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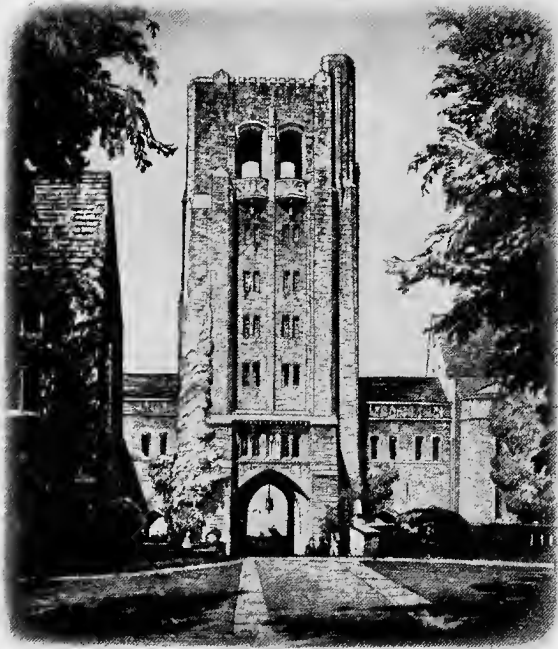
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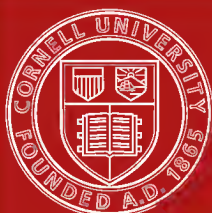
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# THE OPINIONS OF GROTIUS







MR. HUGO DE GROOT,  
Raad en Pensionaris  
te Rotterdam.

From a Photograph in Wagenaar's *Vaderlandsche Historie*  
Swan Electric Engraving Co.







THE  
OPINIONS OF GROTIUS

AS CONTAINED IN THE

HOLLANDSCHE CONSULTATIEN EN  
ADVIJSEN

COLLATED, TRANSLATED, AND ANNOTATED BY

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SUPREME COURT OF THE COLONY OF THE CAPE OF GOOD HOPE, AND OF  
THE HIGH COURT OF THE SOUTH AFRICAN REPUBLIC

LONDON  
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TO  
SIR J. HENRY DE VILLIERS, K.C.M.G.  
CHIEF JUSTICE OF THE SUPREME COURT OF THE  
CAPE OF GOOD HOPE

AND TO  
HIS HON. JOHN GILBERT KOTZÈ  
CHIEF JUSTICE OF THE HIGH COURT OF THE  
SOUTH AFRICAN REPUBLIC

THIS WORK IS

BY PERMISSION

**Dedicated**

AS A TOKEN OF PERSONAL RESPECT AND ESTEEM, AND  
WITH THE HOPE THAT THEY MAY LONG  
GRACE THE JUDICIARY OF  
SOUTH AFRICA

BY THE WRITER.



## INTRODUCTION.

THE works of Hugo Grotius, the most eminent expounder of Roman-Dutch jurisprudence, have gradually been placed before an English-reading public by means of excellent and accurate translations. Before the present work was taken in hand, translations of the *De Jure Belli ac Pacis* and of the *Introduction to the Jurisprudence of Holland* had already appeared. In addition, we have translations of the *Commentaries on Grotius* by Schorer, by Van der Keessel, and, in a sense, by Van der Linden. The “*Consultations*,” or, as I prefer to call them, the “*Opinions*” of Grotius remained untranslated; nor is this to be wondered at. The Opinions are indiscriminately and confusedly dispersed over the six volumes of the *Hollandsche Consultation*. Then the language is by no means easy; it suffices to state that it is the *Dutch juristic language of 1600*, a style intelligible only with very great difficulty. Lastly, the black-letter type employed in printing these Consultations is sufficient to repel the ordinary student, conversant though he be with modern Dutch.

These difficulties and obstacles have rendered the valuable Opinions of Grotius useless and unintelligible to many South African jurists, whilst to others

reference to them has been vexatious and annoying, or at least distasteful.

Under these circumstances, I trust that a translation of these Opinions will serve a double purpose : firstly, by completing the series of translations of the works of the eminent Jurist and of his Commentators (the *Rechtsgeleerde Observatien* are still awaiting a translator); and, secondly, by giving the profession an opportunity to consult these scattered but valuable Opinions with convenience.

*Translation.*—In rendering the old Dutch into English, I have kept as close as possible to the original text. The terseness of expression and the peculiarity of style have in some places necessitated free translations. The original “*Advysen*” are copiously interspersed with Latin maxims and quotations used by Grotius. These I have left untranslated in most instances, in order to preserve them in the present work. The antiquated and cumbersome method of reference to the Pandects and the Code has been replaced by numerical citations indicating the title, chapter, &c., whilst the texts are indicated by D. and C. respectively.

*Arrangement.*—The Opinions have been collected from the six volumes of the *Hollandsche Consultatien*. I have, however, deemed it inadvisable to present them arranged according to the order of sequence there followed. The result would have been a confused collection of opinions on different subjects,



without regard to order or method. To avoid this, they have in the first place been grouped according to the juristic questions discussed; and, secondly, the groups have been arranged according to the order of treatment observed in the *Introduction to Dutch Jurisprudence* of Grotius; the new number of the rearranged opinions being given first, then the reference to the *Hollandsche Consultatien*, and lastly the reference to Grotius' *Introduction*. This arrangement is the best possible that I could devise. It is, however, not absolutely perfect or satisfactory, and it entailed very anxious consideration; for it will be seen that the same Opinion sometimes treats of two or three different subjects. In such a case, the more prominent subject decided the arrangement and selection.

*Annotation.*—Every Opinion which treats of an important question has been annotated with a view of placing before the reader a brief disquisition on that branch of the law, with special reference to *South African case and statute law*. Neither time nor trouble has been spared to make the references to the decisions of the South African courts as complete as possible. The regrettable want of a series of reliable reports of cases decided in the High Courts of the two Republics has been badly felt, and has made my task in this respect most difficult.

I have also inserted—

(1.) An outline of the life of Grotius, which I

trust will prove interesting and instructive. The materials at my disposal for this purpose, although accurate and perfectly reliable, were unfortunately somewhat meagre, and I have therefore been compelled to confine myself to an "outline."

(2.) A list of maxims appearing in the Opinions and Annotations.

(3.) A table of cases cited in the Notes and Opinions.

(4.) A list of abbreviations used in the citation of cases.

(5.) A table of the Opinions according to the arrangement adopted in the present work, giving the references to the Nos. in the *Hollandsche Consultation*, and *vice versa*.

No one is more conscious of the shortcomings of this work than I am myself. Relying, however, on the indulgence of the profession, I offer this book to the public, and more particularly to the admirers and students of Roman-Dutch jurisprudence, sincerely trusting that it will be found valuable as a work of reference, and that it will prove to be the means of a closer and more intimate acquaintance with the juristic writings of Hugo Grotius.

"Non potes in nugis dicere plura meas  
Ipse ego quam dicere."

D. P. DE BRUYN.

CHAMBERS,  
March 1894.

## BIOGRAPHICAL SKETCH OF GROTIUS.<sup>1</sup>

HUGO DE GROOT, or, in the Latinised form, HUGO GROTIUS, was born at Delft on the 10th of April 1583. He was descended from an ancient and noble family, CORNETS or DE CORNETS by name, who for a long time resided in the dukedom of Burgundy. Early in the sixteenth century his great-grandfather, KORNELIS CORNETS, married ERMGARD, daughter of the Burgomaster of Delft, DIRK HUIGEN DE GROOT, also an illustrious family; in fact, the surname *De Groot* was conferred on the ancestors of DIRK on account of the numerous and valuable services rendered by them to their country. The Burgomaster had no male issue, and he made it a condition precedent to the marriage that KORNELIS CORNETS should give to his children by ERMGARD the surname of DE GROOT, in order to preserve the family name. A son, HUIG DE GROOT, was born of this marriage, and he again had two sons, of which JAN DE GROOT—the youngest

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<sup>1</sup> The materials at my disposal for this sketch have been few in number, but, I am pleased to state, most reliable. The following authorities and writers have been consulted by me:—Wagenaar's "Vaderlandsche Historie;" Boel, "Ad Loenius;" "Regtsgeleerde Observatien;" Herbert's translation of Grotius—Preface; Kent's "Commentaries," Lecture I.; Maasdorp's Introduction to his translation of the "Inleiding" of Grotius; Luden's "Life of Hugo de Groot;" Rogge's Article on "Grotius te Parijs" (De Gids).

—became the father of HUGO DE GROOT. JAN was a Doctor of Laws, Rector of the Leyden High School, and Burgomaster of Delft. He was a man of excellent and high repute, greatly respected, and an enthusiast in the cause of education. Hugo's mother, ALIDA VAN OVERSCHIE, was a woman of keen insight, and was imbued with a deep sense of duty and piety. Both parents exerted themselves most strenuously in order to promote the education of their son, and the marvellous abilities of the boy, which manifested themselves from infancy, induced them to redouble their efforts. At the age of eight he wrote Latin elegiacs, devoid for the most part of originality, which was quite natural, but nevertheless a marvellous production for a youth of that age. A few years later he was sent to the Hague in order to be instructed in theology and thoroughly grounded in the principles and doctrines of Christianity by the REV. UITENBOGAARD. This step was the first link in a train of events which influenced the whole life of GROTIUS, and in later years altered and bedimmed the illustrious career of him who had no contemporary compeer in the civilised world, and who, under more favourable circumstances, would have shone forth with dazzling brilliancy and in all his splendour as the leading light of the later Middle Ages. GROTIUS had been brought up in all piety with the ardent and religious exhortations of a pious mother. No wonder then that the teachings of UITENBOGAARD on what was afterwards known as *Remonstrantism* and the doctrines of ARMINIUS found

eager and enthusiastic consideration at the hands of young GROTIUS. The nature and result of these teachings will be discussed presently.

Before GROTIUS was twelve years of age (1595) he was deemed fit for the University of Leyden. During his stay there he became first a pupil, and later a close friend of the world-renowned JOSEPH SCALIGER. At the age of fourteen (1597) GROTIUS had made such progress in general study and elocution that he was able to debate publicly several juristic and scientific questions, with such good result that he received the unanimous applause and congratulations of those who had heard him. Verily he was an "adolescentem sine exemplo; juvenem portentosi ingenii." It was of him at this epoch that BARLÆUS wrote—

"Et puer hæc dixit, quæ stupere senes,"

and HEINSIUS—

". . . . Grotius vir natus est."

In the following year he accompanied JOHAN VAN OLDENBARNEVELD and JUSTINUS VAN NASSAU on an embassy to France. He was heartily welcomed by the men of learning in Paris, whither his reputation had preceded him. He was also introduced to HENRY IV. of France, who extended to him a gracious and warm reception. At this time he took his degree of Doctor of Laws at Orleans, and upon his return he immediately began to practise as an advocate at the Courts of Law. Previous to his departure for France he had finished a new, amended,

and revised edition of the philosophical works of MARTIANUS CAPELLA, an almost incredible performance for a youth of fourteen summers. The work was published upon his return. During his practice as an advocate he occupied all his leisure time in writing and publishing several works, of which an account is given later.

In 1608 GROTIUS married MARIA, daughter of Burgomaster VAN REIGERSBERGEN of Veere, in Zeeland, and a better choice could never have been made by him. She had a dogged perseverance, indomitable courage, and shrewd common-sense (*carissima et fortissima*), so much needed in times of danger and oppression. The events which followed bear excellent testimony to her various good qualities.

It must here be noted that two ruling passions guided, governed, and influenced the whole life of GROTIUS. A patriotic love for his country ruled all his actions as a dutiful and loyal citizen; but, above all, a deep-rooted devotion to the religious creed of his younger days, coupled with a passionate love and sympathy for his co-religionists, and a conviction, never shaken, that the doctrines of Christianity, as expounded by his party, were correct and true, altered entirely his whole aim and object in life, chequered his career, and made GROTIUS, as we know him, not as we might reasonably have expected from acquaintance with his antecedents that he would have been—a religious enthusiast, and not the profoundest philosopher and scholar of his time; a devotee of

a certain sect, not a leader of men ; an unfortunate, disappointed, and migratory fugitive and exile from his fatherland, not the brilliant and illustrious pole-star of early modern times, the laurel-bedecked hero and champion of justice, science, and civilisation, the admired of all nations.

As regards the first, little need here be said. He was born at a time when the Provinces of the Netherlands had already partially succeeded in breaking their bondage and subjection to the tyrannous yoke of Spain. Upon severance of their allegiance to PHILIP II., the Provinces formed the Union of Utrecht in 1579 ; the sovereignty vesting for the most part in the States of each separate Province, but, as regards matters concerning the general welfare of the Union, the States-General had jurisdiction. Patriotism at such an epoch and under such circumstances becomes a common attribute, fluctuating and evanescent with the weak, but strong, lasting, and pervading with men of courage and stability. Patriotism, as a rage, was the order of the day, and it would have been wonderful if GROTIUS, a man of keen sensibilities and broad sympathies, had not been affected thereby along with the rest. With him it became a lasting influence. These circumstances, and the then existing order of things, imbued him with a deep love and devotion for justice, for freedom, and for fatherland.

