

von Hontheim (1701-1790), *alias* Febronius, who was not afraid of (even more) radical positions.

With the French Revolution, the end of the Holy Roman Empire and Europe's new order after 1815, the world Van Espen had in mind had disappeared. His *Jus ecclesiasticum universum* lost its importance for the positive canon law. Instead since the 19th century, the author and his work have been subject to research in the areas of the history of canon law, the history of the University of Leuven as well as the history of the Church of Utrecht as oldest member of the Old Catholic Church.

Online version (Cologne 1702):
https://books.google.be/books/about/Jus_Ecclesiasticum_universum_hodiernae_d.html?id=Lx-koq5cAr0C&redir_esc=y.

Zeger-Bernard van Espen at the Crossroads of Canon Law, History, Theology and Church-State Relations, ed. Guido Cooman, Maurice van Stiphout & Bart Wauters. 2003. Leuven: Peeters; Leclerc, Gustave. 1964. Zeger-Bernard van Espen (1646-1728) et l'autorité ecclésiastique. Zürich: Pas Verlag; Nuttinck, Michel. 1969. La vie et l'œuvre de Zeger-Bernard van Espen. Un canoniste janséniste, gallican et régalien à l'Université de Louvain (1646-1728). Leuven: Presses Universitaires de Louvain; Von Schulte, Johann Friedrich. 1880. Die Geschichte der Quellen und Literatur des Kanonischen Rechts, Vol. III.1, Stuttgart: F. Enke (repr. 1956. Graz: Akademische Druck- und Verlags-Anstalt).

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Decisiones sacrae rotae romanae
(Decisions of the Sacred Roman Rota)

1701

Jacob EMERIX DE MATTHIS (1626-1696)

Keywords: Case Law, Law Reports, *Sacra Rota*, *Ius Commune*, Canon Law.

Jacob Emerix de Matthis was born at Bilzen (now in Belgium) in 1626 and died in Rome 2 September 1696. A Catholic, he was educated in law at the University of Leuven. In 1658 he moved to Rome, where he joined his uncle Johann Emerix, judge of the Roman *Sacra Rota*, and became his *adiutor studii*. He held that office for ten years, which allowed him to acquire a strong insight and expertise in the practice and procedures of the court. After having been duly examined on 9 October 1668, he was appointed as a judge of the *Sacra Rota* on 10 December of the same year. His brilliant career as a *Rota* judge spanned almost thirty years. At a time when significant changes and reforms of the Church tribunals took place, he actively contributed to those developments. In July 1678 he attended, as a delegate of the *Rota*, the Congregation for the reform of the Roman courts and

their procedure established by Pope Innocent XI. In January 1685 he intervened at the Congregation of rites. In July 1686 he became dean of the *Rota* and in 1687 counsellor of the Holy Office. Finally, on 24 October 1689 he was appointed *reggente* of the Apostolic Penitentiary by Pope Alexander VIII. Emerix is also known for a short *Tractatus seu notitiae Sacrae Rotae Romanae* dating back to 1676 (and edited by Charles Lefebvre in 1961), an important and exceptional insider's view in the workings of the *Rota* at the time. He also kept a *Diarium* (partially edited by Mirella Tocci in 1982) compiled throughout his career.

The *Decisiones Sacrae Rotae Romanae* were first published in Rome in three volumes by the lawyers Nicola Antonio Rossi and Giovanbattista Arrighi in 1701. Another edition followed in 1712. The volumes contain 1.370 decisions of the Roman *Sacra Rota*, spanning the period 1669-1696, collected in alphabetical order. The published version includes detailed indexes: an *Index decisionum per dioceses*, an *Index decisionum per materias*, an *Index argumentorum* and, at the end of the third volume, a long and accurate *Index generalis materiarum ad decisiones*, containing a summary of the rules and principles referred to in every single decision.

The book belongs to the collections of decisions from the great tribunals in Europe, which began to circulate all over the continent during the 14th and 15th centuries and had become an established genre of legal literature in the 16th and 17th centuries. Until the beginning of the 17th century, the *Decisiones* were mostly private and unofficial compilations, written by judges and advocates of the supreme courts. They often enjoyed an extraordinary authority both within and outside the jurisdiction of the court. Among the most numerous, authoritative and widespread collections, were the *Decisiones* of the Roman *Sacra Rota*, the supreme tribunal of the State of the Church dating back to 14th century. The *Rota's* extensive and potentially unlimited competence included secular cases in the State of the Church and spiritual cases in all Catholic countries. The court developed a prestigious and authoritative jurisdiction which was known and referred to all over Europe.

