
**QUAE LEGENTEM FEFELLISSENT, TRANSFERENTEM
FUGERE NON POSSUNT**

Plinius *Epistulae* 7.9.2

Margaret Hewett (University of Cape Town)

The foundation stone of Eric's services to the law – his punctilious interpretation of texts – is a sound knowledge of classical philology and general linguistics. Without these there can be no accurate translation, and, without accurate translation, a scholar cannot establish the full significance of a text. As Pliny said (*Ep* 7.9.2), "[w]hat has eluded one who reads, cannot escape one who translates". This is as true today as it was in the first century AD and it is patently necessary in interpreting legal texts.

During the last two centuries this issue has progressively come to the fore in South Africa. Without translations, many sources of our Roman-Dutch variant of the *ius commune* would be inaccessible to the majority of South African practitioners and legal academics. And it is the translating of the great Roman and the Roman-Dutch jurists that continually provides a link between Eric's Netherlands and my South Africa.

It is therefore apposite and fitting that the subject of this paper should be about a translation. This time it is not a Latin but a Dutch work that was translated into English for use in Southern African law schools and courts. The work is Ulric Huber's *Heedensdaegse¹ Rechtsgeleertheyt so elders, als in Frieslandt gebruikelyk, vermeerdert met veele nieuwe gewysde saken ende hervormt in gevolge van de nieuwe's Landts Ordonnantie der selver Provintie door Zacharias Huber*, Amsterdam 1768. The translator is Percival Gane, then judge of the Supreme Court of South Africa assigned to the Eastern Districts' local division. Gane's English translation, which appeared 270 years after Huber wrote, glories in the title *The Jurisprudence of my Time, as prevailing in Friesland and elsewhere ... augmented by the addition of many new decided cases and revised in accordance with the Local Ordinance of that province by Zacharias Huber* (1939).² Perhaps it will be edifying and amusing, on this

1 See Feenstra *Bibliographie van Hoogleraren in de Rechten aan de Franeker Universiteit tot 1811* (hereafter *BGNR* Franeker), Amsterdam, 2003, (212) *Intro* p 73.

2 Limitations of space preclude a complete bibliographical note. I have, where possible, cited the actual words and sentiments of characters concerned in this brief sketch *ex ore* or *ex libris*. For further information on Huber consult *ia Veen Recht en Nut. Studien Over en Naar Aanleiding van Ulrik Huber (1636-1694)*, Zwolle, 1976; *id* "Exercitia Huberiana", in Veen *ea* (eds) *Secundum datur. Negen studies en een laudatio aangeboden aan Hans Ankum*, Amsterdam, 1997, pp 127-161; Feenstra *BGNR* Franeker 2003. For the general South African scene see Lee "The teaching of Roman-Dutch law" in 1930 *SALJ*

occasion, to let the various persons who played a rôle in bringing both the original and its translation into being speak for themselves, with a little help, where necessary, from bystanders and from the writer of this article.

So *adeste aequo animo* (which Eric will tell you is Terence's appeal to his audiences and means "attend with open minds").

ACT I, Scene 1

Speaker: Ulric Huber, 1636-1694, of the University of Friesland; a man of many parts, innovative writer on Roman law, Frisian law, universal public law. For three years *raadsheer* (councillor) of the Court of Friesland.

Time: Early November 1694.

Place: Franeker – deathbed of the speaker.³

"Ick ben gebooren binnen Dockum in de Gasthuisstraet den 13^{en} Martij⁴ 1636. Mijn Vader Zacharias Huber doen ter tijdt Procureur (en Notarius) aldaer" ... but no, let me continue in English.

