

# ***USUS MODERNUS PANDECTARUM ;*** **A SPURIOUS TRANSPLANT**

Philip J. THOMAS  
(*University of Pretoria*)

## *Introduction*

During the second life of Roman law the Justinianic codification was received in varying degrees in the law of the states of Western Europe. However, in only one instance the adjective Roman was included to denote the new legal system, namely Roman-Dutch law. This term was exported and is open to an *interpretatio multiplex*. Firstly, it is used to denote the legal system applicable in the province of Holland during the 17th and 18th century. Particularly in this province of the Dutch republic, Roman law was accepted through custom as supplementary law, where statutory law and customary law were silent. The second meaning refers to the South African common law, one of the foundations of which is constituted by the said law of the province of Holland.

The jurists of Holland approached Roman law in different ways, which were largely dependant on the objective of their occupation with this system. The most important working paradigm is found in the *usus modernus Pandectarum*, a continuation of the Italian method of the Commentators, a practice-orientated approach interested in the contemporary relevance and application of Roman law, in combination with customary and statutory local and regional law.

For the jurists in the province of Holland the *De Legibus Abrogatis*<sup>1</sup> was an essential tool. In this work Simon Groenewegen<sup>2</sup> systematically went through the *Corpus Juris Civilis* and discussed which texts still applied and which were abrogated by legislation or custom in the province of Holland.

One of the pillars of Roman-Dutch law, in its originality and genius far surpassing the traditional works of the *usus modernus*, is the *Inleidinge tot de Hollandsche Rechtsgeleertheid* by Hugo de Groot. In this work published in 1631 de Groot incorporated local law, received Roman law and natural law and laid down briefly formulated positive norms. The subsequent notes, commentaries and lectures on the *Inleidinge* bear witness to the practical and scientific success of the book<sup>3</sup>.

The best representative of the *usus modernus Pandectarum* in the Netherlands is Johannes Voet. His *Commentarius ad Pandectas*<sup>4</sup> followed the order of the Digest, which is indicative of his traditional approach.

This paper will deal with the making of law by the Roman-Dutch jurists and in particular with the creation of the rule that a marriage could be voided at the request of the husband, if he could prove that his wife was pregnant on the wedding day and that this pregnancy was not his doing or to his knowledge.

The introduction and assimilation of the rule into Roman-Dutch law went as follows:

*First step: convenient solution*

The first mention of this possibility of annulment is found in consultation 100 in the first volume of Isaac van den Berg's

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<sup>1</sup> *Tractatus de Legibus Abrogatis et Inusitatis in Hollandia vicinisque regionibus*, Leiden 1649.

<sup>2</sup> Simon à Groenewegen van der Made (1613-1652) studied law in Leiden, practised as an advocate and became secretary of the town of Delft. A.A. ROBERTS *A South African Legal Bibliography*, 1942, 137; J.C. DE WET, *Die ou Skrywers in Perspektief*, 1988, 135ss.; R. ZIMMERMANN, *Römisch-holländische Recht — ein Überblick*, in R. FEENSTRA and R. ZIMMERMANN (ed.), *Das römisch-holländische Recht*, 1992, 43ss.

<sup>3</sup> ZIMMERMANN, *op. cit.*, 26-32.

<sup>4</sup> ZIMMERMANN, *op. cit.*, 39-42.

collection of opinions, the *Nederlands Advys-Boek*<sup>5</sup>. The first edition of this work appeared in Amsterdam in 1693 and the opinion in question was given by Hendrik Brouwer on 6 April 1669.

The facts of the case were that a widower had married a spinster on 16 January 1667. On 19 May of the same year the newly-wed wife gave birth to a healthy and full-term baby-daughter. The husband denied having had sexual intercourse with his wife before the wedding-day. On behalf of the wife two conflicting statements were offered. The husband chased mother and daughter from his house. The wife instituted an action for separation *a mensa et thoro*<sup>6</sup> and for maintenance for herself and the child. The husband intended to assent to the proposed separation of table and bed, but to defend the claims for maintenance. In his turn he instituted an action asking the court to declare the child illegitimate and incapable of being his intestate heir.

