

**CHAIRPERSON'S ADDRESS • VOORSITTERSREDE****THE INFLUENCE OF ROMAN LAW ON THE PRACTICE OF  
SLAVERY AT THE CAPE OF GOOD HOPE (1652-1834)**

John Hilton  
University of KwaZulu-Natal, Durban

**ABSTRACT**

This article investigates the extent to which Roman Law and received ideas about Roman slavery actually did form the basis on which slavery was practised and administered in the Cape of Good Hope between 1652 and 1834. Cape slavery was governed by *plakaaten* issued in Batavia as well as in Cape Town, but, particularly in capital cases, recourse was had directly to Roman Law and to the Roman-Dutch writers such as Simon van Leeuwen, Joost de Damhouder, Ulrich Huber, Andreas Gail and others. These writers frequently cite actual Roman laws, especially when considering the appropriate punishment. At this stage of our knowledge of how Roman Law was used in these cases, it is not possible to say whether its effect was ameliorative or pejorative, but there is little doubt that it was used both by owners and slaves, prosecution and defence, from the beginning until the end of this period.

'If a more minute and exact history of what slavery really was in South Africa be required, it will perhaps be found best recorded by each of us in our hearts.' Olive Schreiner, *Thoughts on South Africa* (London 1923) 121.

The broad outlines of how the law was administered at the Cape of Good Hope in the 17th and 18th centuries are by now fairly clear. In 1602 the States-General of the Netherlands granted the Dutch East India Company control of the Cape and all Dutch interests east of the Cape by means of a charter (*octrooij*), in terms of which legal matters in these territories were to be administered by a Council of Justice.<sup>1</sup> Records of the proceedings of this Council show that it recognised as law the 'The Statutes of Batavia' (also known as 'The Statutes of India' and 'Van Diemen's Code'). These statutes had been compiled by Van Diemen in Batavia in 1640 and Joannes Maetsuijcker in 1642 and were adopted by the Council of Justice at the Cape in

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<sup>1</sup> Wessels 1908:355. For recent discussions of legal aspects of slavery at the Cape see De Beer 1992 and Dooling 1992.

1715 'in addition to the Roman law and modern laws, and without derogating from the plakaten and ordinances issued here at various times.'<sup>2</sup> This quotation briefly recapitulates the major sources of law at the Cape: the *plakaaten* (Latin *placita*), or by-laws regulating the behaviour of slaves – not just those issued by the governor at the Cape, but also those issued in the Netherlands and Batavia<sup>3</sup> –, the written laws (i.e. Roman Law),<sup>4</sup> the ordinances of the Heeren XVII in the Netherlands and those of their commissioners sent to the Cape from time to time, and the common Roman-Dutch Law.<sup>5</sup> Behind all of these the influence of Roman Law can often be seen. For example, the Statutes of Batavia cite the *Corpus Iuris Civilis* often: *Digest* 15.1 is cited for its discussion of *peculium*, *Digest* 21.1 and *Codex* 4.58 are mentioned in relation to the Roman Law principle of latent defect in relation to the sale of slaves; *Codex* 9.14.1 crops up in a discussion of the deaths of slaves resulting from excessive punishment by their owners. Roman Law occurs also in a *plakaat* issued in Batavia in 1752 which decreed, citing the authority of ancient practice, that slaves should not occupy a sidewalk except when in attendance on their masters, and in 1775 it was enacted – in consonance with the ethics of ancient slavery – that a slave who rescued his master from danger must be emancipated.<sup>6</sup> The present paper investigates the influence of only one of these sources of law – Roman Law and its reception by the Dutch jurists – and confines its attention to a particularly problematic area – slavery. Even this is a vast area to investigate and I shall not be touching on many facets of this problem which have been discussed elsewhere, such as the status of slaves,<sup>7</sup> manumission, the punishment of sodomy between burger and slave,<sup>8</sup> and slave testimony against their

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<sup>2</sup> Van de Roos 1897:6. For the ameliorating intentions of the Statutes of Batavia on Cape slavery, see Böeseken 1977:2-3, 20.