The religious controversies of the time require more than a passing reference. If we wish thoroughly

to understand the character and the life of GROTIUS, we must grasp the origin and effects of the different Christian doctrines which influenced the whole civilised world of that time. Trifling as these differences and discussions may appear, when viewed in the light (or perhaps darkness would be more correct) of modern times, they were of vital importance to the statesmen and public personages of those days, and it is therefore unsafe to weigh the actions of that time in the balance of the present; for if this is done, a true and correct estimate cannot be obtained. At this stage a pause must be made to examine briefly the nature and consequences of these religious controversies.

The seed of discord was sown during the early years of the Christian Church, and had its origin in the heated discussions concerning *man as a free agent*. From this point it was but a step to the controversy concerning *Predestination*. The heated arguments frequently led to extraordinary and somewhat illogical conclusions and teachings, and necessarily engendered chaos where before there had been light. In the fifth century PELAGIUS attempted to elucidate the points in dispute by modifying the harsh doctrines concerning predestination and fatalism, and his attempt proved partially successful. AUGUSTINUS violently opposed the theories of PELAGIUS, holding that the salvation or condemnation of man is pre-ordained and entirely dependent on the grace and will of God. This controversy was continued by



GODSCHALK and the Dominican and Franciscan monks. At the Reformation, LUTHER arose and embraced the doctrines of AUGUSTINUS concerning this subject. MELANCHTHON and ERASMUS qualified and modified the views of the great reformer, and considerably strengthened his party by their concessions. CALVIN and BEZA, on the other hand, upheld the extreme views of AUGUSTINUS and LUTHER, and proceeded to still greater lengths. The two last mentioned had the most influence in the Netherlands; there was, however, always a party that favoured the views of PELAGIUS. Shortly after 1603, JACOB ARMINIUS became Rector of the University of Leyden. He followed and taught *Pelagianism*, as it was called, in a somewhat modified and moderated form. At the same time FRANCISCUS GOMARUS, an ardent supporter of the views of LUTHER and AUGUSTINUS, was professor at the University. A heated dispute was therefore inevitable; and since both disputants found favour with different sections of the people, neither lacked support. For a time the opposing parties were called "Arminians" and "Gomarists," after the leaders in the controversy. The courts of justice intervened to allay, and, if possible, to settle the dispute, but to no avail. ARMINIUS died in 1609, and GROTIUS wrote a poem *In Mortem Arminii* as a token of respect. Up to this time GROTIUS had taken no part in these religious controversies, and, as he himself writes in 1609, he was almost entirely unacquainted with them. It might, however, have

been safely predicted that his education at the feet of UITENBOGAARD, his familiarity with the heroes of antiquity and classic lore, and his views on philosophy and ethics, would have tended to enlist his sympathies on the side of ARMINIUS. His *In Mortem Arminii* indicated this tendency, and from that time he was looked upon as an *Arminian*. ARMINIUS was succeeded by VORSTIUS, a not happy choice, and the breach soon widened, resulting in frequent disturbances, which were checked in time to avoid a civil war. From about this time Prince MAURITS evinced a leaning towards the Gomarists. Numerically the Arminians were inferior to their opponents, and they decided, for their protection against false and groundless accusations, and in order to establish their doctrines on a firm basis, to send a Memorial or Remonstrance to the States of Holland, setting forth their teaching *in extenso*. This was drawn up by UITENBOGAARD in *five Articles*, and submitted as decided; hence the appellation of REMONSTRATORS given to them, whilst their opponents, the Gomarists, became known as the CONTRA-REMONSTRATORS.

Owing to certain maritime difficulties with England, GROTIUS was sent in 1613 as ambassador to the Court of King JAMES I., and he was induced by OLDENBARNEVELD, the Attorney-General (*Lands-advocaat*), to use his influence with the English monarch on behalf of the Remonstrators. In this respect his mission was of little avail. In the same year he was made Pensionary of Rotterdam. This at

once brought him in closer contact with the famous and highly reputed OLDENBARNEVELD, who was then Raadpensionary, and had for nine years occupied the post just offered to GROTIUS. But for this circumstance GROTIUS would perhaps not have become a victim to the sad and most lamentable circumstances of 1618-19. Be that as it may, the events of the succeeding years after the death of ARMINIUS indicate that GROTIUS, in some indescribable manner, had become the tool of circumstances; and although he at first tried to avoid all participation in the religious controversies which raged around him, he seems to have been unintentionally, almost unconsciously and involuntarily, dragged into the maelstrom. In 1613 he wrote a treatise on the *Jurisdiction of the Temporal Sovereign in Ecclesiastical Matters*, and also defended the action of the States in his *Religion of the States of Holland and West Friesland* against the attacks of LUBBERTUS, a headstrong and vituperative Gomarist. Step by step GROTIUS found himself becoming more and more involved in these disputes. Although he was inclined to favour the views of the Remonstrators, yet, up to the last, his sole object and desire was to see the disputes finally settled, and to restore peace and concord between the parties. In 1616 he was sent to Amsterdam as leader of a deputation from the States, with the object of obtaining the co-operation of that city in their endeavours to restore peace and quiet in ecclesiastical matters. Amsterdam, with its vast majority of Contra-Remonstrators, refused, and the subject had

to be temporarily dropped. During this period GROTIUS was subject to severe fits of melancholia, but his activity and the pressure of work had a beneficial effect, and the worst form of the disease soon passed off.

Prince MAURITS assumed an unfriendly and antagonistic position over against GROTIUS and OLDENBARNEVELD, urged by self-interest and the fear that their ascendancy would mean the lessening of his power; for he saw that in the restoration of peace, laboured for by both, lay a weakening of his influence with the States—in short, his influence and power could be better felt and maintained in times of trouble and discord than in an epoch of peace. He therefore threw in his lot with the Gomarists, and these openly avowed their confidence in the Prince, backed up by the military. Meantime, matters went from bad to worse. At Amsterdam, the Hague, Utrecht, Leyden, and other places, breaches of the public peace occurred. Civil discord throughout the young Republic became imminent, and several of the States engaged mercenary troops (*Waardgelders*, so called because they were paid for keeping watch) for their internal protection and to ensure peace. Matters now assumed a threatening aspect. The appointment of *Waardgelders* naturally met with the strongest disapproval from MAURITS, who wished them to be disbanded, whilst the States maintained that the appointment was for their safety, and for the welfare of the country -

On the 29th of August 1618, without any intervening occurrence sufficient to serve as a cause, GROTIUS, OLDENBARNEVELD, HOOGERBEETS, LEDENBERG (Secretary of Utrecht), and MOERSBERGEN (member of the States), were suddenly, surreptitiously, and illegally arrested at Utrecht upon vague charges of certain members of the States-General who belonged to the Contra-Remonstrators, and were acting in consort with MAURITS. They were individually informed that the Prince desired an interview, but upon entering the room, first one and then another was seized and hurried off to confinement. During their imprisonment every artifice was tried in order to extort some confession from the unfortunate prisoners for the purpose of formulating an indictment against them, but the attempts were futile. After several months of close confinement and harsh treatment, during which time they were not allowed an interview with wife, child, or friend, they were brought to trial in February 1619. The bench was composed of twenty-four persons, styled "judges," specially selected to try the prisoners (GROTIUS refers to them in his *Apology* as "de his, quæ vitio aut inique gestæ sunt in dandis iudiciis"). The charges against the prisoners were vague and unfounded, but since their accusers sat as their judges, nothing but a conviction could have been expected, no matter what arguments or evidence might have been advanced or adduced on their behalf.<sup>1</sup> GROTIUS

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<sup>1</sup> Was it not an insult to JUSTICE to designate such a Bench a "Regtbank"?

was at first inclined to treat the matter lightly. He knew that right and justice would be done by the courts of law, and that he could easily satisfy them that he was innocent. Never did he contemplate the constitution of a special court appointed for the purpose of pronouncing a verdict of guilty under pretence of a trial which was a hypocritical formality and a persecution. On 17th April 1619, the grey-headed Lands-advocaat, OLDENBARNEVELD, then in his seventy-second year, was sentenced to death, and was executed on the following day. Another month was spent in fruitless attempts to wring some confession from GROTIUS by means of ill-treatment and threats. MARIA, the wife of GROTIUS, throughout this trying time, and in fact until her death, displayed the greatest fortitude and strength of mind. A direct hint was sent to her by some of the judges that her husband would escape the fate of OLDENBARNEVELD if he confessed and apologised, and she was requested to persuade him to do so. With scorn and derision she replied, "I absolutely refuse, and if he *is* guilty, you may proceed with the execution." On 18th May 1619, GROTIUS and HOOGERBEETS were again brought before the court, and were sentenced to life-long imprisonment and their property confiscated, on vague charges of high treason, receiving bribes from the Spaniards, creating civil disturbances, and inciting to rebellion and civil war. Palliating circumstances, such as the uncivilised times and religious enthusiasm, may be advanced by patriotic writers out of respect for the fair fame

of their country; viewed, however, from a calm and clear standpoint, the so-called trial was illegal *ab initio*, and, as above stated, a hypocritical formality and well-planned persecution; and the fact remains that a crime and unjust inquisitorial persecution, which stained the national good fame for many generations, and which will ever be regretted by all who have made an acquaintance with the works and lives of the condemned, were perpetrated by those in authority. GROTIUS and HOOGERBEETS were transferred to the Castle of Loevestein, at the western extremity of the Bommelewaard, on 5th June, and confined separately. Here they were harshly and cruelly treated. They were at first not allowed to have any intercourse with their families, but after a while the importunities of MARIA gained the day, and the wives of the prisoners were allowed to reside within the prison. GROTIUS was allowed the use of books and writing materials, and he made the most of his opportunities during his incarceration. His writings at this time will be referred to later. A vast quantity of books were left at his disposal by VOSSIUS and other friends at Gorcum with one DAATSELAAR. A large box was employed for the purpose of conveying the books between this place and the castle. At the command of the officer in charge at the castle, the box was at first regularly inspected and examined; but since nothing but books were always found therein, this precaution was ultimately neglected. This fact was noticed by MARIA, and a plan of escape was there-

upon considered, and eventually, after sundry experiments, put into execution on the 22nd March 1621. GROTIUS got into the box, and his wife carefully filled up the vacant spaces with books and locked the box. At her request the box was, as usual, conveyed to Gorcum, and was there opened by Mrs. DAATSELAAR two hours after GROTIUS had entered it. As may well be imagined, there was great secret rejoicing. In the garb of a mason GROTIUS departed for Waalwijk, and thence to Antwerp. He was persuaded by DU MAURIER, the French Ambassador in Holland, to seek refuge in France and to proceed to Paris. He followed the friendly advice, and arrived there on the 13th April. MARIA GROTIUS was closely confined in prison as soon as the escape of her husband became known, but she was released on the 7th April. GROTIUS was warmly welcomed at Paris by those in power. LOUIS XIII. was then at Fontainebleau, but he returned to Paris in January 1622. He was accorded a hearty reception by the French King, and was granted a pension, payment whereof was however delayed from time to time, and was eventually made in tardy instalments obtained with great difficulty. He was therefore in constant need of money, and sometimes in dire straits. Congenial but at the same time remunerative employment seemed unobtainable in Paris.

After this GROTIUS began to lose heart and became restless. Three great ruling desires were at war against his banishment and forced inactivity:—An



ardent longing to return to his native land, in order to further her interests as far as it was in his power so to do—although it must be admitted that, from personal considerations, he preferred to remain abroad; an overpowering desire to have freedom of religion accorded to himself and his party; and a craving for active life as a practising jurist. His letters throughout this period afford ample proof thereof. A man of such eminence, renown, and influence as GROTIUS had not long to wait for offers and invitations to settle in other countries. None of these offers were, however, sufficiently attractive, for in no instance would he bind himself by any engagement which precluded a chance of a speedy return to Holland. Projects of change of residence to Holstein, Hessen, Marburg, Steinfürt, Venice, and other places were in turn discarded, on the ground that he would thus be hampered in his work in the interests of his party and of his country. It must be borne in mind that, after the death of OLDENBARNEVELD, and during the continuance of the incarceration of HOOGERBEETS, the hopes of every one who desired and expected amelioration in the home and foreign policy of the Republic were centred in him, and on this account he was most anxious to remain in Paris until the renewal of the alliance between Holland and France. For a long time, however, he seriously contemplated going to Denmark in connection with an embassy to that Court. He was subsequently dissuaded by all his influential friends, and reluctantly gave up the idea. About November 1624, he was offered the

professorial chair in History and Jurisprudence in the University of Soroë, founded by CHRISTIAN IV. This he declined, and the vacancy was filled by JOHANNES MEURSIUS. It became evident that he could not continue much longer in Paris without a livelihood, for his funds were running low, and his family had to be cared for. He could not commence practice as an advocate, for he was handicapped in respect of the language and the legal phraseology, and he would further have been hampered, since he would have been compelled to start *ab initio*. To a man possessed of such powerful talents as GROTIUS, these difficulties would have been trifling; there was, however, another obstruction that barred the way—he would have to be naturalised; and to forswear allegiance to his country he stoutly refused. He then contemplated going to Spiers, where Latin was used in the courts of law. His friends and relatives, however, urged him to remain where he was, in the firm belief that he would attain such success as would compensate him for the years of inactivity.