Brouwer practised as an advocate and later became a judge of the court of Leiden. His treatise on the law of marriage, *De Jure Connubiorum*<sup>7</sup>, is described by Wessels in his *History of the Roman-Dutch Law* as 'a monument of research'<sup>8</sup>. In this opinion Brouwer devotes eight closely printed pages to the question whether each party's claim should be adjudicated. In this discussion he relies on the usual *sedes materiae* from the Digest and Codex and finds authority in authors like Baldus, Mascardus<sup>9</sup>,

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<sup>5</sup> Isaac VAN DEN BERG, *Nederlands Advys-Boek, Inhoudende verscheide Consultatien en Advysen van voornome Regtsgeleerde in Nederland*, t'Amsteldam ( 4 vol.) 1693, 1694, 1697 and 1698. DE WET, 187s. ; ROBERTS, 50s.

<sup>6</sup> Brouwer refers to D.24.1.32.13 and D.25.2.15 ; MENOCHIUS, *De Arbitrariis Judicium*, 137.5 ; SANCHEZ, *De sancto Matrimonii Sacramento*, 10.18 ; GROENEWEGEN, *De Legibus Abrogatis*, in Nov.117.14 and GROTIUS, *Inleydinge I*, 5.20.

<sup>7</sup> *De Jure Connubiorum apud Batavos recepto Libri Duo*, Amstelodami 1665. DE WET, 138 ; ROBERTS, 63.

<sup>8</sup> ROBERTS, 63.

<sup>9</sup> Josephus MASCARDUS (*obit* 1588) author of *De Probationibus*, (4 vols) Francofurti 1585-1588. DE WET, 89 ; W. DE VOS, *Regsgeschiedenis*, 1992, 93 ; ROBERTS, 203.

Menochius<sup>10</sup>, Gail<sup>11</sup>, Carpzovius<sup>12</sup>, Everhardus<sup>13</sup>, Perezius<sup>14</sup>, Merula<sup>15</sup>, Grotius<sup>16</sup>, Groenewegen<sup>17</sup>, van Leeuwen<sup>18</sup>, Sande<sup>19</sup>, Sanchez<sup>20</sup>, all authors falling within the expected ambit of his research. He devotes a detailed discussion to the presumption of paternity<sup>21</sup>, since both the maintenance and the intestate succession are dependent on the outcome. As to be expected, evidentiary aspects dominate<sup>22</sup>, and Brouwer comes to the conclusion that the child is illegitimate and not entitled to maintenance; that the wife has provided proper cause for separation of table and bed and was thus not entitled to maintenance either. It comes as a surprise,

<sup>10</sup> Jacobus MENOCHIUS (1532-1607) professor of law at Pisa, Padua and Pavia. The work referred to by Brouwer is *De arbitrariis judicum quaestionibus et causis libri duo*, Venetiis 1605. DE WET, 90 ; ROBERTS, 209ss.

<sup>11</sup> Andreas VON GAIL (1526-1587). Gail's *Practicarum Observationum libri duo*, Coloniae Agrippinae 1580, were translated in Dutch, *Observantien van de Kayserlyke Practyke* (transl. by A. van Nispen Leyden 1656). DE WET 95 ; DE VOS, 103 ; ROBERTS, 126.

<sup>12</sup> CARPZOVIVS, *Jurisprudentia ecclesiastica seu consistorialis rerum et questionum in principis Electoris Saxonicae Senatu Ecclesiastico et Consistorio Supremo libri III*, Lipsiae 1645, which work was not available for consultation.

<sup>13</sup> Nicolaus EVERHARDUS (1462-1532) professor at Louvain, member of the Great Council of Mechlin (1505), president of the Court of Holland (1510) and president of the Great Council of Mechlin (1528-1532). His *Consilia sive responsa*, Lovanii 1554, was a collection of his opinions in the Italian tradition. DE VOS, 164ss. ; DE WET, 114ss. ; ROBERTS, 116.

<sup>14</sup> Antonius PEREZIUS (1583-1673) professor at Louvain. The reference is to his *Praelectiones in XII libros Codicis Justiniani*, (ed tertia) Amstelodami 1653. DE WET, 122ss. ; ROBERTS, 236.

<sup>15</sup> Paulus MERULA (1558-1607) practised as an advocate and became in 1593 professor of History at Leiden, author of the standard work on civil procedure, *Manier van Procederen in de provintien van Hollandt, Zeeland en West-Vrieslandt belangende Civile Zaken*, Aemsteldam 1592. DE VOS, 170 ; DOLEZALEK, *Das Zivilprozessrecht*, in FEENSTRA and ZIMMERMANN, *op. cit.*, 60.

<sup>16</sup> *Inleydinge*.

<sup>17</sup> *De Legibus Abrogatis*.

<sup>18</sup> *Het Rooms Hollands Regt*, 1664.