<sup>3</sup> Watson 1989:105-14 describes the character of the *placaaten* relating to the Dutch West India Company.

<sup>4</sup> Botha 1933:5.

<sup>5</sup> Van de Roos 1897:10-11.

<sup>6</sup> For these cases, see Van de Roos 1789:18-19. The manumission of Fortuijn of Bengal in 1785 shows this principle in action (Leibrandt 1896-1905:572a115). Lambertus Arnoud Halfman, naval captain in the Company's service, liberated Fortuijn because of his good faith, zeal and virtue in discovering a mutiny of the Eastern Natives on board his ship. For further discussion of the basis on which the law at the Cape was administered, see Wessels 1908:357; Watson 1989:103. Watson deals only with slave law under the Dutch West India Company, not under the Dutch East India Company. In general, the common law of Holland and West Friesland seems to have been most influential at the Cape; see Watson 1989:106.

<sup>7</sup> Hugo 1970:3-19; Botha 1933:4-12.

<sup>8</sup> Newton-King 2002:21-42.

owners.<sup>9</sup> Instead, I intend to confine my attention to the relevance of Roman Law in cases involving slaves and aim to demonstrate its importance in a number of trials before the Council of Justice as they are recorded in the Cape Archives.<sup>10</sup>

I turn now to actual cases from the archives of the Council of Justice, and begin with a case of stock theft brought by the Fiscal, Hendrick Crudop, on 10 February 1672 against five members of the Khoikhoi people.<sup>11</sup> These five, named KKarré, Dhaurij, TTentshe, Achtonij and Chamtagou (the spelling of their names showing that the Khoikhoi language was not well understood), had, according to the case brought by the Fiscal, ganged together to rob a shepherd, Lucas Harmensz, who was in service to Willem Schalck, of some sheep, tobacco and food. In making his case Crudop addressed three issues: (1) whether the Khoikhoi were subject to the law or not; (2) what penalty was appropriate for the ringleaders; and (3) whether their accomplices were equally culpable.

In dealing with the first point, he quotes Ulpian (*Dig* 1.1.1.3-4) to the effect that all animals understand the *ius naturale* and the *ius gentium*, and concludes that, although the Khoikhoi were the most brutal and immoral of all people, they were nevertheless human and bound by these laws. He draws a distinction between humans and animals on the grounds that only the former know the difference between good and bad, and follows up by citing Justinian's *Dig* 1.1.2 on the religious duties people owe to God, their parents and their fatherland, and *Dig* 1.1.3-5 on the natural right of all people to defend themselves against violence, the natural distinction between free and slave in the *ius gentium* (1.1.4), and the consequent establishment of property rights as a result of warfare (1.1.5). He concludes that the Khoikhoi certainly obeyed their parents, defended themselves against their enemies, strove to maintain their freedom, enslaved those weaker than themselves, and struck agreements over trade and exchange. They were therefore liable to the penalties imposed by the law.

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<sup>9</sup> Hewett 1998.

<sup>10</sup> That slavery continued to be discussed in legal treatises in Europe in the 17th century is clear from Stamm 1634. Space constraints prevent full discussion of this treatise here. Likewise, the letter of the Fiscal, Denysen, to the British governor, Sir John Cradock, in 1812 gives a clear idea of how slave laws were implemented in the colony, and how much Roman law influenced this practice directly. The letter is given in Theal, *RCC* 1813:143-61.

<sup>11</sup> *CJ* 282, transliterated by Böeseken 1986:378-84. As the term 'Hottentot' is considered offensive by some (*Oxford Dictionary of South African English* s.v. 'Hottentot'), the term 'Khoikhoi' is preferred in this paper.