As long as MAURITS lived, no hope of reconciliation appeared on the horizon. GROTIUS had whilst resident in Paris, and more especially during the latter portion of his stay, ingratiated himself with Prince FREDERIK HENDRIK and other influential and highly placed officials, with a view of obtaining leave to return to Holland when a suitable opportunity should arrive. With this object in view he gave an "*Advice*," setting forth in detail the steps

that ought to be taken upon the death of MAURITS in order to ensure internal peace. “*Sæpe me dejectum tot malis relevat conscicuitia amatae patriæ et legum et pacis et veritatis.*”

After the death of MAURITS, which occurred in 1625, GROTIUS would have returned under the letter of “safeguard” with which he had been supplied by the French sovereign; but the feeling against his party was still too strong, and, moreover, he refused to solicit a pardon on the ground that it would be degrading, and there existed no reason for such a step. “Rogues and thieves ask for pardon, but not honest folk,” was MARIA’S curt reply when questioned upon this matter. He likewise steadfastly refused to sever his connection with the Remonstrators. Little hope of permission to return was held out until such time as he complied with these two requirements. To the honour of GROTIUS be it said, that, notwithstanding these frequent rebuffs, his devotion for his country never decreased, but, on the contrary, he was ever alert to watch and forward her interests and to strengthen her position with foreign powers. There is, however, a limit to human endurance, and when the unreasonable attitude of the States, dictated by his enemies, was forcibly brought home to him between 1631–34, he decided to give up all idea of returning, and to waste no more energies on behalf of an ungrateful and hostile fatherland.

To imagine that GROTIUS, throughout the period of his residence in Paris, lived the cheerless life of a

recluse, void of all pleasurable enjoyment and happiness, would be a mistake. Paris was then the leading city of the civilised world, and counted among its inhabitants diplomatists, theologians, litterateurs, scholars and statesmen of the highest repute.

His reputation as a scholar, divine, eminent jurist, and author gained him a hearty welcome upon his arrival in 1621, and he soon made the acquaintance of most of the leading men in France. His activity and capacity for work was truly marvellous, and his leisure time, if such it may be called, was fully occupied. Eventually, towards the close of 1631, after various negotiations and promises of assistance, GROTIUS returned to Holland. The malignity of his enemies had, however, not abated, and on the 10th March of the following year a reward of 2000 guldens was offered for his apprehension, and he was sentenced to perpetual banishment. With a heavy heart he once more bade adieu to the country of his birth, for whose welfare he had made such enormous sacrifices, and to whose prosperity he had devoted the energies of a lifetime. On the 17th April 1632 he proceeded to Hamburg, and very soon became inundated with offers of employment by various powers and sovereigns, eager and willing to engage his services. For a considerable time he refused to bind himself absolutely by any definite acceptance, for he knew that in all probability his next step would be almost irrevocable and binding for the rest of his life.

In 1634 he entered the diplomatic service of

Sweden, and immediately wrote to FREDERIK HENDRIK, Prince of Orange, that henceforth he was a Hollander no longer, that Sweden was now his adopted fatherland, and that Rotterdam was free to choose another Syndic or Pensionary in his stead. In the early part of 1635 he left for Paris as Swedish Ambassador at the French Court. His position as such was a delicate and trying one. For ten years, however, he continued to represent the interests of Sweden, despite the malicious slanders and underhand actions of his enemies and the objectionable attitude assumed by the Chancellor RICHELIEU. No matter what difficulties or counter-inducements presented themselves, GROTIUS manfully executed his duties, and succeeded in important diplomatic negotiations where others under more favourable circumstances had failed.

WORKS.—This is a fitting place to give in detail a list of the various writings of GROTIUS. Many of them have already been referred to and discussed at an earlier stage. As early as 1599 he issued an amended and revised edition of the philosophical works of MARTIANUS CAPELLA. In the same year he translated the technical *Instructions for Seamen* into Latin. In 1600 he published the *Phenomena of Aratus*. In 1602 he wrote a treatise on the *Comparative Merits of the Athenian, Roman, and Batavian Nations*. He was appointed historiographer by the States about this time in commemoration of the struggles of the Netherlands for freedom

from the Spanish yoke. In 1609 he published his *Mare Liberum (de Jure quod Batavis competit ad Indica commercia)*, one of the first dissertations on International Law with respect to freedom of navigation, and a work whose influence and sound logical reasonings have been felt and recognised in modern international jurisprudence. Another work on constitutional government, *The Antiquity of the Batavian Republic*, was written in 1610. On the death of ARMINIUS in 1609 he wrote a poem *In Mortem Arminii*, and, as we have seen, he gradually became involved in the religious controversies, and supported the views of his party by his pen in such works as *The Jurisdiction of the Temporal Sovereign in Ecclesiastical Matters*, *The Religion of Holland and West Friesland*, &c. Yet, although so deeply engrossed in the performance of his duties and in attempts to bring the religious parties to an amicable settlement, he still found time to devote to study. His *Lucanus* was published in 1614, and all this time he steadily continued his labours as historiographer. In 1616 a selection of his *Poems* were first published (*Hugonis Grotii Pœmata omnia*). The poems are well written, instructive, and are couched in masterly language. Despite all this, GROTIUS cannot be ranked as a true poet of the first order. He was a scholar, a man of delicate feeling, and an admirable writer, but his poems lack the inspiration of true genius. The collection contains elegies, marriage songs, *Silvæ*, patriotic compositions, *Epigrammata*, and three dramas—*The*

*Suffering Christ, Sophompaneas* (the history of Joseph), and *Adamus Exul* (first published in 1601). In 1617 he wrote in *Defence of the Catholic Faith concerning the Sufficiency of Christ*. During his imprisonment at Loevestein he wrote *Annotations on the New Testament, The Christian Faith* (in six books), and *Introduction to the Jurisprudence of Holland*. He makes mention of these works in a letter addressed to his sons which accompanied the last-mentioned work. Therein he solemnly protests his innocence, and leaves the *Introduction* as a legacy to his children. This work was the clearest and most systematic early discussion of the laws of Holland. GROTIUS may therefore be styled the father of Dutch as well as of International Jurisprudence. His stay in Paris was characterised by a most marvellous display of energy in writing, studying, and teaching, the first two out of pure love for work as a scholar, and the last out of necessity to provide for his family. Shortly after his arrival we find him busy with the *Tragedies of Æschylus*, and before the end of the same year he finished his *Disquisition on Pelagianism*, and his *Apology or Defence (Verantwoording)* was almost complete. At the same time he was busy at an epic poem commenced in Loevestein on the *Evidences of True Religion*, in six books (already referred to). His *Specimens of the New Dutch Inquisition* was also commenced. He subsequently re-wrote this work in Latin under the title of *The Truth of the Christian Religion*, which created for him a world-wide repu-

tation. He then finished *Extracts from the Greek Poets*, with copious annotations, and the *Annâles*. In 1623 he commenced his masterpiece, *De Jure Belli ac Pacis*, which gained for him the proud position of being the first and the most eminent expounder of International Law during the seventeenth and eighteenth centuries. He has thus justly been considered the father of International Jurisprudence. "He arose," says KENT, "like a splendid luminary, dispelling darkness and confusion, and imparting light and security to the intercourse of nations." It is said by BARBEYRAC that the works of Lord BACON first suggested to GROTIUS the idea of reducing the laws of nations to the certainty and precision of a regular science. This is possible, but unlikely. We have it on record that he was induced by NIC. PEIRESC to commence the work, but only after very lengthy correspondence. GROTIUS himself, in his Introduction to this work, states that his object was to correct and dispel the immoral tendencies of the false theories prevalent in his day, by showing a consensus of opinion among the wise and learned of all nations and ages in favour of the natural law of morality. "GROTIUS," continues KENT, "therefore went purposely into the details of history and the usages of nations, and he resorted to the works of philosophers, historians, orators, poets, civilians, and divines for the materials out of which the science of public morality should be formed; proceeding on the principle that when many men, at different times and places, unanimously affirmed the same thing for



truth, it ought to be ascribed to some universal cause. His unsparing citation of authorities, in support of what the present age may consider very plain and undisputed truths, has been censured by many persons, as detracting from the value of the work. On the other hand, the support that he gave to these truths, by the concurrent testimony of all nations and ages, has been justly supposed to contribute to that reverence for the principles of international justice which has since distinguished the European nations."

In 1623 the materials for this great work were collected, and it progressed so rapidly and satisfactorily, that early in 1624 he was able to announce that it would extend over three volumes. DIRK GRASWINKEL and WILLEM VAN DER VELDEN, who were deeply interested in the work, acted as most willing and industrious clerks, and but for their efforts the work could not have been finished till considerably later. In November of that year it was in the press, three separate presses being employed at the same time. Early in 1625 the publication was completed, and the work issued amidst the great and unanimous acclamation of scholars, jurists, and statesmen alike. The sale paid him fairly well.

As Swedish Ambassador at Paris, GROTIUS had little leisure for writing. He continued and finished his *History of the Netherlands*, and on behalf of the Swedes he translated the *History of the Goths and Vandals* by PROCOPIUS. Another historical work

written at this time was *The Origin of the American Nations*.

After having served faithfully as Swedish Ambassador for ten years, he requested his recall in 1645. This was reluctantly complied with, but his ill-health and age (GROTIUS was then in his sixty-third year, and the severe trials and constitutional shocks that he had undergone, coupled with unending hard work, had shattered his system and made him an old man) brooked no excuse or delay. He left Paris for Sweden, and breaking his journey, he visited the land of his birth for the last time. Both Amsterdam and Rotterdam accorded him hearty and triumphant receptions. On his arrival at Stockholm, his health rapidly failed, and he was forced to leave again almost immediately. He intended going to Lübeck, but was taken severely ill on the journey. At Rostock he was confined to his bed, medical aid was summoned, and it was soon discovered that his constitution was completely broken down by the persistent application and unremitting labours of his previous life, and that his condition was hopeless. On the 28th August 1645, at Rostock, GROTIUS peacefully passed the portals of eternity, knowing no pangs of conscience for an ill or misspent life, and with the assurance—for he must have known—that his life in the interests of his Maker, his Fatherland, and mankind had not been in vain.<sup>1</sup> Thus

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<sup>1</sup> After his death several reports were spread by his enemies that he had met with a violent death, by lightning, as some have it, or by poison, according to others. These stories, however, are absolutely false.

died a noble man, patient, kindly, sympathetic, and long-suffering—a “vir doctus supra exemplum rarè ad modestiæ.” His own interests were completely merged in those of his banished co-religionists, whilst he was always forbearing to his opponents and his enemies.

“To fairly estimate,” says Sir JAMES MACKINTOSH in his *Discourse on the Study of the Law of Nature and Nations*, “both his endowments and his virtues, we may justly consider him as one of the most memorable men who have done honour to modern times. He combined the discharge of the most important duties of active and public life with the attainment of that exact and various learning which is generally only the portion of the recluse student. He was distinguished as an advocate and a magistrate, and he composed the most valuable works on the law of his own country. He was almost equally celebrated as an historian, a scholar, a poet, and a divine, a disinterested statesman, a philosophical lawyer, a patriot, who united moderation with firmness, and a theologian who was taught candour by his learning—unmerited exile did not damp his patriotism—the bitterness of controversy did not extinguish his charity. The sagacity of his numerous and fierce adversaries could not discover a blot on his character, and in the midst of all the hard trials and galling provocations of a turbulent political life, he never once deserted his friends when they were unfortunate, nor insulted his enemies when they were weak. In times of the most furious civil and re-

ligious faction, he preserved his name unspotted, and he knew how to reconcile fidelity to his party with moderation towards his opponents.”

The body was embalmed, and buried at Delft, where he rests among his ancestors. The following epitaph was written by GROTIUS himself—

GROTIUS HIC HUGO EST, BATAVUS, CAPTIVUS ET EXUL,  
LEGATUS REGNI, SUECIA MAGNA TUI.

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## LIST OF ABBREVIATIONS.

A. I. and II.	. . .	Appeal Court Reports.
Buc. 1868, &c., or simply 1868, &c.	. . .	Buchanan's Supreme Court Reports.
C. L. J.	. . .	Cape Law Journal—Digest of Cases.
C. T. L. R.	. . .	"Cape Times" Law Reports.
E. D. C., 1, &c.	. . .	Eastern Districts Court Reports, by Buchanan & Dulcken.
F.	. . .	Foord's Supreme Court Reports.
G.	. . .	Griqualand High Court Reports, by Laurence & Collinsou.
J.	. . .	Juta's Supreme Court Reports.
Kotze	. . .	High Court of Transvaal Reports, by Kotze.
M. or Menz.	. . .	Menzies' Supreme Court Reports.
Natal L. R.	. . .	Law Reports, Supreme Court, Natal.
O. F. S.	. . .	Orange Free State, High Court Reports.
R. or Ros.	. . .	Roscoe's Supreme Court Reports.
S.	. . .	Searle's Supreme Court Reports.
S. A. R.	. . .	South African Republic, High Court Cases.
Sh. or Shiel	. . .	Shiel's "Cape Times" Law Reports.
W.	. . .	Watermeyer's Supreme Court Reports (1857).

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# OPINIONS OF GROTIUS.

## OPINION No. 1.

HOLL. CONS. III. B. 341.

[GROTIUS I. 3. 1, & II. 17. 11, 13, 17 & 18.]

Laws concerning persons, things, or actions—Personal, real, and mixed statutes—Jurisdiction—Comity of nations—International law—Ambassadors—*Jus gentium*—*Jus nature*—Testamentary disposition allowed by these—Formalities for making testaments—Reason why two witnesses are required to prove the commission of a crime.