<sup>19</sup> Jan VAN SANDE (1568-1638) professor at Franeker and member of the Court of Friesland. His *Decisiones Curiae Frisicae*, Leovardiae 1635, are cited. DE WET, 143ss. ; ROBERTS, 272ss.

<sup>20</sup> Thomas SANCHEZ (1551-1610), *De sancto matrimonii sacramento disputationes*, Antwerp 1607. ROBERTS, 272.

<sup>21</sup> D.1.6.6 ; D.2.4.5 ; D.1.5.12 ; D.38.16.3.9 and 12 ; D.48.5.12.9 ; D.50.17.20.

<sup>22</sup> D.22.5.4ss. ; D.22.5.10 ; D.42.2.1 ; D.42.2.6.3 ; C.4.20.9.1 ; C.4.20.10 ; C.4.20.16 ; C.7.59.1 ; MASCARDUS, *De Probationibus*, concl. 347 and EVERHARDUS, *Consilia*, 72.5 and 169.2.

however, when after the questions posed have been answered, Brouwer suddenly states in the last six lines that *magni nominis juris consulti* are of the opinion that on account of premarital fornication alone the marriage can be annulled on instigation of the unknowing husband. The necessary authority, the jurists of name, are Carpzovius<sup>23</sup>, Forster<sup>24</sup>, Zepper<sup>25</sup> and Joachim a Beust<sup>26</sup>. Finally Brouwer closes with *Deuteronomy* chapter 22 verse 20<sup>27</sup>.

Van den Berg, the editor of the *Nederlands Advysboek* mentions that the same was decided in Amsterdam on 16 April 1669.

The fact that the Amsterdam court applied such ground for annulment can be explained by the limited grounds for divorce and the strict application thereof, which strictly speaking made the granting of a divorce in the present case impossible.

<sup>23</sup> BROUWER refers to "Carpzovius lib 2 tit 10 defin 187 & tit 11 defin 193 jurispr & pract crimin part 2 4 63 num 54 & seqq". The works referred to by Brouwer are the *Jurisprudentia forensis Romano-Saxonica secundum ordinem constitutionum Augusti Electoris Saxoniae in partes IV divisa*, also known as *Definitiones forenses* and his *Practica nova imperialis Saxonica rerum criminalium in partes tres divisa*. However, *Definitiones forenses*, Pars II, Constitutio 10 deals with *patria potestas* and contains only 32 definitions, while *Constitutio XI* of the same part deals with tutors and contains but 50 definitions. The reference in the *Practica nova* is : Pars II, *Quaestio* 63, *De Divortio*, subquaestio 4, *An concedendum divortium, si quis gravitatem vel corruptam uxorem duxerit, quam virginem esse credebatur?* n. 47-63.

<sup>24</sup> FORSTER, *De Nuptiis*, cap. 8. Valentinus Gulielmus Forster (1574-1620) was professor at Wittenberg. The reference is to his *Liber singularis de Nuptiis*, Wittebergae 1617. ROBERTS, 122 ; R. STINTZING. *Geschichte der deutschen Rechtswissenschaft* I, 1880, 419-423.

<sup>25</sup> Wilhelm ZEPPEL, *de legibus Mosaicis*, cap. 20. It is probable that Philippus ZEPPEL, *Collatio Legum Mosaicarum, Forensium, & Romanorum, Canonici, item, & Saxonici Juris*, Halae Saxonii 1632, was meant.

<sup>26</sup> Joachim a BEUST, *De Jure Connubiorum*, part. 2, cap. 33. The reference is to Joachim VON BEUST (1522-1597), professor at Wittenberg and president of the consistory in Dresden, and author of *Tractatus de Jure Connubiorum in tres partes divisus*, Vitebergae 1586. This tract is also found in von Beust's collection of tracts *Tractatus connubiorum praestantissimorum iuris consultorum* I-II, Jenae 1606 (I), Lipsiae 1617 (I-II). These tracts deal with a modified application of Canon law in the Protestant regions of Germany in which process von Beust's collection played an important role. H COING, *Handbuch der Quellen und Literatur der neueren Europäischen Privatrechtsgeschichte* II (1), 1977, 574 ; STINTZING I, 553, n. 3.

<sup>27</sup> *Nederlands Advys-Boek* C Consultatie in fine (p. 264) : En volgens de Wet Mosis, wie voor een Maagd getrouwt en geen Maagd bevonden werd gesteenigd werden. Deuter. 22 vers 20 (Brouwer must have meant 21).

