The vicissitudes of the application of *postliminium* to movable property in 17th century international law

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OPSOMMING

Die lotgevalle van *postliminium* ten aansien van roerende sake in die 17de-eeuse internasionale reg

Die Romeinse reg het persone en sake wat deur die vyand gevang of as oorlogsbuit geneem is, in hul oorspronklike regsposisie herstel wanneer die persone en/of sake weer in Romeinse hande geval het. Ten aansien van roerende sake was toepassing van die reg van terugkeer egter beperk tot sekere sake: oorlogs- en vragskepe, slawe, perde, muile en esels. Kaser noem as kriterium dat die sake vir oorlogvoering belangrik moes gewees het. In die artikel word die hipotese gestel dat die sake se waarde asook die feit dat hul uitgeken kon word, deurslaggewend was.

De Groot het in sy *De jure belli ac pacis* die stelling gemaak dat *postliminium* ten aansien van roerende sake verdwyn het. Van Bynkershoek volg hom op hierdie punt, maar albei skrywers het nuwe reëls met betrekking tot oorlogsbuit oorgeneem om skade vir die Hollandse handelsvloot te beperk.

Die wetgewing van die State-Generaal op hierdie gebied asook die internasionale verdrae toon egter aan dat die spore van *postliminium* moeilik uitgewis kon word.

INTRODUCTION

During the German advance into the Netherlands in May 1940, the Jewish art dealer Goudstikker succeeded in obtaining tickets for his wife and himself on a ship leaving for England. During the voyage he fell into the hold and died. Soon afterwards part of his collection was bought by the German Reichsmarschall Hermann Goering. After the German capitulation the latter's art collection was repossessed by the Americans and the artworks obtained from Goudstikker were handed over to the Dutch state. In 1952 the widow Goudstikker reached an accord with the state in terms of which the latter retained possession of the collection. In 1998 Goudstikker's daughter-in-law instituted an unsuccessful claim for restitution in a Dutch court. However, in 2000 a commission was created to advise the Dutch government on matters concerning restitution of cultural goods lost as a result of the Nazi regime and in possession of the Dutch state.[1] This commission was prepared to find the required *novum* and advised the government to grant the request for restitution.[2]

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1 Besluit adviescommissie restitutieverzoeken cultuurgoederen in Tweede Wereldoorlog, *Staatscourant* 21 December 2001 248.

2 For a detailed discussion of the *Goudstikker* case see Schrage *De regelen der kunst* III (2007) 47ff.

Another interesting solution to the same problem is found in Russia, where in 1998 parliament enacted a statute declaring Soviet World War 2 booty to be Russian national property. In 1999 the Constitutional Court ruled that countries and individuals which had been the victims of Nazi Germany had the right to ask for restitution of works of art. However, the court ruled that aggressor countries cannot claim the restitution of cultural valuables received by Russia as compensation for damage inflicted on the country.

In spite of the much vaunted *pax Romana*, the Romans lived by the sword. In consequence, Roman law made provision for both capture and loss of persons and property in war by way of the *ius praedae* and the *ius postliminii*.

The reception of Roman law is commonly referred to as the second life of Roman law. However, there appears to have been a third life as well, namely the introduction of many Roman law rules in international public law developed during the 17th century by Grotius, his predecessors and successors.

This paper addresses the application of *postliminium* to movable property in international law during the 17th century on the basis of observations made by Cornelius van Bynkershoek.

ROMAN LAW

Postliminium applied when persons and goods[3] captured by the enemy returned within the Roman orbit of power and this right[4] restored them to their old position.[5]

D 49 15[6] and *C* 8 50[7] deal with this matter; the majority of texts relates to the status, the marital and financial affairs or the succession to and from persons captured by the enemy,[8] be it prisoners of war[9] or civilians.[10]

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3 *D* 49 15 14 *Pomponius libro tertio ad Sabinum* pr. Cum duae species postliminii sint, ut aut nos revertamur aut aliquid recipiamus.

4 *D* 49 15 19 *Paulus libro 16 ad Sabinum* pr. Postliminium est ius amissae rei recipiendae ab extraneo et in statum pristinum restituendae inter nos ac liberos populos regesque moribus legibus constitutum. For the origin of *postliminium* see Hernández-Tejero "Aproximación histórica al origen del ius postliminii" 1989 *Gerión* 53–64.

5 Buckland *A textbook of Roman law from Augustus to Justinian* (1963) 67.

6 *De captivis et de postliminio et redemptis ab hostibus.*

7 *De postliminio et de redemptis ab hostibus.*

8 In consequence the secondary sources concentrate on the *postliminium* of persons rather than of things. Cf Hernández-Tejero 1989 *Gerión* 53-64; Bechmann *Das ius postliminii und die Lex Cornelia: Ein Beitrag zur Dogmatik des römische Rechts* (1872) *passim*; Ratti *Studi sulla "captivitas" e alcune repliche in tema di postliminio* (1927) *passim*; Bona "Sull' animus remanendi nel postliminio" 1961 *SDHI* 186–234; Watson "Captivitas and matrimonium" 1961 *TR* 243–259; Amirante "Postliminio (diritto romano)" 1966 *NDI* 429–433; Urso "Matrimonio del prigioniero in diritto romano" 1992 *SDHI* 85ff; Stiegler "Et partui postliminium datur" in Schermaier und Vegh (eds) *Ars bona et aequi. Festschrift fur W Waldstein zum 65 Geburtstag* (1993) 331–343; Cursi *Struttura del "postliminium" nella repubblica e nel principati* (1996) *passim*; Sanna *Richerche in tema di redemptio ab hostibus* (1998) *passim*; D'Amati "Pater ab hostibus captus e status dei discendenti nei giuristi romani" 1999 *Index* 55ff; Sanna *Nuove ricerche in tema di postliminium e redemptio ab hostibus* (2001) *passim*; D'Amati *Civis ab hostibus captus. Profili del regime classico* (2004) *passim*.

9 Eg *D* 49 15 4.

10 This can be deduced from the fact that *postliminium* also applies to women, and can even apply in peace. *D* 49 15 5, *eod tit* 8, *eod tit* 9, *eod tit* 12, *eod tit* 19 10, *eod tit* 21, *eod tit* 25.

In his discussion of the natural modes of acquisition of ownership Kaser holds that whenever Roman property is captured by the enemy the ownership is lost, but that in terms of *postliminium* the ownership of certain things, which are important in warfare, revives on reconquest by Roman troops.[11] Thus *postliminium* in respect of property only takes place in certain instances. Hidden in *D* 49 15 20 1 we find that in the case of immovable property the ownership always returns to the previous owners when the territory is reconquered by Roman troops.[12] In consequence, the exceptions appear in the application of *postliminium* in respect of movables, which exceptions are linked by Kaser to the criterion whether the goods in question are important in warfare or not.