Dokkum was, and still is, a small town in the North of Friesland, where my father Zacharias was the local notary and attorney, as I said. I, his sixth child, was baptised in the church at Dokkum and named after my paternal great-grandfather. My father, who was steadily bettering his position, becoming secretary of the rural municipality (*grietenij*) of Westdongeradeel and then representative of the same municipality in the *Staten* of Friesland, saw to it that we boys were well educated. I first attended the Latin School at Dokkum, later that at Leeuwarden. On 4/14 July 1651 I registered as a student at the University of Franeker⁵ where, in my first year, I studied in the Faculty of Arts, concentrating on the propaedeutic subjects, Greek, Philosophy, History and Rhetoric. In my second year I began to study law under Johannes Jacobus

p 210ff; Roberts *A South African Legal Bibliography* 1942; Zimmermann & Visser *Southern Cross* 1996 *passim*. For a listing of all legal literature, and therefore of Huber, referred to in South African judgments reported since the first law reports of 1828 see Uys J.F. *Fontes Juris* Being the Sources of Law which were Noted in the *South African Supreme Court Judgments*. Vols 1-8, 1994. *Legal Literature Noted 1828-1996*, Vols 9-11, 1997.

3 For Huber's *Historia vitae meae* see Veen *Recht en Nut* Bijlage I p 247f.

4 Until 31 December 1700, Friesland used the Julian calendar. Thereafter the Gregorian calendar was adopted. There was a 10-day discrepancy, hence 13 March (Old Style) is 23 March (New Style), and 8 November (Old Style) is 18 November (New Style). Where applicable I shall indicate dates in Friesland as eg 13/23 March.

5 The University of Franeker was founded by the Frisian "Staten" and the "Stadhouder" in 1585.

Wissenbach (1607-1665), but continued simultaneously with my history and language studies. Undoubtedly Wissenbach exerted a formidable influence over me. I respected him as a person and as an academic, although later I discarded his humanistic and antiquarian policy on teaching law.

After a short but abortive spell in Utrecht and a further year under Wissenbach, I and a group of friends (alas, now all passed on) set out for a student tour of Germany. It was at Heidelberg, that, having enrolled on 18 September 1656, I defended my thesis *De iure accrescendi* (On the right of accretion) and was promoted *Iuris Utriusque Doctor* (Doctor of both laws) on 14 May 1657 (I think that's right; the past is often confusing. But no matter. I was just 21 years old – that I know).

While I was preparing to defend my thesis, my father, Professor Wissenbach and other well-wishers were, unbeknown to me, manoeuvring to acquire a chair for me at Franeker. There was no vacancy in the law faculty but the chair in *eloquentia, historia et politica* was vacant and it was to this that I was appointed. Certainly I had hoped for an academic appointment but this one did not entirely delight me as I would have preferred law and besides, although I always enjoyed the Humanities, I felt somewhat unsure of my ability to teach Rhetoric and History. But the die was cast and at the end of November 1657 I assumed my new position with an inaugural oration *de bona mente sive de sincero genuinae eruditionis amore*.

The appointment to the Faculty of Arts was only a stepping stone to higher things. A first step towards my desired professorate in the Law Faculty occurred in 1662 on the death of Laurentius Banck (1611-1662), then Professor Extraordinarius. It was decided not to fill Banck's post but to farm some of the deceased's work out to me. Thus I busied myself also with legal collegia and disputations. Three years later (1665) Wissenbach died, his colleague Guilielmus Cup became Primarius Professor and I bade the Arts Faculty farewell. Now as Professor Ordinarius in law I was responsible for teaching the *Institutes*, two years later I took on the *Digest*. Then, following on a call to the University of Leiden in 1670 (which I refused), I extended my teaching programme by including *ius publicum* (public law). This was breaking new ground and resulted in my most significant contribution to the legal thinking of my day – but that is another story.

Ambition still drove me and in 1679 I decided to abandon the University of Franeker for the Court of Friesland in Leeuwarden and a position as *raadsheer* (councillor – judge). This was a major step up the social ladder, a councillor

being superior to a professor, and established my family as one of the Frisian patriciate. Also, for the purposes of this article, my experiences with court work provided the base from which developed first a preliminary survey *Beginnselen der Rechtskunde in Frieslandt en elders gebruikelijk*.⁶ As you can read in my Preface to the Reader, "Myn oogmerk in dit Boek is, om den geenen die geen Latyn hebben geleert, te doen verstaan de gronde van de Rechtskunde gelyk die in Frieslandt gebruikt word naer het voorbeeld van onse naeburen en andere Volkeren".