In assessing the exact penalty to be imposed, Crudop notes that in the *Digest* 48.19.28.10 the penalty of death is laid down for robbery with violence. He fails to note, however, that in some cases the lesser penalties of condemnation to work in mines (admittedly tantamount to the capital penalty), or relegation, are handed down. Crudop comments further that the Romans viewed this crime so seriously that they threw those guilty of it to the wild beasts, citing Van Groenewegen (*Tractatus de legibus abrogatis* 1.3) and quoting the appropriate section of the *Digest* on cattle thieves (47.14.1.1, which does not mention the penalty *ad bestias*), where the emperor Hadrian writes to the council of Baetica to the effect that cattle thieves are usually condemned to death, together with the comments of Van Groenewegen (*comment. ad loc.*) and De Damhouder (*Practijcq Crimineel* 113.1).

On the third point – the liability of the two accomplices – Crudop notes that Justinian states in his discussion of obligations that arise from delicts that those who aid and abet a theft are also liable (*De obligationibus quae ex delicto nascuntur, Inst.* 4.11). He also cites Van Groenewegen (*De legibus abrogatis* 8.4.9) to the same effect and Callistratus (*Dig.* 48.8.14) on the importance of the intention to commit a crime rather than the actual result.

On the basis of these authorities, Crudop demanded that the three leaders in the robbery be hanged and their two associates be flogged, branded and made to work in chains for six years. Instead, the council sentenced the first three to flogging, branding and fifteen years hard labour on Robben Island, while the two others were sentenced to flogging and seven years in chains on the same island.

This case is remarkable on several counts. First, it occurs very early in the history of Dutch occupation of the Cape – a mere twenty years after Van Riebeeck first established a settlement there – and yet the Fiscal cites Roman Law directly from the *Digest* and *Institutes* of Justinian, as well as the Roman-Dutch jurists Simon van Groenewegen and Joost de Damhouder, and all of these sources are accompanied by exact references to book, title and section numbers, in addition to Latin phrases indicating the beginning of the appropriate passage. This suggests that the kernel of the future law library at the Cape, which was considerably expanded in the 18th century,<sup>12</sup> had already been established, and that law was practised through direct consultation of these books. Second, it views slavery as a natural institution common to all nations and, crucially, one practised also by the Khoikhoi themselves. Third, it views the law, particularly Roman Law, as fundamental to civilised life at the settlement and something to be imposed unilaterally on the indigenous inhabitants of the land.

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<sup>12</sup> De Smidt 1998; Botha 1935.

This trial can be compared with the case of manslaughter brought against Johannes Strijdom in 1812 towards the end of the period in which slavery was practised at the Cape. Strijdom, the veldkornet of Winterhoek in the district of Uitenhage, was being defended by an advocate W.M. Ruijsch against a charge of unlawfully killing a Khoikhoi, whom he had taken prisoner.<sup>13</sup> Court procedure at the Cape at the time allowed the defendant to reply to the *eisch*, or 'claim' of the prosecution. In turn the *eischer*, or claimant, could rebut the objections of the defence in a *repliq.*<sup>14</sup> On 10 May 1813, the prosecutor made his reply to the defence advocate, who would have argued that the death of the Khoikhoi was unintentional. Towards the end of his lengthy address he referred to the Julian law on treason, quoting directly from the *Digest* (48.4.7.3 [Modestinus]) to the effect that the character of the accused must be taken into account. The citation of the Julian law on treason specifically was pertinent, however, since this Julian law regards as guilty those who kill hostages without the command of the emperor (*Dig* 48.4.1.1), and the prosecutor was concerned to show that Strijdom's actions were unauthorised but nevertheless understandable.

Further quotations made in the prosecutor's case provide excellent evidence of how the lawyers of the day made extensive use, not just of Roman Law, but also of wider Classical learning. In recognition of the sensitivity of the case in which a white man in a paramilitary position faced the death penalty for manslaughter of a captive Khoikhoi, he begins with a quotation from Caesar's defence of the Catilinarian conspirators as recounted by Sallust (*Cat.* 51.1), where Caesar notes that in dubious cases judges must be impartial. As elected consul in 63 BC, Marcus Tullius Cicero had detected a conspiracy against the state led by L. Sergius Catilina and his associates. After arresting the conspirators, he introduced a debate in the senate in which C. Julius Caesar took a merciful line, as opposed to the intransigence of M. Porcius Cato, who advocated the death penalty. The subtext of this quotation therefore clearly suggests that the court should exercise mercy in the case of Strijdom. In a similar vein, the prosecutor quotes Juvenal 6.221 (*nulla umquam de morte civis cunctatio longa est*, 'No deliberation concerning the death of a citizen is ever [too] long') on the importance of careful deliberation in capital cases. The prosecutor varies the quotation, omitting *umquam*, substituting *vita* for *morte*, and adding the underlined words: *Nulla de vita hominis, en ik voeg by, de honore civis cunctatio longa*