However, a search for the authority relied on by Brouwer proves enlightening. It comes as no surprise that the references were rather casual, but the substantive variance between cited authority and original text is more alarming and will be dealt with *infra*.

It is also remarkable that Brouwer made no mention of this rule in his *De Jure Connubiorum* and even more noteworthy that he did not amend the text of the second edition of 1714 to reflect this new development.<sup>28</sup>

### *Corroboration*

Nevertheless, the rule was confirmed into Roman-Dutch law by Simon van Leeuwen and Johannes Voet.

It should be noted that the rule is sought in vain in van Leeuwen's main work *Het Rooms-Hollands-Regt*<sup>29</sup>. However, the rule is found in his *Censura Forensis*.<sup>30</sup> In the latter work van Leeuwen posed the question, after having discussed divorce on account of adultery, whether premarital fornication can be a ground for dissolution of a marriage<sup>31</sup>. He was of the opinion that in the event that a man unknowingly had married a woman corrupted and pregnant by another, the marriage could be totally dissolved and not only from table and bed. Van Leeuwen relied on

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<sup>28</sup> In both editions Brouwer discussed in I.18 under the heading *De Sponsalibus per errorem contractis* (I.18.23ss.) whether a man who discovers his wife not to be a virgin, can have the marriage dissolved. The only instance in which he deemed this possible was the case where the husband discovered on the wedding day (night) that his wife was not a virgin and/or pregnant. In that event he must not touch the wife and immediately send her away. (1665) I.18.28 ; (1714) I.18.30.

<sup>29</sup> *Het Rooms Hollands-Regt, Waar in de Roomse Wetten met het huydendaagse Neerlands Regt, ... over een gebragt werden* I, 15. The available edition was the Amsterdam edition of 1686.

<sup>30</sup> The first edition of the *Censura Forensis theoretico-practica, id est totius Juris Civilis ... methodica collatio* dates from 1662. The available edition is the fourth edition from 1741, which edition was updated by Gerard de Haas. However, prior to this date a reference to the *Censura Forensis* fragment is found in VOET's *Commentarius ad Pandectas*. The second edition of the *C F* appeared in Leiden in 1678 and the third edition in Amsterdam in 1685. ROBERTS, 184ss.

<sup>31</sup> *Censura Forensis*, I.1.15.10.

Schneidewinus<sup>32</sup>, Joachim a Beust<sup>33</sup>, and Carpzovius<sup>34</sup>. From D.48.5.14(13).10 he derived the requirement that the husband should not have condoned the matter by resuming sexual relations with the woman after he became aware of the facts. Van Leeuwen continued, however, by stating that the marriage is not actually dissolved as such, but is declared null and void, since a contract entered into as a result of *dolus*, is *ipso jure* null and void<sup>35</sup>. Finally van Leeuwen broached the case where a husband had committed premarital fornication elsewhere. He concluded, however, that this does not entitle the wife to dismiss her husband, because unchastity on the part of women is more reprehensible than that of men. He is of the opinion that greater chastity is required from women, because a woman's fault can cause major trauma to a family by the introduction of another's offspring<sup>36</sup>.

### *Ratification*

The above authors prepared the ground for Johannes Voet, the grand master of the Dutch *usus modernus*. In his *Commentarius ad Pandectas* 25.2.15, Voet held one of the grounds on account of which marriages may be annulled to be premarital unchastity followed by pregnancy. If a man in ignorance had married a

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<sup>32</sup> Johann Schneidevin(us) or SCHNEIDEWINUS (1519-1568) was professor at Wittenberg. The work referred to is his *In quatuor Institutionum imperialium Justiniani libros commentarii* (1609). ROBERTS, 279 ; STINTZING I, 309ss.

<sup>33</sup> The reference is to *De Jure Connubiorum*, Part. 2, cap. 34, while Brouwer's reference was to cap. 33.

<sup>34</sup> The references differ from those of Brouwer, namely "*Jurisprud Forens part 4 constit 20 defin 12 and Definit Consistorial lib 2 tit 11 defin 193 & seq*". Van Leeuwen referred correctly to "*Jurisprudencia Forensis Pars IV Constitutio 20 Definitio 12 Dissolvitur matrimonium si uxor ab alio antea impraegnata & gravida reperiatur*". The latter reference can either be to *Definitiones forenses* or to *Jurisprudencia ecclesiastica seu consistorialis rerum et questionum in principis Electoris Saxonicae Senatu Ecclesiastico et Consistorio Supremo libri III*, Lipsiae 1645, which work was not available for consultation. ROBERTS, 74. For Brouwers references see *supra* nn.23, 24, 25, and 26.