1. EVERY law treats either of persons, things, or actions (formalities).

2. A law treats of persons if it makes him incapable who was formerly capable, or makes him capable who was formerly incapable, either absolutely or under certain conditions.

3. Such a law retains its force although the person to whom it refers be outside the State: the reason therefor.

4. A law treats of things when it lays down that a certain thing, as a piece of land, for instance, cannot be alienated except in a certain manner, and

laws of this kind retain their force no matter where the act be done.

5. The third kind of laws is that which prescribes certain formalities in connection with certain acts, and in that case the place where the act is done is referred to.

6. Testamentary laws belong for the most part to the third class of laws.

7. Not only ambassadors, but also their attendants are exempt from all laws of the place where they reside.

8. Testamentary disposition is allowed by the Civil Law.

9. A person can naturally alienate his own property even before delivery.

10. He who alienates his property can do so in a certain manner, under certain conditions, for a certain time, or even with power of revocation.

11. The right of alienation can be continued even beyond the death of the alienor.

12. The power of testamentary disposition is granted by natural law; and some persons are, by way of penalty, deprived of this right: *et num.* 13.

14. According to the *jus gentium*, a testament can be made in the presence of two witnesses, and this rule applies also to testaments *ad pias causas*.

15. According to the *jus naturæ*, no particular form of testament is required, but merely the expression of the intention.

16. According to natural law, the only reasons which render an act void are (1) want of capacity,

(2) inaptness of the subject-matter, and (3) the inevitably immoral consequences of the act.

17. The *jus gentium* prescribes no particular form of making a testament.

18. According to both the *jus gentium* and the *jus naturæ*, the proof required for testaments is virtually arbitrary, varying according to the position of persons and the nature of the case.

20. The good character of the accused is of the same effect as the presence of one witness, and thus cannot be rebutted save by a greater number of witnesses.

21. Concerning the judge's duty in cases where he is in doubt as to the good character of the notary. His duty where the testator or the notary had not been sufficiently acquainted with this or that language.

22. According to the *jus gentium*, the formalities which suffice for the making of codicils are likewise sufficient for the making of wills.

23. If any one is subject to the laws of the place where he lives, his testament will be valid if made according to the laws of that place.

(1) In deciding this case, the main question to be considered is whether the law or custom of France is to be observed outside France by any one who wishes to make his will. In connection with this matter we must note what *Baldus* says,<sup>(a)</sup> viz., that

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(a) Baldus ad C. 1, 1, 1.

every law treats either of persons, things, or actions (formalities). (2) A law treats *of persons* if it makes him incapable who was formerly capable, or makes him capable who was formerly incapable, either absolutely or under certain conditions. (3) Such a law retains its force although the person to whom it refers be outside the State; (b) for, as Baldus says, “*ius habilitationis respicit personam et habet ipsam qualificare, id est habilitare ubicunque locorum.*” It may be added that this result depends rather upon a subjection which follows residence than upon a subjection *in actu*, which depends upon territory. (4) A law treats *of things* if it is laid down that a certain thing—a piece of land, for instance—cannot be alienated except in a certain manner, and laws of this class, since they refer directly to things, always retain their force wheresoever the transaction takes place. The authority generally quoted in support of this is Code 5. 71. 16. (5) The third kind of laws is that which prescribes certain *formalities* in connection with certain acts; and with regard to these laws it is decided that the place where the act is done is referred to.(c) It may be remarked that this effect depends upon *actual* subjection, and not upon subjection arising from residence. Most testamentary laws belong to this class. (6) Assuming, for instance, that we are discussing the customs of the Franks, it does not follow that this act ought to be governed by such custom.

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(b) Baldus *d. loco*, num. 13.

(c) Baldus *d. loco*, num. 20.



From what has been said above it would follow that acts of this class must be governed by the law of the place where they are done. But in my opinion this rule does not hold where it is alleged that the testator has been in the retinue of an ambassador. (7) For I submit that not only ambassadors, but also their attendants are not subject to any of the laws of the place where they reside, on the grounds advanced by me in the chapter on the laws relating to ambassadors in my work *De Jure Belli ac Pacis*. Therefore acts of this kind must be decided according to the *jus naturæ* or the *jus gentium*.

(8) In order to arrive at this decision, the first question which arises is whether the power of making wills arises from the *jus naturæ ac gentium* or from the Civil Law: that is, whether, apart from the Civil Law, testamentary disposition is allowed. (9) I hold the affirmative; for according to the *jus naturæ* any one can alienate his property even before delivery: (10) and any one who alienates his property can do so either in a certain manner, under a certain condition, for a certain time, and even with power of revocation. (11) Now the power of alienation can be prolonged even beyond the death of the alienor: (12) hence it follows that the power of making testaments is granted by natural law; (*d*) and this is the general opinion. (*e*) (13) This contention is borne out by the fact that this power existed even in the original

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(*d*) *Videri possunt quæ diximus. De Jure Belli ac Pacis, lib. 2, c. 7, n. 14, et c. 8, num. 25.*

(*e*) *Ut docet Julius Clarus de Testamento, quæst. 2, citans Bartolum, Jasonem, et alios.*



*gentium*—that is, by the general concurrence of the human race.(*i*)

I have laid down this particular rule for myself, that I will uphold the wishes of deceased persons as binding (legally perfect) although expressed in a deficient manner.(*k*) This, if you consider the law, is void,—if the will of the deceased, it is sound and valid. For my part, I prefer the will of the deceased, which I respect, the jurisconsults, as I will show, holding that it is prior to law.

(18) As regards the proof, this, according to both the *jus naturæ* and the *jus gentium*, is virtually arbitrary, varying according to the position of the persons and the nature of the case. (19) The allegations from the law of Moses concerning two or three witnesses are not opposed to this.(*l*) for this indeed is the number of witnesses naturally required as regards crimes, (20) because the good character of the accused is of as much value as the testimony of one witness, and it cannot be disproved except by a greater number. But in other cases, especially in those in which there is nothing conflicting, the same reasoning is not required.(*m*) The law must take notice of the will of the deceased; consequently, if the notary who has signed the deed appear to have been sufficiently acquainted with the transaction, his good faith is upheld. (21) If such good faith be wanting, the judge may interpose in order that the

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(*i*) Plinius refers to this matter in lib. 2, Epist. ad Annianum.

(*k*) Et lib. 5, Epist. ad Calvisium.

(*l*) Quod respicit C. cum esses de testamentis.

(*m*) Idem Plinius, lib. 4.

testimony of witnesses who were present may be given. So, too, if it be doubted whether the testator understood sufficient Italian, or the notary sufficient French, and proof thereof may be demanded.

(22) It seems that the codicillary clause is not of much use, for by the *jus gentium* the formalities which suffice for the making of codicils are likewise sufficient for the making of wills.

(23) But if any one holds that the attendants of ambassadors are subject to the laws of the place where they reside, it follows also that he must consider a testament made by one of them in accordance with the law of that place to be valid, as *Ferd. Vasquius* proved and established by arguments.<sup>(n)</sup> And this appears to me correct.

Ad §§ 6, 8-19, 21-23, see Chap. and Opinions on "Testaments" pp. 168 *et seq.*

Ad § 7, see Article on "Domicile," pp. 71, 72.

Ad § 20, see Opinion No. 87, pp. 620, 621.

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THE DIVISION OF LAWS IN RELATION TO THEIR  
EXTRA-TERRITORIAL FORCE.

**Extra territorium jus dicenti impune non paretur** is the rule laid down by Paulus with reference to the force of statutes,<sup>(a)</sup> and it must not be lost sight of in discussing the extra-territorial operation of laws. The necessary consequence is that, as a matter of absolute right, no law can have any operation or binding effect outside the territory of the lawgiver.<sup>(b)</sup>

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<sup>(n)</sup> Lib. 4, contr. cap. 3, num. 19.

<sup>(a)</sup> *Digest*, 2, 1, 20.

<sup>(b)</sup> Voet ad Pandectas, 1, 4, pt. 2, 5.

Let us now consider the circumstances under which this rule is by common consent departed from.

In discussing this subject, the civilians divided laws into three classes, which they called *personal*, *real*, and *mixed statutes* (the latter are called "laws relating to actions or formalities" by Grotius in the present Opinion). By "statutes," as used by these writers, was not meant the enactments of legislative bodies, but the whole municipal law of a State, from whatever source arising.<sup>(c)</sup>

The civilians generally are agreed as to the effect of the different classes of statutes. It is when we come to the definitions of, and distinctions between, these several classes that we meet with differences almost verging on disorder. "The moment," says Mr. Justice Porter, "we attempt to discover from the jurists what statutes are real and what are personal, the most extraordinary confusion is presented. Their definitions often differ, and when they agree on their definitions, they dispute as to their application."<sup>(d)</sup> The subject itself is full of intrinsic difficulties, but the subtleties and metaphysical niceties introduced by argumentative writers have rendered it vastly more perplexing.

Austin in his treatise on Jurisprudence, after a lengthy argument, briefly states the distinction as follows:—The law of persons is the law of *status or condition*; the law of things, the law of *rights and obligations*.<sup>(e)</sup>

Voet (*f*) defines the several classes as follows:—

*Personal* statutes are those in which the provisions principally concern the universal or quasi-universal condition, quality, capacity or incapacity of persons, whether no mention is made at all of things, or whether such mention is made; but the main intention of the lawgiver was not to dispose concerning any thing, but concerning a person.

(c) Hertii Opera, de Collisione Legum, § 4, art. 5. Story, *Conflict of Laws*, Introduction, § 12. Paul Voet, de Statut., 1, 1, 4. Merlin, Repertoire, art. Statut.

(d) Saul v. his Creditors, 17 Martin, 590-6.

(e) Lecture 13, *in fine*.

(f) Ad Pand., 1, 4 (2), 2, 3, 4.

*Real* statutes, on the contrary, principally affect a thing and dispose as to a thing, whether mention be made of a person or not, provided the primary intention of the lawgiver be to dispose concerning things and not persons.

*Mixed* statutes are those which neither treat principally of persons or things, but define the form, manner, or solemnities of acts done by persons concerning things either judicially or extra-judicially.

On reference to the Opinion given above, it will be found that this definition bears out the classification and distinctions made by Grotius.

Le Brun is almost to the same effect, for he bases the distinction between personal and real laws on the fact whether the statute in question governs the condition of the person *universally*, independent of things, or not.(g)

Voet's view in most respects receives the approval of Van der Keessel,(h) who defines these laws as follows:—

*Personal* statutes are not only those which define the *status* of a *person*, but those also which by reason of such status pronounce any one qualified or unqualified for the performance of any personal act.

*Real* statutes are those which treat of things, or which treat of them in such a manner that, though mention is made of the person also, yet the enactment is intended to affect the thing, and not the person.

*Mixed* statutes are those which prescribe the solemnities, formalities, and mode of acts and transactions.

In order to obviate the difficulties and perplexities of the subject, Story has adopted the terms "personality of laws" and "reality of laws." By the former he means all laws which concern the condition, state, and capacity of persons; by the latter, all laws which concern property or things—*quæ ad rem spectant*.

As to the effect and operation of foreign laws, it is universally agreed that *real* laws do not extend or operate beyond

(g) *Traité de la Communauté*, 2, 3, 5, n. 20-18.

(h) *Thes. Sel.*, 26-29.

the territorial jurisdiction of the lawgiver, or beyond the limits of the territory from which they derive their authority. *Personal* laws, on the other hand, follow and govern the persons subject to them wherever they may go. In this respect the personal statute of one country governs and controls that of another country. It is, however, subject to a real statute, or to directly contrary legislation of the place whither the person subject to the personal law may go or where the property in question is situated.

As regards *mixed* statutes, all contracts, testaments, and *other* acts duly executed in accordance with the laws of the place where they are done, are valid everywhere, unless contrary to an express law of such place, or unless the execution took place to evade the restrictions and penalties of the law of such other country.(i)

It must be noted that, as regards movables, these are, by a legal fiction, presumed to be at the place of domicile of the owner, and are therefore subject to the laws of his domicile, and not to the laws of the place where actually found.(k)

Huberus has thus summed up the results of the various teachings of the jurists on this subject:—(1.) The laws of every empire operate only within the limits of its government, and bind all subjects thereof, but do not extend beyond those limits. (2.) All persons within the limits of a government, whether resident for a time or permanently, are deemed subjects thereof. (3.) The rulers of every empire *by comity* admit that the laws of every people in force within its own limits ought to have the same force everywhere, in so far as they are not prejudicial to the rights or powers of other governments or of their citizens.(l)

Hertius, in commenting upon this passage, elucidates the third axiom just mentioned, proceeds to state under what circumstances foreign laws should be recognised and admitted, and lays down the following rules: (m)—

(i) Voet, 1, 4 (2). Van der Keessel, Thes. Sel., 30–44.

(k) Voet, 1, 4 (2), 11. Van der Keessel, Thes., 36.

(l) De Conflictu Legum, 1, 3, 2.

(m) Hertii Opera, de Collis. Legum, § 4, n. 3, 4.

(1.) When a law has regard to *the person*, we must refer to the laws of the country to which he is personally subject.

(2.) When a law bears directly upon things, it is local, whatever place and by whomsoever the act is done.

(3.) If a law prescribe formalities for a certain act, then the place of the act, and not of the domicile of the party or of the situation of the thing, is to be regarded.