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<sup>13</sup> On the role of veldkornets in maintaining law and order at the Cape, see Botha 1917:109-12.

<sup>14</sup> Worden & Groenewald 2005:xxv.

*est*, 'No hesitation concerning the life of a man, and I add, concerning the honour of a citizen is long.' This suggests that the line has been quoted from memory. The substitution of *vita* for *morte* also suggests that Strijdom should be allowed to live. Similarly, a quotation from Valerius Maximus (1.1.ext. 3 *ad fin.*) stresses the slow but sure process by which the gods punish serious crimes. By far the greatest prominence in the speech, however, is given to an extensive composite quotation from Cicero's *Pro Milone* (9-11, 30, 105). In 52 BC Cicero defended the optimate politician, Titus Annius Milo, on a charge of public violence, after the Caesarian Publius Clodius Pulcher had died in an inn at Bovillae, as a result of a skirmish with Milo's gang. Asconius (30-42C) suggests that Milo had ordered the killing of Clodius.<sup>15</sup> Milo was convicted and went into exile at Massilia (Dio 40.54). The Cape prosecutor cites at length the passages in which Cicero argues that killing in self-defence is justified, omitting Cicero's example of the young soldier in the army of Gaius Marius, who defended himself against homosexual rape by murdering the perpetrator, and stressing the law of nature that violence must be repelled by whatever means available. This lengthy passage (from *Pro Milone* 9, 10 and 30) again appears to have been quoted from memory. At any rate, there is no indication of a separation between the various extracts (widely dispersed in the original) as would be expected from someone reading them from a text. Instead, the extracts from different parts of the speech are written out continuously. If so, this long quotation must have made a powerful impact on the court. However, the prosecutor points out that for Cicero's defence to hold up, three conditions were necessary: that unjust aggression was used (*injuncta agressio*), that there was an imminent danger to life (*imminens vita periculum*), and that there was no other way of protecting oneself from danger. He goes on to cite the *Lex Cornelia de Sicariis* 2, 3 and 4 (it is not clear whether *Dig* 48.8.2-4 or 48.8.1.2-4 is meant) in corroboration of these three requirements. On balance it seems that the Fiscal is referring to *Dig* 48.8.1.2-4 here. These sections stress that the status of the victim is immaterial, that the intention that lies behind the killing is all important, and that killing someone during a sexual assault is pardonable (a reference, no doubt, to the *Pro Milone* passage). He then leads evidence relating to the quiet demeanour of the Khoikhoi prior to his death at the hands of Strijdom. This rebuttal is rather unexpected after the prominence given to Cicero's famous argument for self-defence earlier.

In concluding his address, the prosecutor again quotes from the *Pro Milone* – this time from section 105 in which the orator calls on the jurors to give their honest opinions on the merits of the case. At the same time the speech

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<sup>15</sup> See Rawson 1975:137-39.

is full of references to the *Digest* on the importance of impartiality of judgement by the court. So, for example, *Dig* 48.19.11.pr. is cited on the need for balanced judgements tempered by kindness. The prosecutor repeatedly stresses the need for impartiality and lack of emotion in judges by citing Justinian, *Dig* 1.18.19 [Callistratus]. In his concluding remarks, the prosecutor also quotes *Dig* 50.17.168.pr. in support of a merciful verdict. This citation is linked to the reference to the *Lex Julia de Maiestate*, with which my discussion of this case began, to the effect that the character of the defendant and his prior record must be taken into consideration in giving a verdict.