The two extreme positions are found in *D* 49 15 19 pr[13] and *D* 49 15 28.[14] In the first text Paul states, without further qualification, that what has been lost in war is recovered by *postliminium* if and when recovered; but in the second text Labeo holds that what is captured in war qualifies as booty and *postliminium* does not apply. However, Labeo returns to *postliminium* in *D* 49 15 30[15] where he specifies that *postliminium* is deemed to apply as soon as Roman property which has been taken by the enemy and qualifies for *postliminium*, has entered the boundaries of the empire. The text mentions that the property in question has escaped from the enemy with the purpose of returning to the Romans, which limits application of this text to slaves and other goods capable to have the *animus revertendi*. The important point is, however, that Labeo admits that *postliminium* does apply to certain things captured in war.

Two texts at the beginning of the title shed some light on the matter. *D* 49 15 2 and 3 state that *postliminium* applies to warships and freighters, a horse or mare, but exclude fishing boats, pleasure craft, arms or clothes.[16] These texts are, however, not enumerative, since it is clear from other texts in this title that captured slaves qualify for *postliminium*, while in his *Topica* Cicero mentions mules.[17]

As criterion for application of *postliminium* the first text appears to indicate absence of fault on the part of the owner and more specifically absence of

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11 Kaser *Das römische Privatrecht* (I) (1971) 426 and 426 nn 10 and 11.

12 *D* 49 15 20 *Pomponius libro trigensimo sexto ad Sabinum* 1. Verum est expulsis hostibus ex agris quos ceperint dominia eorum ad priores dominos redire nec aut publicari aut praedae loco cedere: publicatur enim ille ager qui ex hostibus captus sit.

13 *Paulus libro 16 ad Sabinum* pr. Postliminium est ius amissae rei recipiendae ab extraneo et in statum pristinum restituendae inter nos ac liberos populos regesque moribus legibus constitutum. Nam quod bello amissimus aut etiam citra bellum, hoc si rursus recipiamus, dicimur postliminio recipere. Idque naturali aequitate introductum est, ut qui per iniuriam ab extraneis detinebatur, is, ubi in fines suos redisset, pristinum ius suum reciperet.

14 *Labeo libro quatro pithanon a Paulo epitomarum*. Si quid bello captum est, in praeda est, non postliminio redit.

15 *Labeo libro octavo pithanon a Paulo epitomarum.* Si id, quod nostrum hostes ceperunt, eius generis est, ut postliminio redire possit: simul atque ad nos redeundi causa profugit ab hostibus et intra fines imperii nostri esse coepit, postliminio redisse existimandum est.

16 *D* 49 15 2 *Marcellus libro trigensimo nono digestorum* pr. Navibus longis atque onerariis propter belli usum postliminium est, non piscatoriis aut si quas actuarias voluptatis causa paraverunt. 1. Equus item aut equa freni patiens recipitur postliminio: nam sine culpa equitis proripere se potuerunt. 2. Non idem in armis iuris est, quippe nec sine flagitio amittuntur: arma enim postliminio reverti negatur, quod turpiter amittantur; *D* 49 15 3 Pomponius *libro 37 ad Quintum Mucium* Item vestis.

17 Cicero *Topica* VIII: homo, navis, mulus clitellarius, equus, equa quae fraena recipere solet. Also Festus *sv Postliminium*.

disgrace and shame caused by the loss. This would imply that the object was utilised in the waging of war or at least under the control of the armed forces, which to some extent is covered by Kaser's *kriegswichtig*. However, this leaves the position of civilian property in limbo. It is feasible that such property could be captured by the enemy without blame and shame of loss on the part of the owner. Moreover, the texts do not distinguish between army mules or private mules, the type of slave or the use of the freighter. In consequence I would like to suggest that the listed movables do qualify for *postliminium* irrespective of the circumstances of their capture or their use at the time of capture. The relevant criterion may be found in their value as well as in the fact that they are easily identifiable on recapture.[18] This hypothesis ignores the disgrace and shame of the capture, which belongs in the realm of prisoners of war,[19] and to some extent explains the exceptions made to the *ius praedae*.

An important question, which must be addressed in the law of war and the right of return, is at what moment the ownership of captured goods is acquired or lost. Although *D* 41 1 5 7[20] provides that ownership is immediately acquired,[21] *D* 49 15 5 1[22] states that until the prisoner of war is taken *intra praesidia*, inside the enemy lines, he remains a Roman citizen. This text recognises the fact that the vicissitudes of war and battle may easily lead to escape. No text addresses the recapture of movables,[23] which opens various possibilities. First, it may be that the *intra praesidia* rule applied to prisoners of war only. A second option is that the rule concerning prisoners would apply *mutatis mutandis* to movable property captured by the enemy. By analogy of *D* 49 15 5 1 the ownership would only be lost once the seized property has been brought *intra praesidia* of the enemy.[24] A third variation could extend the *intra praesidia* rule to living beings only, thus including slaves and horses, which in turn risks introducing the tenuous principle of the *animus revertendi.* This legal point is of extreme importance in naval warfare, where ships may be captured on the high seas and may only be brought into port days, weeks or even months later. Thus, the matter of *postliminium*

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18 The same reasoning is found in Pufendorf *De jure naturae et gentium libri octo* (1744) VIII 6 25: Quod autem res attinet, quamdiu bellum durat, si hostibus iterum sint ereptae sive per nos ipsos, sive per nostros cives aut milites, eas ad antiquos dominos redire par est, non immobiles tantum, sed & mobiles, modo liquido a nobis possint dignosci. Pufendorf argues that it is the duty of the state to protect the possessions of its citizens, which includes the recovery of possessions looted by the enemy; the soldiers represent the state and it would be inequitable if the state acquired recovered civilian property.

19 Cf the fate of the Roman POWs after the battle of Cannae, which the senate refused to ransom back and were sold into slavery by Hannibal.

20 *Gaius libro secundo rerum cottidianarum sive aureorum* 7. Item quae ex hostibus capiuntur, iure gentium statim capientium fiunt.

21 Also *D* 41 2 1 *Paulus libro quinquagensimo quarto ad edictum* 1. Item bello capta et insula in mari enata et gemmae lapilli margaritae in litoribus inventae eius fiunt, qui primus eorum possessionem nanctus est.

22 *Pomponius libro 37 ad Quintum Mucium* 1. In bello, cum hi, qui nobis hostes sunt, aliquem ex nostris ceperunt et intra praesidia sua perduxerunt: nam si eodem bello is reversus fuerit, postliminium habet, id est perinde omnia restituuntur ei iura, ac si captus ab hostibus non esset. Antequam in praesidia perducatur hostium, manet civis. Tunc autem reversus intellegitur, si aut ad amicos nostros perveniat aut intra praesidia nostra esse coepit.

23 For immovables see *D* 49 15 20 1.

24 Application of this "rule" to other instances of occupation would lead to introduction of the requirement that the taken object should be brought home before ownership would vest.

remained relevant in pubescent international law, which provides the link to the work of Van Bynkershoek, a native from Zeeland, a maritime state within the United States of the Netherlands.