<sup>35</sup> Which rule van Leeuwen erroneously bases on D.4.3.7.1.

<sup>36</sup> He relies on D.48.5.6.1 and D.48.5.35(34).1 and WESEMBECIUS, *Paratitla* on the same texts. Mattaeus Wesembecius (1531-1586), professor at Jena and Wittenberg, whose *Paratitla* or *Commentarius in Pandectas juris civilis et Codicis*, Basel 1582, was a popular textbook into the 18th century. STINTZING I, 351-366.

woman spoilt and pregnant by another and he had not after discovery of this, condoned the matter in any way, he can claim the marriage to be declared *ipso jure* void.

In view of the absence of Roman law authority, Voet searches for support in Canon law. After admitting that *Decretum Gratiani* 2.29.1.1 explicitly denies the above<sup>37</sup>, Voet continues, nevertheless, to look for authority within the Canon law. From the fact that in Canon law a free person who had married another's slave girl mistakenly thinking her to be free, could send her away if he could not buy her from her owner<sup>38</sup>, Voet reasons by analogy that the man who mistakenly married a spoilt woman could send her away as well, as if he had never consented to marry her.

Voet finds a second argument for nullity of the marriage in Roman law. The fact that Canon law draws an argument from *error in materia* to establish the nullity of a marriage<sup>39</sup>, emboldens Voet to do the same. He thus uses Ulpian's opinion on the case of the man who thought he was buying a virgin<sup>40</sup>. In fact a mature woman was sold and the seller knowingly allowed the purchaser to persist in his mistake. It was held that the *actio empti* was available to undo the purchase and that the woman must be returned after the price had been repaid. Voet finds further support in the fact that a betrothal can be broken off if the betrothed woman should be spoilt by another. He dismisses the comparison with the man who has married a pauper in the mistaken belief that she was a woman of wealth. According to Voet in such case the man cannot have the marriage voided, but ought to blame himself. However, honour and the very nature of things absolve from any blame the man who mistakenly marries a spoilt woman.

Voet concludes by referring to *Deuteronomy* chapter 22 verses 20 and 21 which deal with the laws concerning chastity and prescribe death by stoning as punishment for the bride whose

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<sup>37</sup> *Decretum Gratiani*, Pars II, Causa 29, Quaestio 1, para. 5. The *quaestio* distinguished in para. 2 between *error personae*, *error fortunae*, *error condicionis* and *error qualitatis*. *Error fortunae* and *error qualitatis* were not deemed to exclude consensus.

<sup>38</sup> *Decretum Gratiani*, II.29.2.4.

<sup>39</sup> *Decretum Gratiani*, II.29.1.par.2.

<sup>40</sup> D.19.1.11.5.



husband found her not a maid<sup>41</sup>. He also alludes to the splendid reasoning of the emperor Leo<sup>42</sup> in his *Novella* 93. This Novel deals with the question whether a man can break off his engagement, if he finds out that his fiancée is pregnant by another.<sup>43</sup>

Voet cites both van Leeuwen<sup>44</sup>, and Carpzovius<sup>45</sup>, as well as his own grandfather the theologian Gysbert Voet<sup>46</sup>, and misleadingly Brouwer's *De Jure Connubiorum*<sup>47</sup>.

Thus a new ground for annulment of a marriage had become part of the Roman-Dutch law of marriage<sup>48</sup>.

### *Extension*

The next step was that this ground was considerably extended by relaxation of the pregnancy requirement. This meant that a marriage could be annulled on the grounds of pre-marital sexual

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<sup>41</sup> Deuteronomy, ch.22, v.21 : then they shall bring out the damsel to the door of her father's house, and the men of the city shall stone her with stones that she shall die ; because she hath wrought folly in Israel, to play the whore in her father's house : so shalt thou put evil away from among you. 22 : If a man be found lying with a woman married to a husband, then they shall both of them die, both the man that lay with the woman, and the woman: so shalt thou put away evil from Israel.

<sup>42</sup> Leo the Wise (848-911 AD) emperor of the Roman Empire in the East from 886-911 AD. Under his reign the *Basilica* were codified. This Greek compilation restored and updated the legislation of Justinian. P. VAN WARMELO, *Die Oorsprong en Betekenis van die Romeinse reg*, 1978, 159 ; H.F. JOLOWICZ, *Historical Introduction to the Study of Roman law*, 1952, 514ss., 583. The Novels of Leo the Wise, 113 constitutions, were included in the *Corpus Iuris Civilis* edition of Dionysius Gothofredus of 1583.