The recognition of foreign laws is based upon the comity of nations, and has its origin in considerations of convenience and utility.

This subject is further discussed in the article of Domicile appended to Opinion No. 9, pp. 59-106.



## OPINION No. 2.

HOLL. CONS. III. B. 149.

[GROTIUS I. 5, 12 & 13.]

Incest *juris civilis*—Punishment—Widower carnally knowing his deceased wife's half-sister—Father carnally knowing his illegitimate child.

1. A WIDOWER who carnally knows his deceased wife's half-sister commits incest *juris civilis*. The punishment for this crime, especially when both parties are unmarried, is of no greater magnitude than in the case of adultery.

2. Adultery, under the Political Ordinance, was punished with privation of office and a fine of a hundred guildens.

Having been asked what punishment should be inflicted on a widower who had carnally known his deceased wife's half-sister, and had thus caused her pregnancy—

(1) I am of opinion (*salvo meliori judicio*) that the said crime is that of incest *juris civilis*, (a) which cannot be more severely punished than adultery,

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(a) *Digest*, 23, 2, 68.

especially where, as in the present case, both parties are unmarried; (b) (2) and since, according to the Political Ordinance of the States, adultery was not more severely punished than with privation of office and a fine of a hundred guildens, it therefore follows that no greater punishment can be inflicted for the said delict.

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The question as to whether incest is a crime or not seems to bear a close relation to the religious views in vogue during different periods, and it assumes different aspects according to the epochs considered.

Under English law there is no such crime as incest. It is true that during Cromwell's reign both wilful adultery and incest were made capital offences; likewise fornication (upon a second conviction) was declared a felony without benefit of clergy. At the Restoration it was deemed undesirable to countenance these ultra-Puritanical views, and, to counteract what people considered the hypocrisy of the late times, a contrary extreme of licentiousness was indulged in.

The above offences were then relegated to the jurisdiction of the Ecclesiastical courts, and ceased to be crimes under the Common Law, nor have they been revived since.(c)

Under the Civil and Roman Dutch jurisprudence, incest was always considered an offence punishable by the temporal courts, as well as by the spiritual. The punishment during the time of Grotius was *the same as that for the crime of adultery*, viz., loss of office and a fine of a hundred guildens. (See also S. van Leeuwen, *R. H. Recht*, iv. 37, 9.) Van Leeuwen (*supra*) suggests that incest ought to be more severely punished, and quotes the 18th Art. of the Pol. Ord. At a

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(b) Ut patet *Digest*, 48, 5, 38; et ibi Bart. et DD.

(c) Stephens, *Comm. on Laws of Eng.*, iv. 258.

more recent date Van der Linden (ii. 7, 8) states that this offence is punished in many instances with death when committed between parents and children; when between persons related collaterally or by marriage, corporal punishment, banishment, &c., is inflicted. He adds, however, that the punishment varies according to the degree of relationship in which the parties stand to each other. It is interesting to compare with this the punishment inflicted during his time for the crime of adultery. He says (ii. 7, 2), "The punishment for adultery by two married persons is banishment for fifty years and a fine of a thousand guilders, besides which the married man is declared infamous, and incapable of holding office." If one party was unmarried, the punishment was considerably less. At the present day the punishment inflicted depends entirely upon the degree of guilt of the perpetrators, and the judge will always exercise his discretion. The sentence may therefore vary from nominal imprisonment to seven years' hard labour,<sup>(d)</sup> or more, with or without corporal punishment. Adultery, on the other hand, has ceased to be considered a criminal offence.

The popular idea of incest is carnal knowledge between persons related closely by blood. The Roman Dutch law, however, according to the best authorities, includes the intercourse between *relations by marriage*. It is a sexual union of two persons who cannot intermarry because they are too closely related by blood or marriage (*Schwagerschap*),<sup>(e)</sup> and therefore carnal intercourse between persons within the forbidden degrees of marriage is punishable by law as incest; <sup>(f)</sup> the test, according to the authorities, as to whether incest has been committed, being whether intermarriage between the parties is, on the ground of relationship, prohibited by law.<sup>(g)</sup> For this reason sexual union between

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(d) Kotze's translation of Van Leeuwen, iv. 37, 9, *in notis*.

(e) Van Leeuwen, *R. II. Recht*, iv. 37, 9.

(f) *Q. v. K.*, Buch 1875, p. 98, and authorities there quoted.

(g) *Q. v. Piet. Arends*, per de Villiers, C.J., 8 Juta, 176.

a father and his illegitimate daughter constitutes the crime of incest,<sup>(h)</sup> and likewise in those countries where the marriage with a deceased wife's sister is prohibited, intercourse between the husband and the wife's full or half (as in the present Opinion) sister would be incest.<sup>(i)</sup>

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(h) Q. v. Piet. Arends, 8 Juta, 176.

(i) Voet, 23, 2, 35.

## OPINION No. 3.

HOLL. CONS. III. B. 183, & V. 128.\*

[GROTIUS I. V. 14, & II. XI. 8.]

Marriage of minors—Consent—Penalty—Placaat of 1540.

1. THE requirements of the Placaat of the Emperor Charles V. of 1540 regulating the marriage of minors were complied with when the friends and relatives of the minor or the magistrate had consented thereto. The penalties prescribed by the law were avoided when such consent had been given.

2. In alternativis sufficit alterum impleri.

3. In pœnam legis non incidit, qui legi paret.

4. Vide 1.

5. Pœna præsупponit culpam.

I have seen a certain recommendatory note by the Schout and Court of Berkel with reference to the petition of Trijntge Simons, spinster, and Peter Jacobsz. van de Hoog, bachelor, and have been asked whether the said Peter Jacobsz., who subsequently married the afore-mentioned Trijntge Simons, is

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\* Like many another, this opinion occurs in more than one place in the Holl. Cons. I have selected the present because the headnote is somewhat fuller.—[ED.]

debarred from participating in the property of his wife by virtue of the Placaat of the Emperor of the year 1540.

(1) I am of opinion that since the Placaat lays down with reference to minors who have no father or mother that they cannot contract a marriage without the consent of their relations or of the judicial officer who has local jurisdiction, the requirements of the Placaat are complied with if the marriage of minors is contracted either with the consent of the relatives or otherwise of the local magistrate. (2) *In alternativis enim sufficit alterum impleri.*( $\alpha$ )

The said marriage received the consent of the Schout and Schepenen, and it therefore follows that the provisions of the Placaat were not contravened when the marriage was contracted; and further, that the penalties laid down by the Placaat cannot be enforced against Peter Jacobsz.; (3) *cum in pœnam legis non incidat, qui legi paret.* This is not rendered untenable by the afore-mentioned recommendatory note, which limits the consent with a special clause, stating that the rights of the relations of Trijntge Simons, claimed by virtue of the said Placaat, over her property should remain in full and unprejudiced; for, firstly, the Court did not concede any rights to the relations, but merely allowed the rights to remain in full, should they be entitled to any under the Placaat, and we have just seen, after mature consideration of the case,

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( $\alpha$ ) C. in alternativis de reg. juris in sexto, Dd. in D. 34. 5, 14. 3.

that no rights whatever accrued. If the intention of the Court had been otherwise (which it is difficult to believe), the clause above referred to would be null and void, as it conflicts with the Placaat. Although the Court was allowed by the Placaat to give or refuse consent, it was not in its power, when it had consented, to order that the penalties should be enforced which were enacted by the statute in cases where consent had not been obtained. *Pœna enim præsupponit culpam*, which in the present case does not exist.

ROTTERDAM, 10th Feb. 1617.

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Marriage, as defined in *Menzies' Reports*, in the prefatory remarks relating to that subject,<sup>(b)</sup> is understood, in a legal sense, to be the union and cohabitation of one man with one woman, until the death of the first dying, with the intention of having and rearing legitimate offspring. Marriage is therefore clearly a contract, and as such it has this in common with consensual contracts generally, that it is created by consent of the parties, testified and confirmed by certain solemnities required by law; but it differs from them in the essential particular that it can never be dissolved by such consent. Persons entering into this state individually contract with each other, and jointly contract with society; and society alone has the power, on fixed principles of justice and policy, of dissolving the contract before the period of its natural dissolution by the death of either of the consorts. Among persons, therefore, who cannot enter into the contract of marriage are those who are unable to give the requisite consent. Under these fall

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(b) *Menzies' Rep.*, i. 143.

minors, who are incapable of entering into any contract without the consent of their parents or guardians. Under the old Roman-Dutch law the consent of parents or of the survivor of them was required before banns were published, and a marriage contracted without such consent was void *per se*; (c) although Grotius in his *De Jure Belli ac Pacis* l. 1, c. 5, § 10, n. 1, 5, argues that since the consent of parents is not required according to natural law, however much it may be demanded as a matter of filial piety, therefore a marriage contracted without such consent is not void, nor are the children illegitimate. By the Placaat of Charles V., art. 17, such marriages were prohibited under a penalty. The consent of parents may, however, be given tacitly and *per ratihabitionem*. (d) Grotius states in i. 5, 14, that where there are no parents the consent of the ascendants was required. Voet, however, says that during his time such consent was not required. (e)

By the Placaat of 1540 the marriage of minors without the consent of their guardians is prohibited, but not void *per se*. (f) At the Cape of Good Hope the consent of parents or guardians is essential, and the marriage officer is prohibited from celebrating the marriage of minors without such consent. (g) So also in the Transvaal. (h) In case the parents or guardians cannot or refuse to give their consent, application may be made in the Cape Colony to the court, and in the Transvaal to the Landdrost for leave to marry, and upon such consent being obtained a marriage may be

(c) Political Ordinance, Arts. 3 and 13. Van Leeuwen, R. H. R., i. 14, 6.

(d) C. 5. 4, 5, Pec. ad Testam. Conjug., lib. i. cap. 5. Cujac. lib. 16, observ. cap. ult. Voet, xxiii. 2, 19. Groenewegen, Cod., lib. 5, tit. 4, l. 8. Van der Keessel, Thes., 75. Grotius, however, i. 5, 14, states that since times of old such marriages, though punishable, were not void.

(e) xxiii. 2. 13, 14, 15.

(f) Sande, lib. 2, tit. 1, def. 7. Grotius, i. 8, 3. Schorer's Notes, 35. Van der Keessel, Thes., 125 and 126. Van Leeuwen, R. H. R., i. 14, 9. Van der Linden, i. 3.

(g) Marriage Order in Council of Sept. 1838, sects. 13 and 17.

(h) Huwelijk's Ord. 3 of 1871, sects. 8 and 17 (S. A. R.).



celebrated, and will be valid and effectual. When the marriage has been solemnised clandestinely and without the requisite consent, it is voidable, and neither party can derive any benefit from the estate of the other,<sup>(i)</sup> or, in other words, such marriage will not bring about a community of property between the spouses, although there may be certain exceptions.—Vide *Mostert v. The Master (infra)*. In the case of *Lea v. Donlon* (decided in the Supreme Court of Natal on 13th September 1884), the plaintiffs, parents of Emily Lea, instituted an action against the defendant to have his marriage with Emily, who was a minor, and had not obtained the plaintiff's consent, set aside as invalid and void. The defendant and Emily Lea had never lived together as man and wife. The court set the marriage aside as invalid. (Natal Legislature, Law 13 of 1883.)

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Mention has been made of the marriage law of the Transvaal, and it may not be out of place to refer to that section of the Ord. (3 of 1871, § 9) which regulates the marriage of widowers and widows. Widowers are not allowed to marry within three months of the death of the wife (a curtailment of the *annus luctus*), widows within 300 days of the death of the husband, unless special dispensation be obtained from the Government. This law was evidently passed to conform to the spirit of the old rule, viz. that a widow is prohibited from marrying during the period of probable pregnancy by her deceased husband.<sup>(k)</sup>

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(i) *Mostert and Another v. The Master*, 3 Ros., p. 59. This same rule is distinctly laid down by Grotius in his *Introductio*, II. xi. 8. The mother's consent without that of the father is insufficient, and he is entitled to have the marriage declared void. *Johnson v. McIntyre*, Sup. Court, Nov. 1893.

(k) Grotius, i. 5, 3. Schorer ad Grotium, i. 5, 3. Bynkershoek, *Quæst. Jur. Priv.*, lib. 2, cap. 4.

## OPINION No. 4.

HOLL. CONS. VI. PART 2, 53.

[GROTIUS I. V. 15, & I. VIII. 3.]

Espousals may be broken off by mutual concurrence—*Sponsalia de futuro mutuo consensu dissolvuntur.*

Two free persons, a bachelor and spinster, both without father or mother, became engaged without the consent or knowledge of their relations. Love between them had cooled and their vows had become weakened, either through lapse of time, the evil talk of slanderers, or from some other cause or occurrence (except unchastity). Can such persons, through the intervention of certain good people, release one another from their betrothals? Will these people who have intervened and effected a separation, as well as the witnesses called for the occasion, render themselves liable to be fined, and ought they to have expected any difficulty and obstruction? Can such release be granted underhand, or must it be before a notary and witnesses? All without prejudice.

I assume that the betrothals afore-mentioned referred to a marriage in the future, and not to one to be celebrated immediately and at present. I am

therefore of opinion that the contracting parties can freely release each other, since this is allowed by the Civil as well as the Canonical Law,(a) and is not prohibited by the Political Ordinance of the States-General. Hence it follows *a fortiori* that those who intervened cannot be charged with any wrong on that account. But if the contracting parties had engaged to get married outright, they might by mutual consent postpone the solemnisation of the marriage, and their subsequent cohabitation, without either being at liberty to marry another.