A comparison between the case of Crudop's prosecution of the five Khoikhoi for cattle rustling and the case of Strijdom shows that Roman Law was applied at times throughout this period of one hundred and forty years. The use of Classical quotations by the prosecutor in the Strijdom case is, however, especially remarkable. It recalls the practice of earlier Dutch humanist jurists such as Vinnius who quotes Cicero, *Pro Cluentio* 32 concerning the case of the woman of Miletus, who had been condemned to death for aborting her child after taking a bribe from the secondary heirs to the estate. In dealing with the legal issues, Vinnius quotes from the *Digest* 48.19.39, Suetonius, Horace, and a wide range of legal glossators and commentators.<sup>16</sup> But the use of Classical literature in the case of Strijdom and the arrested Khoikhoi appears to be playing an even more important legal role. The prosecutor in this case went out of his way to present to the court references to famous instances in which mercy had been shown to those guilty of manslaughter. The extensive quotations from the *Pro Milone* are particularly noticeable here. Although he argues against the self-defence line taken by Cicero, and points out the lack of aggression by the Khoikhoi prisoner, the force of his long quotation of a passage of Cicero's emotional rhetoric would have stayed in the minds of the court long after his rational objections had been forgotten. The Classical quotations appear to be included in order to guide the court towards a lenient verdict, as, of course, a prosecutor is even now allowed to do.

The *Pro Milone* features also in a case cited by Wessels (1908:711-27). This case came before the Council of Justice on 21 September 1822. It involved the severe beating of a slave, Joris of Moçambique, by his owner, William Gebhardt, as a result of which the slave died. The facts of the case are expounded by the Assistant Fiscal Officer, J.J. Lind. In reply H. Cloete, counsel for the defence, sought to prove that Gebhardt had not intended to kill the slave but merely to chastise him. Unlike Lind, who made no reference

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<sup>16</sup> See Van Warmelo 1961:46.

to Roman Law, Cloete cited the *Digest* 48.8.14.1: *in maleficiis voluntatem non exitum spectari debere*. This appears to be a free adaptation of the actual text, *in maleficiis voluntas spectatur, non exitus*, but the meaning of the quotation is clear – in dealing with crime, the intention, not the result, is what is important. Cloete reinforces this citation by referring to Cicero, *Pro Milone* 19.10: *non exitus rerum, sed hominum consilia vindicantur*. Again this is a paraphrase, simplifying the complexity of Cicero's argument. Cicero is here referring to an attempted assassination of Pompey by a slave of Clodius, to which the slave later confessed. Cicero's words are therefore ironic, and his argument is aimed at the condemnation of the slave not his acquittal – the very opposite of the Fiscal's aim at the Cape. The context of the words quoted has therefore been completely ignored. Cicero's words are in full: *nisi vero, quia perfecta res non est, non fuit punienda, proinde quasi exitus rerum, non hominum consilia legibus vindicentur*, 'unless indeed the crime, because it was unsuccessful, should be unpunished – just as if it were the issue of an attempted crime, and not the purpose of the criminal, of which laws had to take cognizance' (tr. Watts). Cloete has therefore given the point of Cicero's text, cutting out the irony. He supports these quotations by reference to Voet's commentary on the *Digest*, Carpzovius' *Criminele Advyzen* 68, and other Roman-Dutch jurists. Despite this defence, however, Gebhardt was found guilty of murder and sentenced to death by hanging. This severe sentence should be placed in the context of the amelioration of slavery under the British administration of the Cape, leading to the final abolition of this form of compulsory labour at the Cape in 1834.

Roman Law was used in the case of Strijdom in 1812 to guide the court to a lenient sentence for an act of manslaughter. In the case of Gebhardt in 1822, it was used to defend a slave owner for beating his slave to death. In both cases, Roman Law and legal authorities were used in relation to paramilitary officers and slave owners. The question is, were they also used on behalf of slaves?