<sup>43</sup> See also P. VAN WARMELO, *Die Verloving*, in *Butterworths South African Law Review* 73 (1954) 93, n.73.

<sup>44</sup> *Censura Forensis*, I.1.15.10.

<sup>45</sup> *Definitiones forenses*, IV.20.12.13, which corresponds largely to van Leeuwen's reference.

<sup>46</sup> Gysbert VOET, *Politicae Ecclesiasticae, part 1, lib 3, tract 1, sect 3, cap 2, quaest 11*.

<sup>47</sup> *De Jure Connubiorum*, I.18.19ss.

<sup>48</sup> The distinction between Roman-Dutch as the law of the province of Holland and the law of the other provinces is exemplified by HUBER, *Heedensdaegse Rechts-Geleertheit soo elders, als in Frieslandt gebruikelyk*, I.6.10. In this text Huber mentions the case of J.A. in Franeker, whose wife gave birth to a fullgrown child twenty three weeks after the marriage ceremony. The husband denied having had premarital sex. Huber advised him that he could deny paternity, but that he could not be released from his wife.

relations with other parties than the intended husband. Van Zurck in his law dictionary, the *Codex Batavus*<sup>49</sup>, cites the case of Henrik de Jong, contra Fronica Meyer, of Vrouwtje Juriaens in which the marriage was held to be null and void, because the bride had pretended to be a virgin, while in fact she had a child<sup>50</sup>. Van Zurck explains this to be in accordance with the old customs of the Germans, who did not pardon a deflowered woman<sup>51</sup>.

*Applicability to both partners*

This extension clearly exemplifies the double standards applicable to this matter, already expressed by van Leeuwen. A surprising protest is however, voiced by an unknown author, Hermannus Noordkerk, who published a dissertation *De matrimoniis*<sup>52</sup> in 1733. The editor of the legal encyclopedia, the *Aanhangzel tot het Hollandsch Rechtsgeleerd Woorden-Boek*<sup>53</sup> borrowed a large extract from this work, albeit with due acknowledgement.

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<sup>49</sup>Eduard VAN ZURCK, *Codex Batavus, waar in het algemeen Kerk-,Publyk, en Burgerlyk Recht van Holland, Zeeland, en het Ressort der Generaliteit, kortlik is begrepen*; The first edition appeared in Delft in 1711; Available to me was the Rotterdam edition of 1758 in which *sub voce* Houwelyk, Houwelyks-voorwaarden, Disertie Matrimonieel, Divortie, Separatie in para. XXXIV, N.5 the matter under discussion was set out. ROBERTS, 344ss.

<sup>50</sup> VAN ZURCK, para. XXXIV, N.5. Vonnis van dezelve (i.e. Amsterdam) Heeren Schepenen, 15. Jul. 1698.

<sup>51</sup>VAN ZURCK refers to Saint John Chrysostom; BROUWER, *De Jure Connubiorum*, 2.18.19; BEZA, *De divortiis & repudiis*, p. 87; VOET, 48.5.4 and *Nederlands Advys-Boek*, Consultatie 100. Beza may be Theodorus Beza (1519-1605), a French Calvinist theologian, who published *De Divortiis*, Genevae 1610, and *De Repudiis*, Leydae 1651. However, Fontana mentions in his *Amphitheatrum Legale seu Bibliotheca legalis* also Petrus de Beza author of the *Tractatus de Repudiis & Divortiis*, Noviomagi 1666.

<sup>52</sup>*Dissertatio de matrimoniis ob turpe facinus quod peccatum sodomiticum vocant, jure solvendis*, Amsterdam 1733, cited by van der Keessel in his lectures on de Groot, I.5.18; cf. *infra* n. 56. ROBERTS, 227.

<sup>53</sup>Te Amsteldam 1772. Franciscus Lievens Kersteman was the editor of *Het Hollandsch Rechtsgeleerd Woorden-Boek* first published in Amsterdam in 1768. *Het Aanhangzel* was published in two volumes in 1772-1773 on instigation of the subscribers to *Het Woorden-Boek*, who were unhappy with their acquisition. Kersteman had already withdrawn from the project, and *Het Aanhangzel* was edited by the Amsterdam notary L. W. Kramp. DE WET, 169s.; ROBERTS, 174s.