VAN BYNKERSHOEK

Cornelius van Bynkershoek[25] made a contribution to international public law. The fame of this versatile and erudite jurist in his country and in South Africa is today to a large extent based on his career as a judge[26] and president[27] of the Hooge Raad,[28] and in particular on his *Observationes tumultuariae*, the diary entries made relative to his work in court, which reveal his sharp legal acumen and critical personality.[29] This has to a degree overshadowed his work as a Romanist[30] of international reputation as well as his work in the field of international law.[31] In his *Quaestionum juris publici libri duo* the Chief Justice published his views on national and international public law and in his discussion on the law of war he deals with *postliminium*.

POSTLIMINIUM IN INTERNATIONAL PUBLIC LAW

In the *De jure belli ac pacis*[32] Grotius discussed *postliminium* and had stated unequivocally that this no longer applied to the movables specified by Roman law.[33]

Van Bynkershoek observes that immovable property reverts by *postliminium* to the previous owner on recapture.[34] He follows Grotius' contention that rules laid down by Roman law in respect of warships and freighters had become obsolete and that in consequence all movable property captured by the enemy is considered booty and outside the law of *postliminium.*[35]

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25 19 August 1673–16 April 1743.

26 In 1704. The six towns of Zeeland represented in the States of Zeeland elected the candidate for the vacancy of one of the three seats reserved for this province. De Monté Verloren/Spruit *Hoofdlijnen uit de ontwikkeling der rechterlijke organisatie in de noordelijke Nederlanden tot de Bataafse omwenteling* (1982) 201.

27 In 1724.

28 The Supreme Court of Appeal in Holland and Zeeland, established in 1582 as the result of the abjuration of the King in 1581, to replace the Council of Malines. In 1587 Zeeland acceded the jurisdiction of this court. De Monté Verloren/Spruit 136ff, 201.

29 Hahlo and Kahn *The South African legal system and its background* (1973) 557ff.

30 *De lege Rhodia de jactu liber singularis* (1703); *Observationum juris Romani libri quatuor* (1710), *Opuscula* (1719); *Quatuor prioribus additi* (1733); *Quaestionum juris privati libri quatuor* (1744).

31 Van Bynkershoek's treatises *Quaestionum juris publici libri duo*, *De foro legatorum*, and *De dominio maris*, are included in the series *The classics of international law*, publications of the Carnegie Endowment for International Peace.

32 *De jure belli ac pacis* (1625) (the 1712 edition was available) III 9 De postliminio.

33 III 9 15. At posterioribus temporibus, si non ante, sublata videtur haec differentia. Passim enim tradunt morum periti res mobiles postliminio non redire, & id de navibus constitutum multis in locis videmus.

34 *Quaestionum juris publici libri duo* (*QJP*) I 5. Bk I ch 6 is devoted to the question of the ambit of the possession of immovables taken in war and the resulting ownership.

35 *QJP* I 5 Res mobiles, & praesertim naves, an & quosque recuperatori cedant? At 36: Unde nunc mobilia, sine distinctione omnia, in praeda sint, sine ullo jure postliminii.

As a result of the disappearance of *postliminium* in respect of warships and freighters a whole new set of rules concerning the acquisition and loss of the ownership of these objects in times of war was in the process of developing. Thus Grotius observed in his *De jure belli ac pacis*[36] that in the more recent European law of nations ships and goods captured at sea became the property of the enemy when they had been in his possession for 24 hours.[37] Some authors[38] and admiralty courts[39] held that this rule applied regardless of whether the captured ship had been brought *intra praesidia*, namely into a homeport by the captor.[40]

Van Bynkershoek rejects this innovation as contrary to reason and doubts whether it was observed.[41] He is of the opinion that this rule is inconsistent with

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36 III 6 3 2: Sed recensiori Jure Gentium inter Europaeos Populos introductum videmus, ut talia capta censeantur, ubi per horas viginti quatuor in potestate hostium fuerint. In his notes he also applies this principle to goods captured on land.

37 Belli *De re militari et bello tractatus* (1563) III 1 traces the origin of the 24-hour rule to the belief commonly held by soldiers that plunder becomes theirs after overnight possession; he refers to Angelus' commentary on *C* VIII 2 as his source. Gentili *Hispanicae advocationis libri duo* (1613; the 1661 edition was available) I 2 at 9 cites Angelus: Et audivi quosdam armorum expertes asserere, inter eos consuetudinem vigere, quod si per unm diem praeda fuerit in campo detenta per hostes, quod intelligitur capientium facta. See also Gentili I 3. De judicio militum, & varia consuetudine in rebus ab hoste captis.

38 *Hollandsche consultatien* II (1670) 151 Een schip, bij een Zee-rover genomen en wederom veroverd bij die gene, geen vijandschap hebbende met die gene, van welkers ingezetenen het zelve bij een Zee-rover genomen is, werd bij den overwinner niet geacquireert, maar blijft den eigendom daar van aan die gene, van de welke het aldereerst is genomen. v Mits . . . en dat ook naar de costuime genoeg zoude zijn iets in vijanden handen of macht geweest te hebben den tijd van vier en twintig of twee maal vier en twintig uur en omme *justo belli titulo* 't zelve van hen lieden weder genomen en in eigendom bekomen te konnen werden. Van Bynkershoek mentions also Zoucheus *Juris et iudicii fecialis seu iuris inter gentes et quaestionum de eodem explicatio* (1650) II 8 1 and Loccenius *De jure maritimo libri tres* (1650) II 4 4.

39 Van den Berg *Nederlands advysboek* (1722) II 66 Consultatie of Request aan de Edele Mogende Heeren Gecommitteerde Raden van de Admiraliteit residerende binnen Amsteldam. Van het nemen en hernemen van Schepen, en van de praemien door de hernemers. At 161. zo zal bevonden worden dat ontrent Schepen ter Zee genomen verstaan werd dat de zelve den Veroveraar die de zelve van zyne Vyanden neemt geacquireert en eigen geworden zyn met alles wat daar in is zo haast hy de zelve de tyd van vier-en-twintig uren is meester geweest zonder onderscheid of de Veroveraar de zelve in eenige Haven ter plaatze daar is uitgevaren geweest gebragt heeft gehad of niet . . . En heden onder alle Natien van Europa werd onderhouden; alzo het is dat ontrent koopmanschappen en diergelijke roerende goederen noyt *jus postliminii* heeft plaats gehad en of wel ten regarde van de Schepen die ten Oorlog mede gebruikt kunde hebben anders is geoordeelt geweest zo is nogtans zelve *posterioribus temporibus*, zo niet al lange te voren mede in ongebruik geraakt als zijnde doorgaans geleert en onderhouden geweest dat *jus postliminii* omtrent roerende goederen geen plaats heeft.

40 Grotius III 6 3 2: Sed recentiori jure gentium inter Europaeos populos introductum videmus, ut talia capta censeantur ubi per horas viginti quatuaor in potestate hostium fuerint.

