *c.s.*/Van Veenhuijsen), NA 3.03.02, no. 937/47.
Dicta 22/12/1637 (Jansdr. *c.s.*/Moens *c.s.*), NA 3.03.02, no. 938/46-48.

Vrijwillige condemnatiën
Vrijwillige condemnatie 9/3/1640 (Van Amelant *c.s.*/Bosch *c.s.*). NA 3.03.02, no. 1069/415-426.

Notarial deeds
Notariële akte 24/2/1638, *Notariële Archieven Amsterdam* 5075, inv. 953A, no. 600843/187-188.
Notariële akte 17/5/1638, *Archieven van de Notarissen te Rotterdam* (ONA) 18, inv. 151, p. 639 (no. 387).
Notariële akte 23/7/1638, *Archieven van de Notarissen te Rotterdam* (ONA) 18, inv. 151, p. 681-682 (no. 419).
Notariële akte 23/7/1638, *Archieven van de Notarissen te Rotterdam* (ONA) 18, inv. 138, p. 534-535 (no. 339).