This little book was a forerunner, an "extract" of a principal work in Dutch which I eventually published in 1686. The basic ideas were the same as in the *Beginnselen* but they were greatly enriched by numerous decided cases, many from Sande, Gail and Nauta (known well for their *Decisiones*) and many which were handled by me myself. I understand my son Zacharias intends to elaborate further from *his* experience!

But practice, valuable experience although it was, did not hold me for long. In 1681 I was again approached by the University of Leiden, again I refused the position but decided instead to return to my *alma mater*. As usual I succeeded in driving a beneficial bargain. I now carried the honourable title of "Out Raetsheer" (former councillor); I had the right to sit in the academic Senate, (the college of Ordinary Professors); I was not required to give public lectures but was free to teach at home on civil law, general public law and on Frisian law. Thus to my basic but princely salary of 2000 guilders a year I added the fees for my private tuition. With my reputation, the students hammered a path to my door – a fact which, understandably, did not endear me to my colleagues.

In 1682 I was aged 46 and for the next 12 years, till my present malaise, I wrote copiously, chiefly texts for students, but also on politics, and political philosophy as well as a number of polemical articles and open letters on controversial topics.

Now, you may well ask why I, who wrote and taught for so many years in Latin, should have "descended" to writing in Dutch and what is more, not of Roman law but of the Frisian law. Read my preface of the *Beginnselen* and consider also that as "theologians and other men of learning have not lost estimation

6 *Beginnselen der Rechtskunde gebruikelijk in Frieslandt* Leeuwarden, Hero Nauta 1684, 2nd ed 1696. An edition revised and updated by Simon Binckes was published in Leeuwarden 1774-1775 by Abraham Ferwerda. See Feenstra *BGNR Franeker* nrs 208-210, pp 72-73.

through writing in Dutch", and as Jurisprudence is a subject which "relates to nothing higher or deeper than what appears before men's eyes and is transacted every day among mankind", such a production for daily use can be rendered more plainly and more clearly in Dutch than in Latin.⁷

INTERMEZZO The Cape under the Vereenigde Oost-Indische Compagnie – 1652-1795

Speaker: The spirit of Joachim Nikolaus van Dessin (1704-1761) an active figure in the legal world of his time.

Time: 1760.

Place: Van Dessin stands outside in the "Old" Law Courts near the Company Gardens at the Cape.

Yes, when van Riebeeck and his 126 men landed here in Table Bay on 6 April 1652 they brought with them the legal system of the Netherlands – shortly to be dubbed *Rooms-Hollands Regt* (Roman-Dutch law) by Simon van Leeuwen. At first the administration of justice was largely in the hands of the company officials, most of whom were untrained in law and they perforce relied on certain basic texts. Fortunately, there were available a number of practical treatises written in Dutch, for instance, the commander probably had at his disposal Joost de Damhouder's *De Practijke of Gebruyk zoo van Civile als Criminele Zaken*. The "Raad van Justitie" (Council of Justice) undoubtedly used Merula's *Manier van Procederen*, Grotius' *Inleiding* and Van Leeuwen's *Het Rooms-Hollands Regt*. The fascinating story of which books were passed down from one Court secretary to the next will be told in the 20th century by Professor Doctor J. Th. de Smidt in his *Old Law Books*, 1998. He will note that in 1727 the library consisted of eleven books of which one, Ulric Huber's *Heedendaegse Rechts-geleertheyd*, was missing by the next roll call of authorities in 1739.⁸ It was replaced in 1740, bought at the auction of the property of the deceased Governor Adriaan van Kervel († September 1737).