To answer this question, the trial of Hester Pienaar, the widow of the farmer Hendrik van der Merwe, who was on trial for the excessive abuse of her slave woman, Bella, is relevant.<sup>17</sup> Joachim van Plettenberg presided over this *eisch*, or claim, which was brought by the landdrost of Stellenbosch and Drakenstein, Lucas Sigismundus Faber on 4 April 1771. Information about Hester Pienaar's mistreatment of her slaves was given by two slaves Rosa and Alexander. They reported that they had been cruelly treated by Pienaar and that an old female slave, Bella, had recently died as a result of repeated

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<sup>17</sup> The case is recorded in *CJ 400: Eisch en conclusie in the case of Landdrost of Stellenbosch contra Hester Pienaar 4 April 1771, 170-85*.



floggings. This testimony was corroborated by the Khoikhoi, Thijs and Cathrijn, who added that Pienaar ordered Thijs and the slave Julij to bury the body two hours after Bella's death and before it had been inspected by any Christian person, although the law required at least two believers to witness the body of a dead slave before it was interred. The prosecutor noted that, although Pienaar believed she had the *ius vitae et necis* over her slaves and could punish her slaves *pro libitu*, she had clearly exceeded the *modum castigandi*. Evidence was also led to the effect that Pienaar had also beaten her female slave Rosa with the *hand sjambok* and *agteros sjambok* and had hoisted her up on a beam to inflict these beatings.

The prosecutor characterised Pienaar's behaviour as excessively cruel and tyrannical, and refuted her belief that she had the right to kill her slaves, if necessary. He noted that the divine law made no distinction between a free person and a slave, and that, despite the fact that in the remote past under Roman Law slave-owners had had the *ius vitae et necis* over their slaves (*alhoewel volgens het Roomsche regt de lyfheer van ouds het ius vitae et necis over hunne slaven gehad en geoeffend hebben*, p. 178), the emperors had later removed this right as had been noted by Mattheus, *De Criminibus* with reference to *Lex Cornelia de Sicariis* in the *Dig* 48.8.1.2 (*Et qui hominem occiderit, punitur non habita differentia, cuius condicionis hominem interemit*, 'Whoever kills a man is punished without distinction as to the status of the man he killed'). He adds that the Romans had also set a limit to how a slave could be punished, and that, if they could do this despite the fact that they had not had the benefit of Christianity, so much the more should Christians show compassion to their slaves. He further noted Bella's age, her blindness, and the fact that she had been born in slavery as reasons why Pienaar should have treated her better. It was only by the mercy of God, he adds, that we are born in freedom and not in slavery. Finally, the *eijsscher* quotes the Statutes of India, under the title of 'Slaves and Owners', articles 6 and 7, to the effect that, while owners are permitted to punish their slaves, such punishment could not include torture without the knowledge and consent of a judge or other official, and that should owners mistreat their slaves, they in turn could be punished, although the precise penalty was not laid down. In this case, the *eijsscher* demanded that Pienaar be fined 200 rixdollars (*salvo meliori iudicio*) and that the slaves who had testified against her be sold on condition that they should never come into the possession of Hester Pienaar or her children or family again.

In contrast with the Hester Pienaar case, in which Roman Law was used to protect slave women from abuse, the well-known case of Maria Mouton<sup>18</sup> shows that the lenient provisions of imperial law were often set aside in the

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<sup>18</sup> Penn 2002:1-20.