As a judge of the Roman *Sacra Rota* and one of its most important and expert reporters, Emerix wrote his *Decisiones* in order to clarify and consolidate the points of law under discussion and, at the same time, to preserve the decisions of the court, allowing its judges to refer to useful precedents in similar cases. Rotal judges had traditionally been reluctant to overthrow an established custom of the court (*stylus Rotae*), but a constitution of Pope Pius IV (*In throno iustitiae*, 1563, restated in 1612) had established that the medieval decisions of the *Rota* (collected in the *Decisiones Antiquiores*, *Antiquae* and *Novae*) could be overruled, though only by a two-third majority in a plenary session. The *decisiones* of the Roman *Sacra Rota* were also frequently quoted in secular law courts and were regarded as highly persuasive authorities for all the *Ius Commune* tribunals. The existence and respect of the *stare decisis* practice is acknowledged and promoted by Emerix, not only in the *Decisiones*, but also in his *Tractatus*, where he affirms that the *auctoritas* of Rotal decisions is superior to any other source, including *communis*

opinio: 'Caeterum decisionum rotalium omni tempore maxima fuit auctoritas, ita ut multi insignes juriconsulti (...) voluerunt eas praevalere communi opinioni' (Tractatus, 100-101).

Emerix collected the judicial cases which he reported to his colleagues *auditores* as judge *ponens*. According to Rotal procedure, a judge of the *Sacra Rota* was normally assigned a case (*commissio*) and followed it until the final judgment. He could not express a vote, but had to seek advice from his colleagues, 'putting' the legal *quaestio* to them and he was bound to follow their opinion. Emerix' decisions start, after a short outline of the case (diocese, date, subject-matter and names of the parties), with a concise description of the facts (*narratio*) and the formulation of the legal question (*dubium*), sometimes expressed in the interrogative form. Emerix then sets out the arguments *pro* and *contra* with regard to the different points under examination, he enumerates the doctrinal and judicial authorities supporting them, and the decision, all according to the traditional dialectic scheme *pro-contra-solutio* elaborated by civil law jurists since the 13th century. Emerix' attention for accurately describing the legal problem reflects the changes which had occurred since the 16th century. In the first place, his *decisiones*, which belong to the individual collections, differ from those collected in the past, which were often less detailed and more heterogeneous in their contents. They were mostly written for personal use, and usually included short legal maxims, *consilia* and personal opinions, but did not mention the decision, which only began to be put systematically into writing after the reform of 1563. Secondly, the decision no longer considered different legal issues, but became entirely focused on the '*dubium generale totius causae complexivum*', expressed in fairly broad terms and referring to the case in its entirety.

Emerix' *Decisiones* deal mostly with canon and civil law, in particular with matrimonial cases, execution of wills, and (ecclesiastical) land law. In spite of the author's superior command and presentation of all the elements and legal issues at stake, the 'decisions' he published were not final judgments. According to Rotal procedure, the *decisio* was a separate extra-judicial act, which expressed the reasoned conclusions of the twelve judges of the *collegium*, the account by the *ponens* of the learned opinions (*opinamenta*, *responsa* or *consilia*) given by his colleagues in order to solve the *dubium*, but it was not regarded as a formal judgment: '*decisiones rotales non sunt sententiae (...) suntque extrajudiciales, et fiunt ad magis investigandam veritatem*' (Tractatus, 98). That *decisio* would be communicated to the litigants before a final judgment (*sententia*) was rendered. The latter, by contrast, did not include the reasons of the decision and was only delivered if no new arguments or evidence were brought forward. This is why Emerix does not always report whether a decisions gave rise to a judgment or not. In many cases, the parties probably reached a settlement and it never came to a judgment of the court. If the proceedings continued, the decision could be superseded by other decisions in the same case.

In citing the authorities of the different arguments expressed in the decisions, which come closer to doctrinal legal literature than to actual case reports, Emerix refers, as the main legal authorities, to the *Corpus Iuris Canonici* and *Corpus Iuris*

Civilis, to the opinions of eminent canonists and civilians, to the opinions of past Rotal judges and, most of all, to earlier decisions of the *Sacra Rota* itself. The abundance of references to precedents of the supreme court reflects the extraordinary authority they enjoyed, but also the changes which had occurred during the 16th century. Whereas the *decisiones* of the court, because they could not be regarded as the court's judgments, had never been collected and published by the court before that period, from the 16th century onwards, lawyers wishing to know the judicial orientations of the court started pressing their demand for reports of the decisions. Printed collections of *decisiones* began to circulate more widely, and in the 17th century it was enacted that the *Rota's* decisions had to be directly printed by Vatican typography, case by case, as unbound folios. Some editors had already started to collect and print the *decisiones* in chronological order (the first such collection, the *Decisiones Novissimae*, dates back to 1589). The monumental *Recentiores*, covering altogether 25 volumes, were published in 1618. Emerix himself, as dean of the *Sacra Rota*, had submitted the decree on the preservation of the court's decisions in its archives. In 1688, only a few years before the publication of Emerix' book, but while the author was intensively active as a Rotal judge, the systematic collection and official publication of the *Decisiones Rotae*, aimed at a substantial revision, had already started.