Those persons who allowed themselves to be called in to intervene will nevertheless not be liable to any penalty, if they did not know that the marriage between the said persons had been fully arranged.

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*Sponsalia*—Espousals (*trouwbeloften*) are a mutual agreement and promise of a future marriage. It is a contract which is confirmed or ratified, like all other transactions completed by mutual consent.(b) Under the law of Holland, they were attended with considerable ceremony, which is now no longer observed, and has been lost to a very great extent. It was generally confirmed by giving an express token on either side,—as a rule, a small and insignificant coin—the “marriage-penny” or *trouw-penning*,(c)—as an earnest of good faith. Espousals were divided, as a rule, into two classes: (1) *de presenti*, or those that were to be celebrated at once, and (2) *de futuro*, or those which were to be celebrated at some distant time. These could, however, not be postponed

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(a) C. 5, 1, 6, and 5, 2.

(b) D. 23, 1, 1 and 2.

(c) Van Leeuwen, R. H. R., iv. 25, 1.

indefinitely except by mutual consent, and had to be celebrated within reasonable time, as to which the court had to judge.(d) In some places a subsequent promise of marriage *de præsenti* was preferred to a previous one *de futuro*.(e) This distinction, Van der Keessel says, was never received into the law of Holland.(f) The consequences of espousals once contracted were that they gave rise to an action for specific performance,(g) and the contract could not be dissolved except by mutual consent.(h) The Colonial law at the present time follows the Roman law more closely, for by the 19th and 20th sections of the Order in Council, specific performance can no longer be decreed, but the forsaken party retains his or her right to institute an action for damages sustained by reason of the breach of the promise. In the case of *Joosten v. Grobbelaar*, the Supreme Court of the Cape Colony decreed the defendant to marry the plaintiff in respect of a promise of marriage *sequente copula*.(i) A promise of marriage by minors, without the consent of their parents or guardians, is invalid and clandestine,(k) and subject to the penalties prescribed by the Placaat of the Emperor Charles.(l)

Among the authorities that may be conveniently consulted on this subject are—

Grotius, I. v. 15., I. viii.

Groenewegen, De Leg. Ab., c. 5, 4, 8.

V. d. Keessel, Thes., 47-61, 75, 76-82, 83-86, 125, 126.

Van Leeuwen, Cen. For., 1, 11, 12, 13; R. H. R., iv. 25.

Voet, 19. 1, 14, 23. 1-4.

Brouwer de Jure Connubiorum.

V. d. Linden, 1, 3.

(d) Echtr. of the States-Gen., § 23. Schorer ad Grot., i. 8, 3.

(e) Leon. Decis. Cas., 43.

(f) V. d. Keessel, Thes., 49.

(g) Voet, 23, 1, 12.

(h) Voet, 23, 1. V. d. Keessel, Thes., 49. Holl. Cons., Opinion above.

(i) 1 Menz., 149.

(k) Gray v. Rynhoud, 1 Menz., 150. Greef v. Verreaux, 1 Menz., 151.

(l) Plac. of Kaiz. Karel of Oct. 4, 1540, Art. 17, and Polit. Ord. of 1580, Art. 3.

## OPINION No. 5.

HOLL. CONS. V. 129.

[GROTIUS I. V. 16.]

Marriage—Publication of banns when contracted in a foreign country—*Lex loci contractus*.

A PERSON residing in Holland is not bound to have his banns published there if he intends to marry outside the Province, and to live in such place.

Cajus, who lives in Holland, gave his daughter in marriage in Germany, with the intention that she should remain there. *Queritur*, whether a marriage contracted under these circumstances is void by reason of non-publication of banns in the place where the daughter was born?

I am of opinion that the person of whom mention is made above, and who has resolved to get married in Germany and to take up his or her residence there, is released from all laws and ordinances of Holland, notwithstanding the fact that his or her parents had always lived in Holland. *Nam moribus nostris, domicilium, tota voluntate mutatur et mutato*

domicilio origo non attenditur, which rule was observed in Holland, and also in other places, without considering what the Civil Law may lay down to the contrary.<sup>(a)</sup> Hence it follows that the said person was no longer a subject of the States of Holland. Et cum omnis potestas statuendi debeat fundari vel in loco ubi actus celebratur, quorum neutrum hic obtinet, quod proinde leges Hollandiæ in celebratione matrimonii extra Hollandiam contracti locum non habeant. The publication of the banns in Holland was therefore unnecessary, since such was laid down by the Political Ordinance only in respect of those remaining subject to the Government of Holland, or who contract a marriage in Holland, but not in respect of those who alter their intention *bona fide*.

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The celebration of marriage by aliens in a foreign country, and the recognition of such marriages by the courts where the spouses may subsequently be domiciled, constitute a most important element of international comity, and is of the utmost importance to married people settling outside the *locus contractus*. The decisions referring to "Domicile," and the attitude of the South African Courts thereanent, are discussed in the Note on Opinion No. 9, where will be found a short note on "Foreign marriages."

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(a) *Videatur* Gaillius, lib. 2, obs. 36.

## OPINION No. 6.

HOLL. CONS. III. B. 313, and V. 132.

[GROTIUS I. V. 19.]

Husband guardian of the wife—His powers—Election of the wife.

ACCORDING to the custom of Holland, the husband is the guardian of his wife and of her property, and in case of necessity, or for the sake of profit, he can sell such property, unless the contrary were especially stipulated by ante-nuptial contract. After the decease of the husband the wife has an action against his heirs for a return of the value of the property alienated, should she prefer this to half the estate.

I have seen a certain ante-nuptial contract entered into on the 25th November 1614 between Michiel Isaacs and Anneke Adriaans, whereby it was stipulated that upon the death of Michiel Isaacs the said Anneke Adriaans shall be entitled to receive back the property brought in by her, and if the estate be worth more, the property is to be divided equally.

I have been asked whether the afore-mentioned

Michiel Isaacs may alienate any of the property brought into the estate by Anneke Adriaans.

Since, according to the custom of Holland, the husband is the guardian of his wife and of her property, and since such guardianship extends so far that, in case of need or for profit, the husband can sell or otherwise alienate the property of his wife, and that this can always take place unless the antenuptial contract specially stipulates to the contrary, which has not been done in the present case, I am therefore of opinion that the said Michiel Isaacs can sell or alienate the property of his wife brought into the estate. Anneke Adriaans, after the death of her husband, has an action against his heirs for the return of the value of the property, if she prefers this to a half of the estate.

ROTTERDAM.

See Opinion No. 8 for a discussion of the marital power.



## OPINION No. 7.

HOLL. CONS. III. B. 146.

[GROTIUS I. 5, 22 & 23.]

Husband—Wife—Debts—Engagements—Ratification.

1. A HUSBAND who does not oppose or object to the actions of his wife is taken to have ratified them directly and absolutely.

2. Such ratification made by a husband with respect to an action of his wife is of like effect as if the husband had originally consented thereto, and any damage caused by such act must be borne by the joint estate.

The facts are briefly as follows :—A. and B. are married in community of property. A. (the wife) lends a sum of money to her step-daughter, C., and obtains a receipt. B. alleges that he did not know of this transaction. Later, a bond is passed by the husband of C. in favour of A. This bond is accepted by B. The pledges are insufficient to cover the sum advanced. A. dies. The question now arises, whether, in case of any loss, it must be borne by the heirs of A. or by the joint estate of A. and B.?

(1) I am of opinion that since B. did not object to

the bond, but afterwards accepted it, he must be taken in law to have ratified the transactions of his wife directly and absolutely, *secundum ea quæ tractat*. Bartol. in l. quo enim § rem haberiss. Rem ratam haberi. D. 14, 6, 16, and C. 2, 13, 1.

(2) Moreover, it is an accepted legal principle that such confirmation by a husband of the acts of his wife is of like effect as if he had originally consented thereto.(a) Since, in the case of money lent by the husband and wife together, the joint estate must bear the loss, therefore the same rule must obtain here on account of the subsequent ratification.

The legal status of the wife after marriage, and the more important relations between husband and wife, will be found discussed in Opinion No. 8, *infra*.

The present text treats more particularly of the liability of husbands and wives for the engagements, obligations, and debts of each other.

By virtue of the position which the law forces upon all married women, she cannot, being a minor in the eye of the law, bind her husband or his estate by any transaction or agreement entered into without his consent, and such agreement is *ipso jure* null and void; (b) nor do such acts revive upon a dissolution of the marriage.(c) The present opinion to a certain extent indicates how such required consent must be construed. (*Vide* also *V. d. Bock v. Reg.*

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(a) Tiraq. in l. Conn. in fine in verbo cons. glos. 4, num. 34.

(b) *Executors of Morkel v. Heirs of Morkel*, 1 Menz., 177. Arg. ex opinione, *supra*. Van Leeuwen, R. H. R., i. 6, 7, and ii. 7, 8. Sande de Prohib. Alien.

(c) *Stokman*, Decis. 52. Van Leeuwen, R. H. R., i. 6, 7.

of *Deeds*, 3 J. 296, and *Ferreira v. Reg. of Deeds*, 5 J. 387.) Two salient exceptions to the rule just quoted are: (1.) that the husband is liable for all debts contracted by the wife for household expense,<sup>(d)</sup> and (2.) when the woman carries on a public trade, she can bind both her husband and herself with regard to matters associated with such trade.<sup>(e)</sup>

In connection with this question an important point arises, namely, the liability of spouses for each other's debts. It will be best to consider, in the first place, the liabilities under a *communio bonorum*, and, secondly, under an ante-nuptial contract, which does away with such community. Community of property brings about a qualified partnership. (See Opinion No. 8.) Hence it follows that husband and wife become liable for each other's debts contracted *stante matrimonio*, and since there is to be a joint account of all property brought in and acquired, they are also liable for the debts contracted *before marriage*.<sup>(f)</sup> *Nubens viro, fœminamve ducens, ducit etiam nomina.* The creditor can only recover the full amount of his claim from the estate if it was incurred before marriage, when he enforces it *matrimonio adhuc constante*; and should he fail to do this, he cannot, upon dissolution of the marriage, recover the amount, or any portion thereof, from the other spouse.<sup>(g)</sup> For debts contracted *stante matrimonio*, the spouses are liable for one moiety upon dissolution of the marriage.<sup>(h)</sup> If the wife is sued after dissolution of the marriage for debts contracted *durante matrimonio*, the declaration should aver that the joint

(d) *Hoffman v. Grassman*, 3 J. 282. *Coetzee v. Higgins*, 5 E. D. C. 352; and compare *Janion v. Watson* (Natal, Sept. 12, 1885), C. L. J. ii. p. 349.

(e) *Van Leeuwen*, i. 6, 8. *Grotius*, i. 5, 23.

(f) *Burge's Col. Law*, c. vi. § 3. *A. Wesel, Damni inter Conjug.*, Com. tr. 2, 3, 1. *Voet*, 23, 22. *V. d. Keessel, Thes. Select.*, 222.

(g) *Voet*, 23, 2, 53. *Grot.*, ii. 11, 12. *V. d. Keessel*, 222, 224. *Van Leeuwen, R. H. R.*, iv. 23, 6.

(h) *Grot.*, i. 5, 22. *V. d. Linden*, i. 3. 7. *Hoffman v. Grassman*, 3 J. 282.

estate cannot satisfy the claim.(i) The wife is not liable for any pecuniary penalty or fine inflicted by judicial decree for a crime committed by the husband, and such penalty is chargeable to his estate alone.(j) In case of confiscation, the wife's interest in the joint estate will be protected.(k) To the rule that the spouses are each only liable for one-half of all debts contracted during marriage upon dissolution thereof, there is one exception: when the husband has mortgaged his wife's property, the creditor can proceed against her estate for the full amount of his claim.(l) When either party has been compelled to pay the debts contracted by the other and to discharge the liabilities incurred, he or she can claim the amount paid or the *damnum* sustained from the joint estate, but this *damnum* is only "quod ex causa societas et juris maritalis, non aliunde accidit."

When the *communio bonorum* is excluded, but the *communio questuum aut damni et lucri* remains, the spouses will not be liable for any debts contracted before the marriage, but must meet all claims incurred *durante matrimonio*.(m) Upon termination of the marriage the qualified partnership is dissolved, and either spouse will only be liable for one-half of the debts contracted whilst the marriage was in existence.

When the parties are married by ante-nuptial contract, the liability will vary with the terms of the contract. If the community of property has been excluded, there will still be a community of profit and loss, unless this too has been specifically excluded. If this is done, each spouse will only be liable for his or her own debts.(n)

(i) *Sichel v. De Wet*, 5 E. D. C. 58.

(j) *Goris Advers. tr. de Societ. Conjug.*, 4, 12. *Van Leeuwen*, v. 3, 13. *Burge's Col. Law*, vi. 3.

(k) *Sande*, lib. 2, tit. 5, def. 8. *Grotius*, i. 5, 22. *V. d. Keessel*, *Thes.*, 92-94. *Schorer ad Grot.*, i. 5, 22.

(l) *Resp. Jur. Holl.*, p. 1, cons. 151, quæst. 2.

(m) *Burge's Col. Law*, c. vi. § iii.