interests of severity against slaves.<sup>19</sup> The facts of the case are very briefly these: Maria had developed a relationship with her slave, Titus of Bengal, who together with another slave, Fortuijn of Angola, beat her husband Frans Jooste to death with the handle of a plough-share, when he attempted to assault her.<sup>20</sup> The case of the prosecution was elaborate and extended over one hundred and fifty folio pages in which repeated interrogations of Maria, Titus, Fortuijn and others are recorded, some under torture. In his amplification of his *eisch*, the prosecutor threw many law books at the accused. They may be listed as follows: Simon van Leeuwen, *Proces Crimineel* 8.1.11, *Kort Begrip van het Rooms-Hollands Regt* 4.3.3, p. 379; De Damhouder, *Practyke ende Handbouck in Criminele Zaeken* 67, 71; Ulrich Huber, *Hedendaegse Rechtsgeleertheit* 2.3.13, 3.13, p. 481; Bernard van Zutphen, *Nederlands practijcque* s.v. 'doodslag'; Joannes van Sande, *Gewijsde Saaken* 5.9, p. 559; Andreas Gail 2.90, p. 581. In addition, recourse was made to the *Lex Pompeia de Parricidiis* (*Dig* 48.9.7) and the *Lex Cornelia de Sicariis* (*Dig* 48.8). The point of this litany of legal citations was to prove that Maria was guilty of murder because she had conspired earlier with Titus to have her husband killed, and according to a well-established principle of Roman Law, first laid down by the emperor Hadrian (as we have seen above), that the intention to kill is what is important, not the actual result. This principle of *voluntas pro facto* derived principally from the *Lex Cornelia*. The prosecution also sought to show that Maria had aided and abetted murder by sheltering the slaves on her farm, although, of course, as slaves they had nowhere else to stay and would have been punished as fugitives had they run away. Here the *Lex Pompeia de Parricidiis* provided the relevant text. Moreover, in terms of this same Roman Law the more severe charge of parricide included the murder of one spouse by another and entailed a harsher sentence – the infamous *culleus* in which a variety of animals were sewn together with the malefactor and thrown into the sea or a river. At the Cape this punishment appears to have been reserved for cases of sodomy.<sup>21</sup> Many of the Roman-Dutch authorities cited in this case also have a bearing on whether the ordinary penalty or an extraordinary penalty could be imposed, and in this case all passages quoted tended to this conclusion. In all of this, little notice was taken of clauses in these same authorities that supported a more lenient position: for example, Huber states that compassion is shown by judges when a murder is committed on the orders of a superior, which might have gained Titus and

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<sup>19</sup> I have discussed the legal aspects of the case in a forthcoming article, and here recapitulate only the main points.

<sup>20</sup> *CJ* 318.

<sup>21</sup> See Newton-King 2002.

Fortuijn some leniency, or when a wife was responding to abuse during a violent domestic quarrel, which would have aided Maria. Despite the presence of these measures, Maria, Titus and Fortuijn were put to death in the most extremely cruel way possible, perhaps as a sensational example of the fate that awaited those who crossed the sexual colour bar and attempted to upset power relations on remote farms at the Cape.

A final example of the application of Roman Law to slavery at the Cape concerns the *eisch* brought by the landdrost Martinus Bergh before the governor, Maurits Pasques de Chavonnes, on 10 February 1724.<sup>22</sup> The case concerned Andries of Ceylon, the 53-year-old slave of a farmer, Barend Buijs, who had stolen brandy and wine from the cellar of his master. For this he had been hoisted up on a beam with his hands tied behind his back and beaten with a *sjambok* by his master and with canes by his fellow slaves. After this humiliating experience, Andries was mocked by a Khoikhoi named Pieter. Andries suspected that Pieter had informed on him to his master concerning the theft of liquor and attacked him with a knife. He then fled into the bush for ten days, after which he returned and set the roof of his master's cellar alight before spending some days marauding for food in the Paarl/Klapmuts area. Eventually he was arrested by the herders of Matthijs van den Berg and brought back to his master's farm. Here he confessed to his crimes, alleging that he was tired of punishment and wanted to leave this world. He was eventually sentenced to be executed by having his right hand cut off, being tied to a stake and half-strangled to death, and finally being scorched to death. His dead body was to be placed on a wheel, with the hand over his head, to rot and to be consumed by the birds.