41 I 4 at 27: Sed ego illud usu servari nunquam potui animadvertere. He continues that in Van Dalen's *Notabile krygsbesoignes* two decisions to this effect can be found, but argues that military courts are ignorant of the law and clearly misled by Grotius. He continues *eod loc*: Omni etiam ratione destituitur, si enim ex ea rem aestimes, sola mutati domini ratio in vera occupatione consistit; vera autem occupatio est, quam tuta retentio excipit, cui quid faciunt horae XXIV quum & ultra res possit esse non vere occupata, atque eam citra eas occupata verissime? Van Zurck *Codex Batavus* (1758) *sv* Prinsen, Commissie-vaerders, Vrybuiten, &c § XIII N 3.

the laws and customs of the United States of the Netherlands and holds that the correct principle is found in Roman law, namely that the captor only establishes ownership when he is in the position to keep and defend his possession. He is deemed to be able to do so when he has brought the captured thing *intra praesidia*, within his lines or his fortifications, *in casu* his ports or his fleet.[42] This point of view is according to him supported by *D* 41 2 22 where Iavolenus holds that he who cannot keep it is not considered to have acquired possession.[43] Therefore, the captor establishes ownership at the time he is able to keep the prize, that is, successfully defend his possession of the booty, which means that for the previous owners all hope of rescue and recapture is gone. Once the goods are within the enemy lines, the captor acquires ownership, and on recapture such goods are considered to be booty from the enemy. Johannes Voet ridicules this reasoning in his discussion of *postliminium* and holds that the enemy acquires ownership by simple capture.[44] However, Van Bynkershoek's principle was applied by the king of England and the States General in 1689 when it was agreed that recaptured ships would be restored to the owner unless the vessel had already been brought into the ports of the enemy, in which case ownership passed to the recaptors.[45]

It is clear that their opinion on the obsoleteness of *postliminium* forced both Grotius and Van Bynkershoek into a restrictive interpretation of acquisition of ownership by way of capture from the enemy,[46] the first by his adherence to the 24-hours requirement, the latter with the even more stringent demand that the captured ship had to be brought within port. It should, however, be kept in mind that *D* 41 1 5 7[47] provides that ownership is immediately acquired, and that *D* 49 15 5 1[48] which introduces the *intra praesidia* requirement deals with prisoners of war and does not address the recapture of movables. Thus an extensive interpretation is only one possibility and the question may be asked whether such extensive interpretation introducing a new requirement for the acquisition of ownership, albeit by the enemy, is feasible when this is based on an obsolete figure of law.

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42 *QJP* I 4 at 28: Tunc tamen retinere videmus posse, ubi rem hostilem, ut Jus Romanum loquitur, intra praesidia deduximus, *praesidiorum* autem nomine & Castra, & Portus, & Urbes, & Classes intelligimus, eorum enim omnium eadem causa est in tuta defensione rei occupatae. Van Bynkershoek simply follows the medieval interpretation. For more information on the different paradigms and their supporters *cf* Gentili I 2 Rem non fieri hostis capientis ante deductionem intra ipius praesidia.

43 *D* 41 2 22 *Idem libro tertio decimo ex Cassio*: Non videtur possessionem adeptus is qui ita nactus est, ut eam retinere non possit.

44 *Commentarius ad Pandectas* II 49 15 3. Et sane, ni ita statuas, dominiumque hostibus neges, donec intra praesidia res delatae fuerint, dicendum foret, id, quod unus militium manipulus occupavit, per alium manipulum socium & amicum, sed numerosiorem posse iterum auferri, quasi id nondum manipuli primo capientis, sed adhuc hostium res esset: quod utique absurdum est. *Cf* Gentili I 2 for adherents to this view.

45 *Groot Placaet-Boeck, vervattende de Placaten, Ordonnantien ende Edicten vande Heeren Staten Generael der Vereenighde Nederlanden ende vande Heeren Staten van Hollandt en WestVrieslandt mitsgaders vande Heeren Staten van Zeelandt* (1658-1795) (*GPB)* V 1 13 2. Conventie met Engelandt noopende het herneemen van Scheepen, den 22 October 1689. *QJP* I 5 at 36.

46 Voet II 49 15 1 held that *postliminium* continued to apply to the transport ships and horses broken in, and could thus follow the traditional principles of Roman law on acquisition of ownership.

47 *Supra* fn 20. Also *D* 41 2 1.

48 *Supra* fn 22.

INTRA PRAESIDIA

However, once this route had been chosen, the logical next step was to limit the interpretation of *intra praesidia.* Since both Pomponius in *D* 49 15 5 1[49] and Paul in *D* 49 15 19 3[50] state that *postliminium* applies when a person enters an allied or friendly state, it would stand to reason that captured ships and goods should become the property of the enemy once they were brought into enemy ports or ports of his allies.[51] However, in this instance a strict and narrow interpretation was adhered to and only where the captured ship had been brought into the enemy's own port ownership was acquired. This was decreed by the States General in 1676 when the French captured two ships from Hamburg with cargoes belonging to merchants from Amsterdam. These ships were brought into the port of Hull in England, an ally of the French. The admiralty of Dunkirk declared ships and cargo lawful prize. On their way from Hull to Dunkirk the ships were seized by Zeelanders, brought into harbour and declared lawful prize once again. After intervention by the Amsterdam merchants, the States General decreed that the goods must be restored to the original owners, since they had not been brought inside the enemy's port.[52]

NEUTRAL PORT

In consequence, bringing a captured ship and goods into a neutral port would not affect the ownership thereof. Nevertheless we find that some Dutch jurists[53] were of the opinion that whatever was recaptured before the enemy had reached an own port, enjoyed the benefit of the *ius postliminii* irrespective of whether it had been captured months ago or had been brought into an allied or friendly port. Van Bynkershoek disapproves of this careless use of *postliminium* and sets the record straight with a didactical explanation that correct application was limited to objects which had become the property of the enemy by capture.[54]

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49 *Supra* fn 22.

50 49 15 19 *Paulus libro 16 ad Sabinum* 3. Postliminio redisse videtur, cum in fines nostros intraverit, sicuti amittitur, ubi fines nostros excessit. Sed et si in civitatem sociam amicamve aut ad regem socium vel amicum venerit, statim postliminio redisse videtur, quia ibi primum nomine publico tutus esse incipiat.

51 *QJP* I 5 at 36ff. (s)ed non aeque liquidum, quae praesidia, quos portus intelligamus? eorum, qui naves ceperunt, an & sociorum? diceres, sociorum sufficere, utique si sint bellui socii, atque ita & hostes eorum, quorum naves captae sunt. In portu ejusmodi socii aeque tuta est navium captarum retentio, ac in portu proprio, & nulla recuperandi spes, nisis rursus inde enavigaverint.

52 *QJP* I 5 at 37. At vero Ordines Generales, ea de re aditi a mercatoribus Amsterdammensibus, 23 Oct 1676 decreverunt, recuperata bona pristinis dominis esse restituenda, quod nempe in portum hostis nondum fuissent perducat, & ibi publicata & distracta. Per *portum hostis* intelligunt hostem, cujus navis cepit, ajunt enim, den voorschreve vyand. Van Alphen *Papegay ofte formulier-boek* (1720) II Request IX Daar by de Reeders van seecker Schip versoecken Mandement van Arrest op seecker haar Schip by de Zeeusche Capers, van de Fransche hernomen 295ff.