(n) *Trustee of Herbst v. Herbst* (O. F. State, Oct. 20, 1878, and April 17, 1879).

If by marriage settlement the husband settles any property upon the wife, or passes any mortgage bond in her favour as a dower or benefit, she cannot claim payment of such dower or benefit upon the death or insolvency of her husband until the claims of all other creditors have been discharged.(o) If the wife incurs any debt with the assistance of her husband, and she has property outside the community, the property can be attached to satisfy the judgment-creditor.(p) The court, in giving judgment against the husband, will sometimes take into consideration the financial position of the wife; for instance, where a decree for civil imprisonment was prayed against the husband, who alleged *nulla bona*, the court granted the order on the ground that the wife had offered to give security, and that she had the means to satisfy the debt.(q) Upon a separation of bed and board, either spouse will be freed from liability for debts contracted by the other subsequent to such separation, for it amounts, for the time being, to a dissolution of the *societas conjugorum*; but this separation, to be valid and effectual against creditors, must be by judicial decree, and cannot be done by an underhand deed *inter partes*.(r)

Under the Old Roman-Dutch law, according to the customs of certain places, the wife could, upon the death of her husband, renounce the inheritance and refuse to take any benefits from his estate, the effect whereof was that she was freed from the claims of her husband's creditors and from debts contracted by him during marriage;(s) but this does not apply to those debts which she herself had contracted during marriage with the authority of her husband,(t) nor to those

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(o) *Thurburn v. Steward*, Buc. 1869, p. 95; 7 P. C. (N.S.), 333. *Trustees S. A. Bank v. Chiappinni*, Buc. 1869, p. 143. *Curator of Van der Merwe's Estate v. V. d. Merwe* (S. A. R., Kotze, 148). *Placaat of Emp. Chas. of 1540*, § 6. V. d. Keessel, 258.

(p) *Brink v. Oliviera*, S. 1, 270.

(q) *Pukler v. Russouw*, R. 2, 74.

(r) *Van der Linden*, i. 3, 8. *Ziedeman v. Ziedeman*, 1 M. 238. Cf. *Albertus v. Albertus' Exors.*, 3 S. 202.

(s) Grotius, ii. 11, 8. *Van Leenwen*, v. 3, 13.

(t) V. d. Keessel, *Thes.*, 226.

arising from a trade carried on by her.(u) This rule was founded on several old charters granted to various places, and is of high origin, and followed by the Dutch Countesses with every solemnity.(x) Grotius states that the wife had to walk alone in her every-day dress before the hearse at the funeral. Van Leeuwen, in his Roman-Dutch Law, gives a more detailed account. The wife must before the burial renounce the estate in the presence of the Sheriff and two judicial officers (*Schepenen*), after which she must depart in her ordinary clothes, and this is commonly called "placing the key upon the coffin." He adds, that according to the Statutes of Rotterdam, the widows of citizens who wish to free themselves from the debts of their husbands must place the keys of the house upon the coffin, and cause them to be publicly carried to the church, and themselves proceed from the house in their daily clothes with the dead body to the church, with ten stivers in money, and for the future remain out of the house.(y) Schorer, in his Notes to Grotius, ii. 11, 18, relates an instance of such renunciation. "When Albert of Bavaria, Count of Holland, died at the Hague on December 12, 1404, his widow, Margaret of Cleves, repudiated the inheritance with the following solemnity:—She was compelled by judicial decree to walk in front of her husband's funeral procession, not only stripped of all ornaments, but even dressed in borrowed clothes, and holding in her hand a reed which she had to throw down, showing that she in the same manner repudiated the inheritance of the deceased and abstained from community of goods." (z) This local custom was, however, never accepted as a rule of the Common Law, and is referred to here merely as a matter of history.

The following table will give at a glance the position of the wife in respect of her liability for the debts of the joint estate:—

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(u) Grotius, ii. 11, 19. V. d. Keessel, *Thes.*, 226.

(x) Van Leeuwen, v. 3, 13, *in notis*.

(y) Kotze's Van Leeuwen, vol. ii. p. 371.

(z) Maasdorp's transl.

## LIABILITY OF THE WIFE.

The wife is responsible—

I. Under community of property.

1. During marriage
- |   |   |
|---|---|
| { | <ol style="list-style-type: none"> <li>1. For all debts contracted before marriage.</li> <li>2. For all subsequent debts.</li> <li>3. Not for fines and penalties incurred by the husband.</li> </ol> |
|---|---|

2. After marriage
- |   |   |
|---|---|
| { | <ol style="list-style-type: none"> <li>1. Not for debts contracted before marriage.</li> <li>2. For moiety of subsequent debts.</li> <li>3. Not for fines, &amp;c., incurred by husband.</li> </ol> |
|---|---|

(a) With *communio quæstumum*.

1. During marriage
- |   |  |
|---|--|
| { | <ol style="list-style-type: none"> <li>1. Not for debts before marriage.</li> <li>2. For subsequent debts.</li> <li>3. Not for fines, &amp;c.</li> </ol> |
|---|--|

2. After marriage
- |   |   |
|---|---|
| { | <ol style="list-style-type: none"> <li>1. Not for debts before marriage.</li> <li>2. For half subsequent debts.</li> <li>3. Not for fines, &amp;c.</li> </ol> |
|---|---|

(b) Without *communio quæstumum*.

1. Not for debts contracted by husband.
2. For half of debts incurred as household expenses.

II. Without community of property.

## OPINION No. 8.

HOLL. CONS. III. B. 182.

[GROTIUS I. 5, 24, & II. 11, 12 & 13.]

Marriage—Ante-nuptial contract—Relation between husband and wife—Equal shares—*Lex hac edictali*—*Kinderbewijs*—*Boedelhouderschap*—Community of property—Marital power—*Senatusconsultum Velleianum*—*Authentica si qua mulier*.

1. WITH respect to marriage, the declaration and promises which appear in the name of the husband only must also be taken to have been made in the name of the wife, and to have been done reciprocally.

2. As regards marriage relations, husband and wife are *correlativa*.

3. *Regula correlativorum est regula parium, et quod in uno statuitur, censetur etiam in alio statutum.*

4. *Absurdum est in alterius persona ratum esse, in alterius non.*

5. According to the customs of Holland and Zeeland, marriage gives rise to a qualified partnership.

6. In societate quod in una parte expressum est, id nisi alitur convenerit, etiam in altera expressum intelligitur.



7. An ante-nuptial contract, wherein it is stipulated *that the survivor shall remain in possession of the estate after having paid out to the heirs of the first dying whatever he or she has brought into the estate, without any further obligation*, excludes not only community of property of all goods acquired during marriage, but also all property inherited *stante matrimonio*; the fruits of such property, however, and any property otherwise acquired, are not included thereunder.

8. *Verba quantumvis generalia, restringuntur, ut absurdus intellectus vitetur.*

9. When no shares are mentioned, equal shares must be presumed to have been intended.

10. Everything not clearly stipulated in an ante-nuptial contract falls under community according to the customs of Holland and Zeeland, but the inheritances and their burdens are not included therein.

11. According to the afore-mentioned customs, the fruits of the property also fall under community, unless these are specifically included.

12. The *lex hac edictali de sec. nupt.* does not, even where an ante-nuptial contract has been made, affect the property which, according to customary law, remains in community, whether such community is general, or only over specific property.

Having seen the copy of a certain deed reading . . . etc., and having been asked how such deed must be construed, and what its effect would be

in case of the predecease of the husband or wife, leaving children or not—

(1) I am of opinion that the deed must be considered as an ante-nuptial contract, since it was signed by the intending spouses, and also by the father of the bride, which clearly shows that they intended to make an underhand contract; nor does the fact that the declaration and promises appear in the name of the husband only conflict therewith, since the wife had an even greater interest in the promises than the husband. The whole matter must be considered as if the said promises also appeared in the name of the wife and were made reciprocally, for, as regards marriage relations, husband and wife are *correlativa*. (2) Regula autem correlativorum est regula parium, (a) et quod in uno statuitur, (3) censetur etiam in alio statutum. (b) (4) Absurdum enim est in alterius persona ratum esse, in alterius non. (c) To the present case can therefore also be applied the law as laid down in the Digest:—Cum emptor venditori, vel emptori venditor acceptum faciat, voluntas utriusque ostenditur id agentis, ut a negotio discedatur, et perinde habetur, ac si convenisset inter eos, ut neuter ab altero quicquam peteret; (d) and again in the Code:—Quemadmodum in feminis sustulimus, ita et in masculis esse sublatam, pertinere quidem ad sensum nostræ legis, non est incertum. (e) (5)

(a) Bald. ad C. 4, 2, 9.

(b) Dd. in D. 19, 1, 19; et D. 18, 5, 5. Præses Everhardus loco a correlativis, No. 10.

(c) L. si cum dies, § pen. D. 12, 1.

(d) D. 18, 5, 5.

(e) C. 6, 40, 3.

And this is of still greater force since by the customs of Holland and Zeeland all marriages give rise to a qualified partnership. (6) In societate autem quod in una parte expressum est, id nisi aliter convenerit, etiam in altera expressum intelligitur.(*f*)

(7) Since the aforesaid deed stipulates that the wife should remain in possession of the estate, paying out to the heirs of the husband whatever he had brought into the estate, without any further obligation, it follows that the husband intended to exclude community of property, not only of everything that the wife possessed at the time of marriage, but also of whatever she acquired by inheritance, especially by reason of the last words, "without any further obligation," which are very significant. This must be taken to be equally applicable to the other side. The wife or her heirs can lay no claim to the property possessed by the husband at the time of marriage or subsequently inherited, idque ne claudicet contractus. The fruits of this property, however, and all property otherwise acquired, cannot be included under this general clause.

(8) Nam verba quantumvis generalia, restringuntur ut absurdus intellectus vitetur. Id enim æquum habetur, cujus contrarium est absurdum.(*g*) Now it would be absurd and unreasonable that the husband should have no share in the property acquired and laid by during the marriage, partly through his instrumentality, if not by means of his property.

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(*f*) D. 17, 2, 29 in Pr. Instit. 3, 25, 1 and 3.

(*g*) Præs. Everhardus in loco ab absurdo, No. 9.

Esset enim eatenus leonina societas, si sociorum alter nihil lucri faceret.(*h*) (9) No shares are mentioned in the deed, and equal shares must therefore be presumed to have been intended.(*i*) (10) This is beyond dispute, since by the general customs of Holland and Zeeland everything not clearly stipulated in an ante-nuptial contract is held to fall under community, so that when the community of property is excluded, community of profit and loss remains, but inheritances and their burdens are not included therein.

(11) According to the same customary law, the fruits of such property also fall under community unless specially excluded. From this it follows that in case of the predecease of the husband or wife, with or without children, all profit and loss during the marriage, including the fruits of the property, must be divided equally; but the property brought into the marriage, and such as was inherited during marriage, will remain with the side whence it comes.

(12) The fact that the wife had children by a previous marriage need not be taken into consideration, since from several authorities it is quite clear that the *lex hac edictali de secundis nuptiis* does not affect the property, which, according to customary law, falls under community, whether such community embraces the whole or part thereof, even though an ante-nuptial contract has been made.

*April 1628.*

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(*h*) D. 17, 2, 29, last §.

(*i*) D. 17, 2, 29, in Pr. and Instit., 3, 2, 3, 1 and 3.

## CONSEQUENCES OF MARRIAGE.

The relationship which subsists between husband and wife varies somewhat according as the marriage is one pure and simple, or is contracted subject to certain conditions—in other words, according as the parties are married in community of property, or by an ante-nuptial contract. The former creates a partnership between husband and wife, under the sole administration of the husband, in all property, movable and immovable, belonging to either of them before the marriage, or coming to either during the marriage, until the date of its dissolution. The idea of separate property is entirely excluded, and a perfect community exists. The wife's position is assimilated to that of a minor, her husband being her guardian. She cannot sue or be sued; (*k*) she cannot contract except on the principles on which minors are sometimes permitted to contract. But the husband's power over the property brought by his wife into the community is far greater than that of a guardian over the property of his ward. As the sole administrator of all, both his and hers, he may *stante matrimonio* alienate and encumber at will, without her consent, all property, movable and immovable, vested in her before the marriage, or which she may have acquired during the marriage, in like manner as he may encumber or alienate what had belonged to him before the marriage, or had come to him during its subsistence. In effect, the partnership is carried on in the sole name and under the sole control of the husband. (*l*) Upon marriage, a community of property or partnership (in the words of the present Opinion) is established between the parties. This *communio bonorum* is either universal or particular. The former comprises all the property which belonged to the parties before marriage, as well as that which they acquire during coverture; whilst the latter

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(*k*) A married woman, however, carrying on a public trade, may sue or be sued in regard to all transactions connected with such trade; and further, she may sue her husband or be sued by him. (Kotze's High Court Reports, p. 184, *Van Eeden v. Kirstein*). (*l*) 1 Menzies, pp. 144–145.

(*communio particularis*) comprises only the property acquired by them during coverture, and is known as *communio quæstum aut damni et lucri*.