In assessing the punishment for the crimes of Andries of Ceylon the landdrost refers to the following Roman-Dutch authorities, citing precise book, chapter, section and page references: Simon van Leeuwen, who recommends the gallows, the sword, or other forms of capital punishment for armed, violent, premeditated murder; Andreas Gail, who agrees with Van Leeuwen; and Joost de Damhouder. On the charge of arson he quotes Van Aller's definition under this title, Huber, and Van Sande. Above all, however, Berg paraphrases *Dig* 48.19.28.11 as 'doorgaans die slaven met vier werden verbrand, die het welweesen haren heeren hebben laagen geleijd.' For the section on arsonists, the landdrost goes on to quote the Latin text of the following section of the *Digest* verbatim (I retain the punctuation in the text): *incendiarii capite puniuntur, qui ob inimicitias, vel praedae causa, intra oppidum, et plerumque vivi exuruntur*, followed by a translation: 'brandstigers werden aan

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<sup>22</sup> *CJ* 328:19-27. The sentence in this trial has recently been transliterated and translated by Worden & Groenewald 2005:96-100.

den galge gestraft, die uijt vijandschap of uijt oorsaak van roof, binne een plek brandstigten, en se worden gemeenlijk levendig verbrand.' It is notable that Berg has not taken note of the specification of arson within a built-up area. Within the ancient Roman context this was of great importance as the city was frequently devastated by fires that spread uncontrollably, and threatened the lives and well-being of many people. Clearly, this was not so in the case of Andries of Ceylon, who set alight a cellar on an isolated farmhouse. In fact, the text in the *Digest* continues: *qui vero casam aut villam, aliquo lenius*, 'but those who [burn] a cottage or farm [are punished] somewhat more lightly.' Berg's translation of the key words *intra oppidum* as 'binne een plek' is an obfuscation. The punctuation of the text seems to show that the words *intra oppidum* are isolated from the rest of the sentence by commas.<sup>23</sup>

It is time to draw this discussion to a close. I hope that the cases cited in this paper have demonstrated that not only Roman Law but also actual trials such as the *Pro Milone* and *Pro Cluentio*, as well as Latin literature in general, including Tacitus, Valerius Maximus, Ovid, Juvenal and Aulus Gellius, in addition to the customs and traditions of legal procedure at Rome, made a direct impact on the lives of slaves and owners, settlers and indigenous inhabitants at the Cape. Legal practitioners here showed a sound understanding of the Latin texts, translating fluently and occasionally code-switching between Latin and Dutch. They possessed legal texts from a very early date and cited chapter, title and paragraph. On more than one occasion, passages appear to have been quoted from memory. However, passages from these texts are often abruptly curtailed, taken out of context and, in the case of the five Khoikhoi, rather unilaterally applied. From time to time translations are cited, rather than the original Latin texts, although this did not happen in the case of the *Corpus Iuris Civilis*. Nevertheless, the original Latin texts selected were well understood and pertinent to the cases in which they were used. As yet only a fraction of the cases involving slaves at the Cape have been properly transliterated and translated. Consequently, it is not possible to quantify the number of cases in which Roman Law in some form or another was employed. Still less is it possible to argue that Roman Law played a clearly ameliorative or pejorative role in these trials. In some cases, such as that of Hester Pienaar, appeal is made to the enlightened legislation in Justinian's code, but in others, such as that of Maria Mouton, the possibilities made available by Roman Law were ignored. What is clear is that the *Corpus Iuris Civilis*, and the later interpretation of it by the Dutch jurists, was applied to both master and slave by both prosecution and defence. It

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<sup>23</sup> For another case of arson involving Roman-Dutch law, cf. *CJ* 410:144-53 (Maart of Batavia).

might be possible to argue that the Roman influence on the practice of law at the Cape resulted in harsh and cruel punishments. Yet the severe recommendations of the *libri terribiles* – Books 48 and 49 of the *Digest* – were not always followed by the Council of Justice, as the case of the five Khoikhoi shows. The study of the reception of Roman Law in South Africa is in its infancy, but it has the potential to make a significant interdisciplinary contribution to our understanding of legal practice in this country in the 17th and 18th centuries. In view of the subsequent importance of this tradition in South African treason trials in the 19th and 20th centuries, we would expect nothing else. Conversely, the study of the reception of Roman Law may tell us a great deal about how Roman slavery worked. Ultimately, however, it may well be that Olive Schreiner was right to say that if we want to find the truth about slavery we need to look within our own hearts.

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hilton@ukzn.ac.za