53 Van den Berg III (1715) Consultatie 68 and 69; Van Zurck *sv* Prinsen &c § X N 1 En cesseert door dit *Placaet* het *regt van vindicatie* voor den eigenaers verder als voor de helft, die anders voor het geheel hun toequam, by *Plac Holl* 4 *Martii* 1600.

54 *QJP* I 5 at 38. Suavis ibi sermo est de postliminio, nam, qui sciunt, quid *postliminium* sit, sciunt quoque non esse, nisi ejus, quod in hostium dominium ante transfierat. Dicendum erat, ante deductionem in portum res non esse factas hostium, sed remansisse prioris domini, recuperatas igitur ei cerdere, & non recuperatori.

Thus it comes as a surprise that Van Bynkershoek devotes chapter 15 to the question whether goods captured by the enemy and brought into neutral territory revert to the owner by *postliminium*.[55] Grotius had interpreted *ad amicos nostros* in *D* 49 15 5 1[56] and *in civitatem sociam amicamve, aut ad regem socium vel amicum* in *D* 49 15 19 3[57] to refer to allied states only,[58] thus following the *communis opinio*[59] and the Judge President scoffs at Gentili,[60] De Imola[61] and Belli,[62] who hold that whatever, persons or things, is brought within neutral territory reverts by *postliminium.*[63] Nevertheless, in summing up he holds that if goods captured by the enemy arrive in a country allied to the Dutch, they revert to the original owners,[64] in fact abandoning the theoretical purity of his earlier reasoning and giving implicit recognition to *postliminium*.

SALE OF LAWFUL PRIZE

As a rule, captured ships and cargo were sold once in port; from the above it has become clear that the crucial question in Van Bynkershoek's paradigm should be whether this was a homeport of the enemy, a port of one of his allies or a neutral port. In the first instance the enemy has secured his possession and has thus become owner of ship and cargo and a consequent sale and delivery passes ownership to the buyer.[65] Since bringing the vessel into neutral and even allied ports was not considered to constitute secure possession and the resulting ownership, the enemy could sell the goods, but not transfer ownership, which still remained with the dispossessed owner.

This matter was subjected to a dazzling variety of novel solutions introduced by legislation and decisions of the various states as well as agreements between the latter.

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55 *QJP* I 15 An res, ab hostibus captae, in non hostis imperium delatae, postliminio revertantur? It is nowhere explained whether this question deals with goods captured and after having been brought *intra praesidia*, brought into neutral territory, or simply goods captured and directly brought into neutral territory.

56 *Supra* fn 22.

57 *Supra* fn 50.

58 *De jure belli ac pacis* III 9 2. Grotius thus adopted the *communis opinio.*

59 See Gentili I 1: Postliminium an sit apud amicum communem.

60 *Ibid* where he argued that *amicos nostros* included neutrals. The question was whether Spanish prisoners of war taken by their Dutch captors to Holland by way of England, became free in England. He concluded at 4: Sic ego contra disertissimos & doctissimos viros atque Advocatos disputabam, neque tamen adeo huic argumento innetebar, ut, contra quam fieri sciam, res jam & praeda Hollandorum, iis in amico regno amitteretur.

61 *Consilia* 51 as cited by Belli II 18 12.

62 *De re militari et bello tractatus* II 18 12 where he followed de Imola on the point that a prisoner of war cannot be taken to the captor's base via the territory of a neutral.

63 *QJP* I 15 at 112. Unde mirir, Gentilem aliosque existimasse, postliminio reverti, quaecunque in non hostis Imperium delata sunt, &, quod ei consequens est, captivos, in territorium amici deductos, fieri liberos.

64 *QJP* I 15 at 113. Secundum haec si res mea, ab hostibus capta, ad socium & foederatum pervenerit, mihi redditur, & perinde habetur, atque si socius & Foederatus eam ab hoste communi liberaverit.

65 *Hollandsche consultatien* (1689) V 161. Op het seste poinct aangaande de Schepen die van den Vijand genomen zijn van onse Ingesetenen en bij den Vijand verkocht en bij neutrale gekocht dat dezelve als *occupatione bellica jure gentium* des Vijands eigen geworden zijnde wel en te rechte van den Fisque aldaar bij de neutrale gekocht mogen werden zonder dat dezelve van haar bij de vorige en oude Eigenaars van den welken dezelve genomen zijn gevindiceert mogen werden.

The decree of the States General of 1666[66] deserves special mention. This case dealt with Dutch ships captured by the English and brought into English ports where they were – after confiscation – purchased by neutrals. The States General provided that should these ships be recaptured by the Dutch on their voyage from the enemy's port to their own port of destination or to another neutral port, they would be declared lawful prize in accordance with ancient customs and the decree of 26 June 1630 by the same body.[67] Van Bynkershoek first raises the question as to how the fact whether the ships have reached the harbour of the buyer or another neutral port can be of relevance since this can hardly bestow ownership either upon the enemy or the purchaser.[68] Nor does the decree settle the point that after purchase from the enemy and reaching the homeport ownership vested in the neutral buyer,[69] since the States General equivocated on this point when consulted by the admiralty of Amsterdam.[70] Van Bynkershoek strongly rejects the latter construction[71] and explains this conundrum by an analysis of the above-mentioned decision of 1630.[72] On that occasion the Dutch had blocked the ports of Flanders to prevent commerce and in consequence seized all vessels of all nations on their voyage to and from these ports.[73] Van Bynkershoek holds such

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66 27 November 1666. Van den Berg II Consultatie 61 of Extract uit het register der resolutien van de Hoog-Mogende Heeren Staten Generaal der Vereenigde Nederlanden. Van Zurck *sv* Prinsen &c § XIII.

67 *QJP* I 4 at 28ff: dat Schepen, by den vyand genomen en in Engeland en de Ryken, daar onder horende, opgebragt, en aldaar geconfisqueert, en by Neutralen gekogt, dog in 't uytkomen van de vyandelyke havenen in ipso actu, of vervolg van 's Lands Schepen verovert, eer zy in haar eigen of andere vrye havens geweest zyn, als nu en in 't toekomende zullen verklaart werden voor goeden pryse, gelyk van ouds altyd gebruykelyk is geweest, en zoo als ook het dispositif op 't vierde point can de Casus positie van 26 Juny 1630 onder anderen mutatis mutandis dicteert. Ipsa verba exhibui, ne putares, me incredibilia narrare.

68 At 29: Miraberis autem, ego certe miror, quid ad rem faciat, utrum naves in proprium emptoris, vel in amicum portum pervenerint, nec ne. Ille portus proprius vel amicus, modo nescio quo, dabit nescio cui, nescio quid. Dominium dare non potuit hosti, qui jam occupaverat & vendiderat, neque emptori, qui ita rem nostram emisset a non domino, eamque rem nobis eriperet portus quidam proprius vel amicus. He proposes that it would have been better to introduce the fiction that the ship was purged of the taint of having become enemy property by bringing it into the purchaser's or a neutral harbour and that until such time it could be lawfully retaken, but rejects his own proposal on the ground that the ship belongs to the buyer and that it is immaterial how it had become the property of the vendor.