Sub voce *Dissolutio matrimonii* the editor, notary Kramp<sup>54</sup> raised the question whether premarital sodomy unknown to the wife is a ground for dissolving a marriage. He cites Noordkerk, who appears to have had strong views on sodomy. Although he admits that premarital sodomy is no ground for annulment, a lengthy argument is made in favour of such ground. The editor agrees with him and favours a wider ground, namely premarital unchastity as such. The main arguments are the absence of the required *consensus* for the marriage, but both Noordkerk and Kramp rely on natural law and on equality before the law<sup>55</sup>. Thus, the fact that discovery of the premarital unchastity of his wife of which he was unaware, entitles the husband to have the marriage annulled, is raised as argument that the same should apply to a wife who discovers the premarital sodomy of her husband. The argument that the law should be more favourable to men than to women in this instance, is rejected and Kramp ends the title with the opinion that a woman's action in such a situation should be founded.

Noordkerk's dissertation found its way into the lecture notes of Dionysius van der Keessel. The latter's lectures on Grotius' Introduction<sup>56</sup> provide to a degree the final statement of Roman-Dutch law. In his lecture on de Groot I.5.18<sup>57</sup>, van der Keessel agrees with Noordkerk that premarital sodomy by the husband gives the wife who unknowingly married him, cause to have the marriage annulled, since it cannot be presumed that an honest wife would have consented to such marriage<sup>58</sup>.

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<sup>54</sup> ROBERTS, *The Mystery Man of Roman-Dutch law* — L. W. Kramp, in *SALJ* 49 (1932), 345-350, 494-496.

<sup>55</sup> NOORDKERK, *Aanhangzel s.v. Dissolutio matrimonii*, 371 : “Maar als wy ons na de Heilige beveelen der gezonde reede zullen schikken, zo zyn wy allen, zowel Mannen als Vrouwen aan een en dezelve Wet verbonden”.

<sup>56</sup> D.G. VAN DER KEESSELI, *Praelectiones Iuris Hodierni ad Hugonis Grotii Introductionem ad Iurisprudentiam Hollandicam*; D.G. VAN DER KEESSEL, *Voorlesinge oor die Hedendaagse Reg na aanleiding van de Groot se "Inleiding tot de Hollandse Rechtsgeleerdheid* (Edd. P. VAN WARMELO, L.I. COERTZE, H.L. GONIN, D. PONT) 6 vols (1961-1975).

<sup>57</sup>In which text de Groot states that in Holland a marriage can only be dissolved by death and adultery. Art 18 Ordonnantie van de Policien binnen Hollandt van 1 April 1580, *Groot Placaat Boek*, I.329ss.

<sup>58</sup> VAN DER KEESSEL, ad I.5 par 18 : *Placet mihi quoque sententia eiusdem Viri Consultissimi (i.e. Noordkerk) statuentis crimen hoc ante matrimonium*

*Fons et origo*

The most authoritative author cited by Brouwer, van Leeuwen and Voet is Benedict Carpzovius (1595-1666) a judge, privy councillor to the Elector of Saxony, author of many legal works, and a representative of the *usus modernus*.

Carpzovius posed the question in his *Practica nova imperialis Saxonica rerum criminalium*<sup>59</sup> Pars II Quaestio 63 subquestion 4 Si quis gravidam vel corruptam pro virgine duxerit in uxorem, an permittendum sit divortium?

He commences with the negation of such ground for dissolution of a marriage by canon law<sup>60</sup> and states that this view finds support in the civil law in C.7.16.10, C.4.44.3 and D.50.17.19, D.12.1.5, D.50.17.203, D.48.5.(13)14.10, D.18.1.11.1, D.19.1.11.5 and in divine law in *Genesis*, 2.22 and *Mattaeus*, 19.6.

However, Carpzovius continues that in spite of the above *rectius statuunt saniores Theologi ac Jurisconsulti*<sup>61</sup> that the deceived husband should be helped by dissolution of the marriage and that this view has been accepted by the reformation. He is of the opinion that the latter view is supported by *Lex Mosaica Deut 22* and that the gloss in c *satis* in verb *lapidaretur* explains that this proves that divorce was permitted in divine law.

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*contractum perpetratum uxori, quae ignorans tali nupserat, iustam praeberere causam discedendi, cum honesta mulier nullo modo praesumi queat consensisse in nuptias cum eiusmodi homine contrahendas.*

<sup>59</sup>The available edition is Francofurti et Wittebergae 1658.