However, the books belonging to the Council of Justice were not the only books at the Cape. When I die, I, Joachim Nikolaus van Dessin, will bequeath my library to the people of the Cape. I have been well able to collect books and of the 3800 books in my library almost 300 are concerned with law. Here, too, is a copy of Huber's *Heedensdaegse Rechtsgeleertheyd* – also the Nauta

7 See Preface to Huber's *Heedensdaegse Rechtsgeleerdheyt*, *passim*.

8 De Smidt *Old Law Books from the Libraries of the "Raad van Justitie" (High Court) and*

edition of 1686. By 1998, when De Smidt will be doing his research, the High Court (the successor to the *Raad van Justitie*) will possess two copies, the 1686 and the 1699 editions. There will undoubtedly be many more copies spread about in private and public libraries.

ACT II, Scene 1

Speaker: Sir Johannes Wilhelmus Wessels (1862-1936), a man of great learning and high principles, "the most dynamic personality in the legal history of South Africa".⁹

Time: Early in 1932.

Place: Transvaal. The Chief Justice is still "in harness" at his desk.

I am proud to go down in history as the author of *History of the Roman-Dutch Law* and I shall read you some passages from the Introduction to explain why I consider knowledge of the Old Authorities and of their place in legal history of prime importance.

This is what I wrote many years ago, in 1908, two years before Union, but what I wrote then applies equally today.

The history of Roman-Dutch law has been sadly neglected in South Africa, so that the ideas which prevail in the profession as to the origin and development of the Roman-Dutch law are extremely crude. Ancient law books are often quoted in the courts with little or no conception of who the authors were or what place they occupy in the development of the law.¹⁰

When discussing why I take into consideration the whole of the Netherlands, not just Holland, I explain that Holland was not separated from the rest of the Netherlands but formed part of it and that in the development of its law, the adjoining provinces played a very important part.¹¹ This is one of the factors that, despite the vociferous views of my colleagues who promote the view that only the law of Holland is accepted in South Africa, determined my high

J.N. van Dessen (South African Library), Leiden, 1998, p 9.

9 Johannes Wilhelmus Wessels, born Cape Town, 7 March 1862, educated at the South African College from which he matriculated aged 16; graduated with honours at the University of Good Hope, 1882, read law at Cambridge and in Chambers in London, was called by the Middle Temple, 26 January 1886; admitted to the Cape Bar, 29 June 1886; became leader of the Transvaal Bar, 1887; Judge President of the TPD, 1920; Judge of Appeal, 1923; Chief Justice of the Union of South Africa, 1932.

10 Wessels *History of the Roman-Dutch Law*, Grahamstown, 1908, p 3.

11 Wessels *op cit* p 8.

evaluation of Ulric Huber's *Heedendaagsche Rechtsgeleerdheid*.¹² He was rightly regarded, I wrote, as "one of the first rank in the Dutch School of Law. His most important work, however, for the student of Roman-Dutch Law, is the *Heedendaagsche Rechtsgeleerdheid ...*".¹³ I concede that as Huber was a judge of the Provincial Court of Friesland, his work was intended principally for Frisian lawyers and law students. But inasmuch as he did not confine himself to an exposition of the law of Friesland but of the Roman-Dutch law as in vogue in the Netherlands it has always been regarded as a work of great value and of high authority.¹⁴ I slate the view that Huber's work is not of great use in our courts as "quite erroneous". I know that some of our students can readily cope with Dutch but there are no few to whom Dutch is a closed book and I consider it "a great pity that so lucid an exposition of the modern Roman-Dutch law and so important a law book has not yet been translated into English".¹⁵

But, my brothers in the law, that was two decades ago and my words have not fallen on stony ground. A young Englishman, Percival Gane, has toiled mightily and produced a most excellent translation which goes by the name of *The Jurisprudence of my Time*. I now hand the baton to him.

ACT II, Scene II

Speaker: Percy Gane (1874-1963)¹⁶ strolls onto the stage wearing the red and gold gown of a Doctor of Law and clutching a pen.