69 *QJP* I 4 at 33: Ceterum ex iis Decretis Ordinum Generalium 1630 & 1666 id tamen constare existimares, ea, quae ab hostibus nostris amici nostri compararunt, iis eripi non posse, si semel in portum amicum fuerint deducta, cum ajunt, recte publicari, *eer zy in hare eigen of andere vrye Havens geweest zyn*, sed ne id quidem satis constat.

70 "Zullen wy als nog een korten tyd in bedenken houden." *QJP* I 4 at 33f. Van Bynkershoek mentions that he found in Aitzema (*Historien* IX 526) that in 1631 the Hof van Holland was consulted, but that he was unable to find whether a decision was given.

71 At 34ff. He argues that this would be in conflict with the decrees allocating certain percentages of recaptured ships to the original owner and recaptor, international customary law, reason and law.

72 *Derde deel van de consultatien, advysen en advertissementen by rechts-geleerden in Hollandt, West-Vrieslandt ende Uytrecht mitsgaders appendix* (Amsterdam 1647) 54ff. Extract, uyt het Register der Resolutien. vande Staten Generael. Merccurij den 26 Iunij 1630.

73 *QJP* I 4 at 30: Scilicet commercii intercludendi ergo Ordines Generales portus Flandriae navibus bellicis obsederant, adeoque omnes quorumcunque naves, eo destinatas, indeque exeuntes, publicabant, quemadmodum ex ratione & Gentium usu Urbibus obsessis nihil quicquam licet advehere, vel ex his evehere.

blockade to be permissible in terms of international customary law[74] and that in consequence the decrees of admiralty of Amsterdam and the States General declaring application to all ships – including those previously taken from the Dutch and sold to neutrals – were correct.[75] Furthermore, the application of the blockade extended for as long as the ship is employed in illicit trade, that is until the voyage is complete, in other words until the ship has reached its own port or another neutral port.[76] However, Van Bynkershoek stresses the fact that the 1630 decree provided no basis for the 1666 decision and the consequent legal reasoning.[77]

Nevertheless, such practices were common, which is borne out by the 1672 edict of Louis XIV ordering capture and confiscation of all ships bought in the United States of the Netherlands.[78] The French captured and confiscated a ship, which had been built and bought in Holland by owners from Hamburg and which was with a Hamburg crew on its way to Hamburg.[79] In retaliation the Dutch issued a similar decree,[80] which as Van Bynkershoek observes harmed the neutrals more than the French.

As stated above the enemy can sell captured goods in a neutral country, but according to Van Bynkershoek's paradigm, he cannot transfer ownership. Van Bynkershoek reports that such sales were often prohibited. In 1658 the States General forbade foreigners, who brought their prize into Dutch harbours, to sell or even unload the captured goods and made buying or assisting in unloading from the ship punishable with a minimum fine of one thousand florins.[81] Later in

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74 *Supra* fn 73. At 31 he mentions, however, that when in 1663 the Spanish held Portugal under blockade the States General refused to recognise that right.

75 30: Atque inde dicebat Admiralitas, ut & Ordines decreverunt, idem quoque juris esse in navibus, quae antea nobis ereptae & deinde venditae erant, cum, obsessis portubus, etiam amicorum naves liceat intercipere.

76 *Ibid*: Quod ita verum est, si capiantur itinere nondum absoluto, dum navarchae versantur in re illicita, absolutum autem iter non intelligi, nisi hae naves proprium emptoris vel amicum portum subierint.

77 At 31: ex quo ad eam, de qua nunc disputo, quaestionem recte argumentaberis, si & anno 1666 Angliam, Scotiam, Hiberniam, & omnia illa, quae in Asai, Africa & America habebant Angli, Classibus suis obsessa habuerint Ordines Generales. Ex his apparet, defendi non posse d Decretrum Ordinum generalium 27 Nov 1666. Et sane, si ejus rationem sequi placeat, mox praesto erunt immania monstrorum portenta.

78 At 32: Edictum Ludovici XIV Francorum Regis, quo 17 Sept 1672 omnes naves, etiam ab amicis suis in Belgio Foederato emptas, & inde primum exeuntes, capi & publicari jussit.

79 *Ibid*: quemadmodum & die sequeni publicata est navis quaedam, quam Hamburgenses, in Hollandia aedificatam & emptam, & Hamburgensibus epibatis instructam, ex Hollandia Hamburgum ducebant, quaeque in eo itinere a francis capta erat.

80 *GPB* III 1 7 8. Daer by alle Schepen in Vranckrijck, of andere Steden ende Plaetsen onder 't gebiedt van Vranckrijck behoorende, by neutrale Princen of Staten, ofte hare Onderdanen of Ondersaten ingekocht, van goeden prinse verklaert werden, soo sy de eerste-mael uyt de Havenen in Zee komen. In date den vijfthienden December 1672. *QJP* I 4 at 32: dat alle Schepen, in plaatsen onder den Coning van Vrankryk by Neutralen ingekogt, zoo zy, schoon met neutraal bootsvolk bemant, de eerstemaal uyt vyandelyke Havenen varende, en nog in geen neutrale, waar na toe zy gedestineert waren, geweest, in handen der Commissie-vaarders vervielen, goede pryse zouden wesen.

81 *GPB* II 4 26 2 1. Placaet, Waer by ordre ghestelt wert, wanneer ende op wat voet vreemde commissie-vaerders hare Schepen inde Havenen of Zee-gaten deser Landen sullen mogen brengen. In date den 9 Augusti 1658. *QJP* I 15 114ff: Sane Ordines Generales 9 Aug 1658 edixerunt, ne quis exterus praedator navim captam, inque suos portus ex causa fontica

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the same year they prohibited foreign captors from bringing their ship into the actual port, only allowing them to bring their ships into the outer roads, and reiterated the prohibition against unloading and selling with the penalty that in the event of non-observance the prize would be deemed to be not captured and returned to the owner, the captor arrested and his ship seized and confiscated.[82]

In the peace treaty of 1662 with England it had been stipulated that enemies could not sell captured goods in neutral territory and that if the price had not been paid the goods were to be returned to their owner.[83] The president queries the rationale for these prohibitions and is disdainful of the argument that the enemy would benefit. He argues that it is lawful to aid friends even if they are at war with each other; the only duty is not to aid them with war material, but that it can hardly be required to close the ports.[84]

The above clearly indicates that consistent application of principles so dear to the chief justice was at odds with legal practice on this topic, where vestiges of *postliminium* repeatedly re-emerged by giving recognition to the rights of former owners to their captured ships and goods.

DUTCH POSITIVE LAW CONCERNING RECAPTURE OF SHIPS

In 1625 the States General promulgated a statute[85] in terms of which one eighth part of the ship and cargo was granted to the recaptor[86] if recapture had taken place within 24 hours after the initial loss; one fifth if within 48 hours and a third thereafter.