<sup>60</sup> Citing *Decretum Gratiani*, 2.29.1.1 and the comments of Hostiensis and Covarruvias.

<sup>61</sup> The *saniores theologi et jurisconsulti* are LUTHER, *tom.5, Jen.Germ.fol.250 & tom.6, Jen.fol.530*; Alb. GENTILIS, *Disputationum de Nuptiis libri septem* 6.13; CYPRAEUS, *Tractatus de Iure Connubiorum*, 13.44.3; Joh. SCHNEIDEWINUS, 4.61; Joach. a BEUST, 34; Joh. GERHARD, *De Coniugiis*, 111; REUSNERUS, *Germani Decisionum libri quatuor*, 4.5; BIDENBACH, *De Causis Matrim.*, fol.87; FORSTER, *De Nuptiis*, 8, p.120ss. The reference to Luther is to the *Jenaische Ausgabe der sämtlichen Schriften Lutheri, deutsche Theile*, V Theil (1588) fol.250, VI Theil (1604) fol.530; Albericus Gentilis (1552-1608), professor at Oxford and mainly renowned for his works on international law. ROBERTS, 129. Nicolaus Reusner (1545-1602) was a philosopher, a mathematician, classicist, medical doctor and jurist. The reference is to his *Sententiarum sive Decisionum juris singularium libri IV*, Francofurti 1599. STINTZING, I, 710-714.

Relying on D.2.14.7.7 and D.4.3.7pr. Carpzovius views the facts as *dolus incidens* which in his opinion does not make the marriage *ipso jure* null and void, but '*contractus per actionem vel exceptionem resolvatur*', in support of which he cites C.4.44.5 and D.19.1.11.5. This interpretation of the latter text he finds collaborated by D.18.1.11.1. The step from sale to sponsalia(?) he deems justified by the fact that marriage is more serious and permanent than a sale. This is reconcilable with D.48.5.14.10 and C.3.1.8 since it could not be said the the contract was perfect. The husband is not to be blamed, since more diligent inquiry is impossible. Moreover such inquiry would constitute *iniuria* towards the wife and finally, sins are carefully hidden.

Carpzovius concludes that this view has been approved and carefully applied by the consistories. He mentions that Beust and Gerhardus state that divorce is not easily granted and that the courts must investigate whether the husband has after discovery of the facts, resumed sexual relations with his wife. Furthermore, a reconciliation must be attempted. Carpzovius concludes with the formula used by the consistories<sup>62</sup> and a decision of the court of Leipzig of 1590.

Virtually the same text is found in the *Responsa Juris Electoralia*<sup>63</sup> 114 and in *Definitiones forenses*<sup>64</sup> IV.20, def.12. In the latter work he asks in *definitio* 13 whether premarital *stuprum* by the man is a ground for divorce. Basing his argument on D.48.5.13(14).5 he opines that it is unjust to deny the wife what is granted to the husband, but concludes that the consistories have decided otherwise in 1626 in the case of *Marten Soffers v Bergen*. This decision is based on C.9.11, C.7.15.3, the gloss on D.23.2.43.12, and D.48.5.6.1 and D.48.5.34.1, which texts supposedly support the view that female unchastity is worse and more detestable than the male variant, since more chastity is required from wives as inclusion of adulterine offspring wrongs the whole family. *Deuteronomy* 22 only applies to woman.

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<sup>62</sup> So wird es auch wegen solches unchristliche Betrugs und begangener grossen Untreu, aus Nachlassung Göttlicher und dieser Lande üblichen Rechte, von ihr der Ehe halben, billig geschieden und lossgezehlet. Inmassen wir ihn von ohr hiermit scheiden und losszehlen.

<sup>63</sup> The Lipsiae edition of 1683 was available.

<sup>64</sup> The Lipsiae edition of 1703 was available.

*Conclusion*

It is obvious that Brouwer misinterpreted Carpzovius *et al.* It is remarkable that the other jurists of Holland did not question Brouwer's solution of annulment of the marriage and/ or were unwilling to solve the problem of the bride impregnated by another by way of divorce.

The analogy drawn by the protagonists of annulment between marriage and the contract of sale, the further extension when the pregnancy-requirement was relinquished and the refusal to apply the same to men, is degrading to women and a retrogression from Roman law. In the latter law the rebuttal of the paternity presumption combined or not with divorce, would have been the apposite solution, which solution respects the human dignity of both partners to the marriage.