Time: 27 June 1958.

Place: University of Cape Town – in front of the Jameson Hall.

When I was at the Bar in the long ago days after I was admitted in 1903, I "formed the intention to open up to the legal profession some one (*sic*) of the *fontes iuris* in a lucid and accessible form by translation into one or other of the vernacular languages", for I am of the opinion that "it is only by the accurate and progressive translation of what is best in our old law books that we shall

12 Wessels *op cit* pp 316-317.

13 Wessels *op cit* p 317.

14 Wessels *op cit* p. 318.

15 Wessels *op cit* p 319.

16 Percival Carleton Gane (1874-1963); born and educated in England; came to South Africa, 1897; gained his LLB at the South African College, 1902; called to Cape and Transvaal Bars, 1903; settled in Grahamstown, 1903; took silk, 1919; Supreme Court Judge of the Eastern Districts, 1934-1944; received Honorary Doctorates from Rhodes University and the University of Cape Town, 1958. To complete the record we must note Gane's invaluable *The Selective Voet being the Commentarius on the Commentarius ad Pandectas* 1955-1958, translated from the Paris edition 1829 of Johannes Voet's *Commentarius ad Pandectas*.

ever be able confidently to administer [our] Roman-Dutch law."¹⁷ My choice of Huber was prompted originally by words written by my learned friend, the late Sir Johannes Wessels, in his *History of the Roman-Dutch Law* and my completion of the task was assisted by a number of colleagues – chief among whom is Sir John Kotzé (1849-1940). Kotzé was one of our leading jurists, but it is to his articles on Wessels' *History of the Roman-Dutch Law* that I here refer. These appeared at length in the *Law Journal* and are an important addition to that work. Moreover, Kotzé helped me unravel some passages where I was in doubt.

In a short article entitled "*Huberiana*" in the *South African Law Journal*,¹⁸ I wrote of some of the pleasures and problems encountered when translating the *Jurisprudence*. There is no doubt in my mind of the merits of the work – it is a "perfect picture of the social, religious and political life of Huber's day".¹⁹ The problems of translating mostly centred round Huber's occasional use of Old Frisian. One of the more entertaining occurs at 3.21.44 where Huber is dealing with impossible contracts and says "gelyk of yemant beloofte een vogel Phoenix, of een Meerminne, of een Pis-dief en diergelyke". What in thunder is a "pis-dief"? Eventually, thanks to Professor Weehuizen of Rhodes University, we established that it is a "mandrake". (But why "pis-dief"?) Also in 6.14.13 when Huber is discussing and listing different types of vagrants, I found "Plek-likkers die plek-ballen te koop hebben". Eventually I settled for "cleaners of clothes who sell balls of stain remover".

Sometimes one must settle for what seems possible.

Now here I stand, in front of this impressive Jameson Hall, gently considering the *laudatio* which preceded my award as Honorary Doctor of Law. Very kind words and words which are deeply gratifying, for I am honoured today "as a scholar, as one who scorning delights has lived laborious days to enrich the legal literature of South Africa"; my translations of Huber's *Heedensdaegse Rechtsgeleerdheyt* and of Voet's massive *Commentarius ad Pandectas* are described as a truly Herculean labour. Certainly I dedicated my *Jurisprudence* "to all fellow workers in the quarry" and my *Selective Voet* more laconically "to the few who hew".

17 *The Jurisprudence of my Time (Heedensdaegse Rechtsgeleerdheyt) (1636-1694)*, Durban, 1939, Vol I, p xi.

18 1931 *SALJ* Vol XLVIII, p 18f.

19 *Gane op cit* p 21.

CONCLUSION

Now as we raise the curtain, I, in the traditional rôle as producer of this small tribute, bid you *Plaudite, omnes amici Erici Poolii, plaudite* – Applaud the achievements of our good friend Eric! May he long continue to hew in the "Roman law quarry".