In 1632 a statute by the same body granted privateers two thirds of the recapture,[87] but in 1643 legislation was passed which reverted to the original position,

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delatam, distraheret vel exoneraret, sed adventum suum Ballivio loci denunciaret, isque posita custodia praedum observaet, usque dum denua abeundi potestas esset, statuta, praeter poenam arbitrariam, mille floeorum mulcta ei, cui aliquid ex ea praeda emisset, aut exonerari navim juvisset. Van Zurck *sv* Prinsen &c § VI N 1.

82 *GPB* II 4 26 2 2. Nader ende stricter Placaet op 't selve subject. In date den sevenden November 1658. *QJP* I 15 at 115.

83 *QJP* I 15 at 114: Plus habet dubii, an hostis noster rem, quam a nobis cepit, in amici territorio possit distrahere, & pretium eigere? Sed non posse, &, si distrahat, rem, nullo soluto pretio, ad pristinum dominum reverti cautum est § 12 d Pacis Anglicae 14 Sept 1662 quem § in facto quodam, quod incidit, servari voluisse Ordines Generales, narrat Aitzema (*Historien* XLIV p 402).

84 *QJP* I 15 at 114: Scire autem velim, quae sit ejus pacti ratio? an quod, si distrahere liceret, hostis noster ea distractione juvaretur? sin hoc ajas, ais, quod incertum est; quin licet amicos nostros, quamvis invicem hostes, juvare, modo ne juvemus bellico apparatu, & his, quam illis, aequires vel iniquiores simus. Noli igitur a me desiderare, ut amicis portus meos claudam, iisque cum subditis meis commercio interdicam.

85 *GPB* I 2 14 3 2. Placaet, vande premie voor particuliere die 's Vyandts Schepen veroveren. In date den vierden Iulij 1625. *QJP* I 5 at 39. Van Bynkershoek mentions at 38 that some jurists hold that the Edict of the States of Holland of 4 March 1600 recognises the *ius postliminii* even though the ships had been brought into the enemy's harbour, but explains that this edict does not pertain to the matter as the States held that the ships were declared lawful prize in contravention of the laws of war.

86 *GPB* I 2 14 3 4. Praemie voor de Schepen van Oorlog, die Duynkerckers veroveren. In date de 22 Iulij 1625. The statute of 4 July 1625 applied to private recaptors; on 22 July 1625 this was extended to recovery by warships.

87 *GPB* I 2 14 3 3. Nader Placaet, vanden elfden Meert sesthien-hondert twee-en-dertich op 't selve subject. *QJP* I 5 at 39. Groenewegen vander Made *Tractatus de legibus abrogatis et*

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that is one eighth, one fifth or a third dependant on the time-limit of twenty four, and forty eight hours.[88] Two years later the States General reverted to the decree of 1632, that is, that privateers became entitled to two thirds;[89] however, in 1659 one ninth fell to the recaptors, private or naval.[90]

In 1677 it was decreed that privateers were entitled to a fifth of the value of a ship and cargo if these had been less than 48 hours in the possession of the enemy; a third, if the enemy possession had been longer than 48, but less than 96 hours; and half if the vessel and goods had been in the hands of the enemy longer than 96 hours. For recaptures made by Dutch warships the premium determined by previous decrees remained in force.[91]

Van Bynkershoek is critical of this legislation.[92] He reiterates that the pivotal question remains whether ship and cargo have become the property of the enemy, which question is without equivocation answered once he has brought his booty into his own port or joined his own fleet.[93] If recaptured before the enemy has achieved to do so, ownership does not yet vest in the enemy and can therefore

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inusitatis in Hollandia (1649) on *D* 49 15 2 5. Van Zurck *sv* Prinsen &c § X: zonder onderscheid van tyd; Van Zurck omits the intervening legislation and continues: Doch is de premie van hernome Schepen, zonder onderscheid van tyd, op de helft genomen, by *Plac Stat Gen* 28 *Jul* 1705. See also N 1: En cesseert door dit *Placaet* het *regt van vindicatie* voor den eigenaers verder als voor de helft, die anders voor het geheel hun toequam, by *Plac Holl* 4 *Martii* 1600.

88 *GPB* I 2 7 3 1 ss 56, 57 and 58. *QJP* I 5 at 39.

89 *GPB* I 2 15 1. Placaten vanden derden October 1643, en de achtsten February 1645. Om de Kruyssers weder in Zee te brengen, tot nader beveylinge van dien, oock ordre ende Regelement op 't Mannen ende Monteren vande selve Kruyssers. Sec 16.

90 *QJP* I 5 at 39ff. Van Bynkershoek mentions: Id Decretum publice quidem editum non est, sed reperi inter Acta Ordinum Generalium, & memoratur quoque alibi (*Nederlandsch advysboek* III 68 69).

91 *GPB* III 1 7 16. Publicatie van de Hoogh Mog Staten Generael der Vereenighde Nederlanden, raeckende het bergh-loon van Schepen by Commissie-vaerders deser Landen van den Vyandt hernomen. In date den dertienden April 1677. The same fractions and time limits were agreed upon in the Treaty with England concluded on 22 October 1689 in respect of privateers; however, for recapture by warships only one eighth was granted without time limits. *Cf GPB* V 1 13 2. Conventie met Engelandt noopende het herneemen van Scheepen, den 22 October 1689.

92 *QJP* I 5 at 40: Cur tam varie? & quae ratio temporis, diversimode distincti? & cur distinctio temporis partes, nunc majores, nunc minores dabit? Unde iterum, si distinctio temporis placeat, tanta partium varietas? & unde etiam, rejecta omni temporis distinctione, modo bes, pars longe maxima, modo nona, pars longe minima, recuperatoris erit? Sane difficile est rationem reddere eorum, quae fere sine ratione idonea constituuntur. Voet II 49 15 4 is, however, of the opinion that *postliminium* applied and that the fractions awarded to the recoverer were reward for the salvage. Moreover this author mentions that the 1677 allocation found its origin in the Treaty with Spain of 25 November 1676. *GPB* III 1 13 37. Declaration sur le Traicté de Marine, arresté en l'An 1650 entre sa Majesté le Roy d'Espagne, & les Seigneurs Estats Generaux Provisionellement arrestée a Bruxelles le 25 Novembre 1676.

93 *QJP* I 5 at 41:Ex eo res tota pendet, ecquando existemus, naves mercesve captas pleno jure hostium esse factas? Jure quidem definitum est, hostium esse factas per veram plenamque occupationem, sed rerum & factorum varietas non permittit, ut semper sciri possit, an vera & plena sit occupatio, id est, an hostis ita ceperit, ut, quae cepit, retinere & defendere possit. Quae hostis cepit medio mari, procul a finibus suis, potest amittere, & saepe amittit per alterius recuperationem. Si, quae cepit, deduxerit ad fines & portus suos, nemo dubitaverit, pleno jure capientis esse facta.

not pass to the recaptor.[94] In such event the original owner can claim his property, but has to pay the recaptor salvage or pay for his expenses and efforts.[95] Van Bynkershoek is of the opinion that the *actio negotiorum gestorum*[96] is the appropriate action, and rejects both the granting of a portion of ship and cargo as well as the variation of this share according to the length of time during which the ship and goods were in enemy hands.[97] He holds that if a part of the ship should be granted, this should be in proportion to the labour and expense incurred as is customary in salvage[98] and was provided for in Holland by Philip II in 1574[99] and re-enacted in 1676 and 1677.[100]

CONCLUSION

Analysis of Van Bynkershoek's work on this point of international public law leads to the a number of conclusions.