Emerix' collection enjoyed a wide international circulation and his decisions were frequently quoted in the main collections of the 18th and 19th centuries. The international success of the *Decisiones* of the *Sacra Rota* echoes the external hunger for this kind of information on the one hand, while, on the other, their edition was also internally highly demanded by the *auditores* of the court, who found in them the doctrinal opinions of expert and renowned jurists and the solution to various legal problems analytically exposed. The *Decisiones* became a fundamental work of reference for legal practitioners in many European jurisdictions and an indispensable instrument for knowing and clarifying the law, and for overcoming the legal uncertainty generated by the crisis of the *Ius Commune*.

Online version (Rome 1701): <http://catalog.hathitrust.org/Record/009037588>

Ascheri, Mario. 1989. *Tribunali, giuristi e istituzioni dal medioevo all'età moderna*. Bologna: Il Mulino; Dolezalek, Gero. 1989. Reports of the "Rota" (14th -19th centuries). In J.H. Baker (ed.), *Judicial Records, Law Reports and the Growth of Case Law*, ed. John Hamilton Baker, 69-99. Berlin: Duncker & Humblot; Antonii Augustini Praxis Rotae et Jacobi Emerix Tractatus seu Notitia S. Rotae Romanae: deux traités inédits sur la procédure de la S. Rote Romaine, ed. Charles Lefebvre. 1961. Tournai: Desclée; Schneider, Egon. 1940. Der deutsche Rotauditor Jacob Emerix (1668-1696) und die Jurisdiktion der Römischen Rota. In *Festschrift Eduard Eichmann zum 70. Geburtstag*, ed. Martin Grabmann & Karl Hofmann, 159-177. Paderborn: Degruyter; *Il diario di Jacob Emerix de Matthiis decano della Sacra Romana Rota*, ed. Mirella Tocci. 1982. Naples: Ed. Scientifiche Italiane.

Dolores FREDA

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De dominio maris dissertation
(*Dissertation on the Dominion of the Sea*)

1703

Cornelis (Cornelius) VAN BIJNKERSHOEK (1673-1743)

Keywords: International Law, Law of the Sea, Territorial Seas, Cannon-shot Rule

Bijnkershoek was born in Middelburg, the main city of the province of Zeeland on 29 May 1673 as a son of a middle class family of the city and died at The Hague on 16 April 1743. After the completion of secondary education in his birthplace, he matriculated in 1689 at the University of Franeker in the province of Friesland where he first studied theology and later law. In 1694 he obtained a *doctor juris utriusque* under the guidance of a.o. Ulrich Huber, who then enjoyed a European-wide reputation. Bijnkershoek settled at The Hague, the seat of the Supreme Court (*Hoge Raad*) of the Dutch provinces of Holland, Zeeland and West Friesland. During the first decade at The Hague he worked as a lawyer; in 1704, he was appointed a judge of the Court and in 1724 its president. He held the office of president until his death.

In parallel to his practice as a lawyer and a judge, Bijnkershoek wrote a number of large treatises and smaller essays on law, especially Roman law and Dutch law. In comparison, his writings on issues of international law (*jus gentium*) are not as numerous or extensive. His most important books in this field are *De dominio maris dissertatio* (*Dissertation on the Dominion of the Sea*), *De foro legatorum tam in causa civili, quam criminali liber singularis* (*Single Book on the Jurisdiction over Ambassadors in both Civil and Criminal Cases*, 1721), and *Quaestionum juris publici libri duo* (*Two Books on Questions of Public Law*, 1737). These three works are reproduced with English translations in the series *Classics of International Law*. The series published respectively *De dominio maris dissertatio* in 1923 (ed. J.B. Scott), *De foro legatorum* in 1946 (ed. G.J. Laing) and *Quaestionum juris publici* in 1930 (ed. J.B. Scott). Complete editions of his works or *Opera omnia* were published after his death in two in-folio volumes, at Leiden in 1752, at Geneva in 1761, and again at Leiden in 1767.

It has generally been maintained that *De dominio maris* was first published in 1702, as Scott remarks in his Introduction in *The Classics of International Law* (at p. 13). However, the first edition seems, as far as the present writer could identify and Star Numan (1869, p. 289) also pointed out, to have been published, together with a treatise entitled *De lege Rhodia de jactu*, in 1703 at The Hague (included in the collection of the Dutch Royal Library at The Hague). *De dominio maris* was compiled with other small works under the title of *Opera minora* (*Smaller Works*) in 1730 and this compilation was revised in 1744 (reprinted in the edition of