Firstly, the tenacity of Roman law principles and rules, which keep re-appearing even after having been declared obsolete, in this case *postliminium* for movables. In spite of Grotius' and Van Bynkershoek's contention, legal practitioners and segments of legal science, for example Voet, continued to rely on *postliminium*. Moreover, the legislature appears to have been in search of a new direction, but seemed incapable of abandoning the right of return completely in peace or truce treaties.

The questions as to whether the rules of public international law are derived from such treaties and whether treaties can deviate from the established rule are raised, but not answered. An example of the first approach is found in Grotius who deduces the rule that captives do not change their status when in the territory of a neutral – unless this has been stipulated in treaties – from the second peace treaty between Rome and Carthage as quoted by Polybius.[101] Van

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94 *Ibid*: Quid igitur, si antea recuperentur? Pristinis dominis utique vindicandi jus erit, utpote dominio in hostem, atque adeo in recuperatorem nondum translato; *pristinos* dico. quia qualiscunque occupatio intercessit.

95 *Ibid*: Sed an dominus vindicabit a recuperatore, non soluto servaticio sive praemio recuperationis? absque ulla mercede pro operis & impensis, in recuperationem factis? id vero aequitas, Juris Gentium magistra, non patitur. Haec postulat, ut detur servaticium, sive praemium, sive merces, quocunque nomine appellare placet. Recuperator servavit navem & merces, alioquin domino perituras; cur, sine spe mercedis, se objiciet periculo?

96 *D* 3 5. De negotiis gestis. *QJP* I 5 at 42: utiliter utique gessit negotium domini, & pro impensis, in recupertionem factis, ipsa negotiorum gestorum actio ipsi praesto erit.

97 *QJP* I 5 at 42.

98 I 5 at 43f he refers to chapter 287 of *Il Consulato del mare,* a compilation of rules of maritime law first published during the 11th century in either Barcelona or Pisa.

99 *Id* at 43. He relates to the *Lex Rhodia* as well as a statute promulgated by Mary of Burgundy dd 14 Nov 1476 for *het redelyk bergloon,* which concept he held to be confirmed in subsequent legislation. *GPB* II p 2117 dd 15 Mey 1574 Placaet, Beroerende de Zee-Driften. This decree mentions "behoorlijcke berghloon" and stipulates certain sums, but provides that where the salvagers were of the opinion "meerdere moeyte en kosten gedaen te hebben, zullen zij daer van betaeldt werden."

100 *GPB* III 6 2 4 Placaet, raeckende de Strandt-roveryen. In date den tweeden April 1674 and III 4 5 7 Placaet van de Staten van Hollandt ende West-Vriesland ordonnerende dat alle het Hout de Rivieren komende afdrijven, moet werden aengegeven aan 't Houtkopers Gilde tot Dordrecht, ten eijnde 't selven wederom aen de rechten Eijgenaer mach komen. In dato den twee en twintighsten Julij 1677.

101 *QJP* I 15 at 110ff: Grotius autem id, quod dicit, solis exemplis defendit . . . quale mox adducit ex foedere II inter Romanos & Carthaginenses, sed recte observat Zoucheus non

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Bynkershoek in his turn cites section 20 of the peace treaty between the king of Portugal and the States General of 6 August 1661[102] where it was agreed that captured property brought into port of the other party would revert to the original owner if claimed within a certain time from capture, and was of the opinion that such treaties can alter neither reason nor the law of nations.

A further reason for the confusion surrounding this topic is found in the fact that states often promulgate their own rules, which may lead to the view that the *ius postliminii* does not form part of the law of nations, but derives from national law,[103] as the decrees of the States General determined the Dutch position, while Louis XIV in turn decreed as he wished.

Thus, the Dutch legislature walked a tightrope between the developing law of nations and their reluctance to abandon *postliminium*, which ambiguity found its expression in the introduction of the 24 hour timeframes on the one hand and the recognition of previous ownership albeit in varying fractions on recapture.

Van Bynkershoek's approach suffered from a similar dualism. As an authority on public international law he followed Grotius on the point of the obsoleteness of *postliminium* of movables, but was driven to re-interpret the Roman law texts to minimise the damage for the Dutch merchant navy.

Finally, an analysis of Van Bynkershoek's work shows once again how expertise in Roman law facilitates analysis and evaluation of contemporary law. This point is amply validated by the successful career of Van Bynkershoek, whose intellectual arrogance can to a large degree be attributed to his mastery of Roman law, which supplied him with a scope of knowledge and a clarity of reasoning unsurpassed by his fellow judges of the supreme court or his contemporaries in legal practice and legal science.

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satis constare, an, quod illi pacti sunt, sit habendum pro Jure publico, an pro exceptione, qua a Jure publico diversi abeunt. In variis Pactis, & antiquioribus, & recentioribus, id adeo saepe est incertum, ut ex solis Pactis, non consulta ratione, de Jure gentium pronunciare pericolosum est.

102 *GPB* II Byvoegsel van eenige Placaten p 2861 Articulen van Vrede ende Confoederatie. Geratificeert 24 Nov 1662. Den Coningh ende het Rijck van Portugael als mede de Staten der Vereenigde Nederlanden en sullen geensints toe laten, dat de Schepen, Koopmanschappen ende goederen d'eene ofte d'andere parthije door Vijanden, Zee-roovers, ofte yemant anders genomen, ende in een Haven ofte eenige Plaets van weder-zijdts ghebiedt aen ende op gebracht zijnde, sullen werden vervreemt; maer sullen de selve ofte aen de Eijgenaers selfs, ofte der selver Ghemachtighde restitueren, midts dat sij alvoorens dat de Waren uyt de Schepen ontladen ofte verkocht zijn, verklaert hebben, ofte laten verklaren, dat de selve haer toe behooren, ende datse binnen drie maenden van dat de Schepen zijn ghenoemen, bij aldien het komt voor te vallen in Europa, ende in andere gedeelten van de Werelt voor het uijteijnde van het jaar, haer recht to de selve met seeckere voor ghebrachte Argumenten ende verklaringen sullen hebben bewesen ende uijt ghewonnen: Des sullen oock de Eijgenaers ghehouden zijn weder te refunderen ende te betalen de kosten to conservatie ende bewaringe van de Schepen, Koopmanschappen ende andere goederen gedaen.

103 See the commentary of Hertius on Pufendorf *De jure naturae et gentium* VIII 6 25 n 2:Nimirum ius postliminii non est tale ius, quod gentibus invicem intercedit, sed est proprium civitatum, quod in illis summi imperantes secundum rationem naturalem, de qua modo dixi, indulgent civibus suis.