The *communio omnium bonorum* is a consequence of the marriage, and takes effect immediately upon the celebration of the marriage *in facie ecclesiæ* or otherwise, unless an antenuptial contract has been passed between the intending spouses excluding it, and stipulating that there shall be merely a *communio quæstum*, or no community of property or of profit and loss whatsoever.(*m*)

There are two exceptions to this, for community of property does not take place between the married couple, *firstly*, if the marriage is contracted by a minor without the consent of the parents or guardians;(n) and *secondly*, where the marriage has originated in the abduction of one of the parties.(o) In case of doubt, the legal presumption is *pro communione potius quam contra eam*.(p) The community takes place not only in the first, but also in second and subsequent marriages.(q) The community embraces every description of property which, from its nature and the interest of its owner, is the subject of his uncontrolled and absolute alienation.(r) Such property, however, as cannot be alienated by the owner, or in which he has a determinable or contingent interest, is excluded. But the annual rents and profits thereof fall under the community.(s) Under the community must also be included all losses and debts incurred before or during marriage. For full treatment of this subject see Opinion No. 7.

The difference between the *communio quæstum* and the *communio bonorum* consists in the fact that from the former are strictly excluded all such property as belonged to the

(*m*) Grotius, ii. 11, 8. Groen., n. ad Grot. V. d. Keessel, Thes., 217, 218. In Thes. 217, V. d. Keessel attempts an hypothesis as to the origin of this community.

(*n*) Mostert v. The Master, R. 359.

(*o*) Placaat of Emperor Charles of 1540, art. 17. Political Ord., art. 13. Van der Keessel, Thes., 218.

(*p*) Coren, Obs. 38, n. 66.

(*q*) Grotius, ii. 11, 9. Van der Keessel, Thes., 219.

(*r*) Burge, Colonial Law, c. 6, 1.

(*s*) Van der Keessel, Thes., 220, 221.

spouses previous to their marriage. Therefore the property which the husband or wife acquires during marriage by any title which existed at the time of the marriage is excluded from the community. Among property of this class are bequests, legacies, and inheritances *ab intestato*.(t)

If a marriage has been contracted in a foreign country where there is no community of property, the removal of the spouses to a place where community obtains *animo remanendi* does not introduce a community of property or acquests.(u) On the dissolution of the marriage, the surviving spouse will be entitled to one-half of the estate, and the court will allow the wife her share of the estate moneys when her husband has been long absent and the presumption is that he is dead.(v)

Exclusion of the *communio quæstum* can be inferred from the wording of the ante-nuptial contract: thus, if the contract contains a clause to the effect that neither of the spouses shall be answerable for the debts of the other, this is sufficient to exclude community of loss during the marriage.(w)

The court will not recognise marriages not celebrated according to recognised Christian rites, (x) and therefore community of property will not be introduced.

Thus far as regards the consequences of marriage in respect of *the property* of the spouses.

The *personal* consequences of marriage affect the relationship between the spouses and the status of the wife as a *femme sole*. The husband is vested with many of the rights, privileges, and powers which were under the Roman law conceded to the *paterfamilias*, unless specially excluded by ante-nuptial contract. The rights, privileges, and powers are known as the "*marital power*." In conformity with this

(t) Grotius, ii. 12, 11. Van der Keessel, Thes., 252.

(u) Blatchford v. Blatchford's Executors, E. D. C. 1, p. 365. *In re Estate of Barnes*, E. D. C. 1, p. 5.

(v) *In re Wilhelmina Miller*, Buch. 1874, p. 28. *In re Nelson*, Buch. 1876, p. 130.

(w) Boyes v. Verzigman, Buch. 1879, p. 229.

(x) Arg. Magmoet v. Registrar of Deeds, 5 Juta. 179. *Nanto v. Melgass*, 5 Juta. 108. *Bronn v. Frits Bronn's Executors*, 3 S. 313.

view, the wife becomes a minor and the husband her *curator*.(a) She is upon marriage *in tutela aut curatelâ mariti*, and consequently has no *locus standi in judicio*.(b) The husband therefore appears for her in court, and when the wife is summoned, she must be cited "assisted by her husband." Women and minors are liable to make civil reparation, and therefore in such cases the wife can be sued personally, assisted by her husband.(c) If the woman is married out of community of property, she must be sued "assisted by her husband," and the summons must also be served on him.(d) The sole administration and management of her property is vested in the husband,(e) and unless she has his authority, either express or implied, she is excluded from the administration in every case. She can in no way bind herself by contract without express or implied authority, and such contracts will be void as against her except in so far as she has benefited by them. The husband will, however, be bound when the wife is a public trader or incurs debts for domestic purposes.(f) During the absence of the husband, the wife can act in his stead and as his agent, and he will be bound by her acts.(g) Therefore, if a wife sells goods in her husband's shop in the ordinary course of business, it is not lawful for her after he has absconded, and thus committed an act of insolvency, to pay one creditor in preference to the body of creditors, for this will be construed as an undue preference.(h) The wife will be liable for the debts of her husband. (See Opinion No. 7.)

As guardian, the husband's powers are wider and more extensive than those of ordinary tutors or curators, for he need not give an account of his administration nor make

(a) Grotius, i. 5, 19. Voet, 23, 2, 41. Sande, 2, 4, 1.

(b) V. d. Linden, i. 3, 7. Voet, 2, 4, 10.

(c) *Boyes v. Verzigman*, 1879, p. 229. *Prince qq. Dieleman v. Anderson and Others*, 1 Menz. 177. Grotius, i. 5, 23. *Snook v. Bosman*, E. D. C. 2, 201.

(d) *Landsberg v. Marchand*, 1 Menz. 200.

(e) Grotius, i. 5, 22.

(f) Grotius, i. 5, 23.

(g) *Selby v. Friemond*, J. 5, 266.

(h) *Brown v. Dyer & Dyer*, E. D. C. 3, 267.



any inventory of his wife's estate. He has absolute power to dispose of the personal, movable, and immovable assets of his wife, whether she is married to him in community of property or not.(i) He can hypothecate it, burden it with servitudes, and sell it without the consent and in opposition to the will of his wife.(k) In like manner he has the free disposition over the rents and fruits of her property, even when the property itself forms no part of the community.(l) The husband may also interfere with the interests of his wife in a negative manner, for he can refuse to adiate a succession devolving on her.(m) If there is sufficient evidence that the husband is abusing his marital power and will bring poverty upon his wife, the law will afford her redress, and will restrain him within proper bounds.(n) In the same manner the court will restrain the husband from alienating the joint estate whilst an action for judicial separation is pending between the parties.(o) In the case of *Linde v. Beyers* (1 J. 411), the question was discussed whether the husband would be considered to have defrauded his wife by wilfully, and with the intention of prejudicing her, alienating her property; but no decision was given on the point.

As a minor, the wife cannot become the curator of her lunatic husband, (p) but the court will allow her the management of the joint estate, either during prolonged absence (q) or during his derangement.(r)

The wife owes the husband fidelity and obedience,(s) and upon a divorce being granted by reason of the adultery of

(i) Grotius, i. 5, 22.

(k) Grotius, *ib.* Voet, 23, 5, 7.

(l) See the present Opinion.

(m) Rodenburg, De Potest. Alien., c. 3, tit. 2, n. 8, 9, 10 *et seq.* Voet, 23, 2, 55.

(n) V. d. Linden, i. 3, 7.

(o) *Sture v. Sture*, R. 1, 51.

(p) *In re De Jager*, Buch. 1876, 228. Grotius, i. 11, 7. V. d. Keessel, Thes., 168.

(q) *In re Oosthuyzen* (S. A. R.), Kotze's Rep. 98.

(r) *In re De Jager*, *supra*.

(s) Grotius, i. 5, 20.

one of the parties, the court in its discretion may decree that the guilty spouse shall forfeit the benefits derived from the marriage.(*t*) Likewise it is in the discretion of the court, upon a decree of divorce, to allow the custody of the children to the more competent and fitter parent, although under the general rule of law the father is the natural guardian.(*u*)

If there is collusion between the spouses, a *curator ad litem* will be allowed to intervene on behalf of the children.(*v*)

Although the wife is, therefore, to a very great extent, under the power of the husband, she is afforded a certain amount of protection in the shape of extraordinary "*benefits*," for, in addition to the usual benefits allowed by law, two special *beneficia* have been made in her favour.

The first is the *beneficium Senatusconsulti Velleiani*, which forbade women to become sureties for others. The benefit can also be exercised in the case where a woman binds herself as principal debtor for another or takes another's debt upon herself as her own (*w*). During the time of Augustus and Claudius, enactments had been made preventing women to enter into any obligations on behalf of their husbands; subsequently, about the time of Vespasian and during the Consulship of *Velleus Tutor* and *Marcus Silanus* (circa 43 A.D.), this *Senatusconsultum* was passed.(*x*) The policy of the enactment is thus given by Paulus:—Custom refuses to women not only offices of state (*munera publica*) but business duties (*officia civilia*), that is, which imply their going from home into the company of men. It was therefore fit that they should be prohibited from undertaking business responsibilities and exposing their property to danger.—The *Senatusconsultum*, with this object in view, was made sweeping. It forbade every woman to make any contract, or give any of her property as security on behalf of any person to

(*t*) *Higgins v. Higgins*, E. D. C. 5, 344.

(*u*) *Painter v. Painter*, E. D. C. 2, 147.

(*v*) *Louw v. Louw*, Buch. 1874, 41.

(*w*) *Van Leeuwen*, R. H. R. iv. 4, 2.

(*x*) D. 16, 1, 2, Pr. *Kotze's Van Leeuwen*, iv. 4, 2, *in notis*.

any creditor.(y) In like manner, the wife is restrained from becoming surety for her husband by the *Authenticum* (Cod. iv. 29, 22). She can, if sued on such engagement, plead the *beneficium Authentica si qua mulier*. Women and wives were, however, allowed to renounce these benefits,(z) but as long as this had not been done, they would not be liable as sureties. After the Senate had passed the *Senatusconsultum Velleianum*, considerable divergence arose among the lawyers as to its operation. Doubts at first arose whether the suretyship of a woman was not absolutely void, but it was finally decided that, although prohibited by law, a woman could only take the benefit of the *Senatusconsultum* by pleading it. "I have never," says de Villiers, C.J., "found any satisfactory explanation for the passing of the new law known as the *Authentica si qua mulier*, whereby married women are specially protected against their contracts of suretyship for their husbands, seeing that they were already protected under the general terms of the *Senatusconsultum Velleianum*. The explanation which I would venture to give, in default of any better, is that the Emperor Justinian wished—to use an English law phrase—to make the suretyship of a wife for her husband not only voidable, but absolutely void. Be this as it may, the juriconsults very soon applied to the new imperial law the principles which they had successfully applied to the enactment of the Senate. 'Every person,' they said, 'who is *sui juris* may renounce benefits introduced for his benefit and not for the public good; the new law was enacted to protect wives against the undue influence of their husbands and against their own supposed weakness, and not upon any ground of public policy; if in any case the court is satisfied that a woman who has become surety for her husband did so with her eyes open and with a full knowledge of her rights, she ought not to be allowed to evade her liability; and if she has effected the renunciation of the privilege conferred on her by the new law, by means of a public instrument, such as is required in the case of other

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(y) Hunter's Rom. Law, p. 393.

(z) Grotius, iii. 3, 18.

women becoming sureties, she ought not afterwards to be allowed to plead the privilege." (a) A woman cannot, however, effectually plead the *Senatusconsultum Velleianum* or the *Authentica si qua mulier* if they have attempted to practise a fraud; if and in so far as they have benefited by the transaction; if they have become surety for a creditor: if they have become surety for their husbands' debts in order to get them out of prison; if, as public traders, they have become sureties for matters connected with such trade; if they become heirs to the principal debtor; if, after a lapse of two years, they have confirmed their suretyship by a renewed promise; (b) if in their testaments they desire their heirs to pay what they owe. The *Senatusconsultum Velleianum* and the *Authentica si qua mulier* apply to all obligations of women, including promissory notes signed by them as sureties; and although public female traders are not entitled to the benefit of the *Senatusconsultum Velleianum* in their trade obligations, they are entitled to that of the *Authentica*. (c) Huberus (d) says that judgment will be given against a woman unless she pleads the benefit of the *Senatusconsultum Velleianum* or *Authentica*; (e) but even after judgment she may still claim the benefit against execution thereof.

Although these benefits are conferred jointly on the wife, and although the benefit of the *Authentica si qua mulier* is practically included in the general terms of the wider *Senatusconsultum Velleianum*, yet, in the renunciation of these benefits they must be treated separately, and each

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(a) Per De Villiers, C.J., in *Oak v. Lumsden*, 3 J. 144.

(b) Grotius, iii. 3, 15, 16, 17. V. d. Keessel, Thes., 495. Voet, 16, 10. Neostad, de Pact. Ant., Obs. 18. Fab. ad Cod., 4, 21. Des. 16 and 17. Wassenaar, Jud. Pract., vol. ii. c. 10, § 13, 15, 17. Kersteman, Regts. W. boek, "Beneficie."

(c) *Auret v. Hind*, 3 E. D. C. 354, and 4 E. D. C. 283. *M'Alister v. Raw & Co.*, 6 Natal L. R. (N.S. 10).

(d) Heeden. Regts., 3, 27, 10.

(e) *Smuts, Louw, & Co. v. Coetzer* (Buch. 1876, 55). Compare this with *M'Alister v. Raw & Co.* (6 Natal Law Rep. N.S. 144), where provisional judgment was refused against the wife, who had signed a promissory note jointly and severally with her husband, and with *Mahadi v. De Kock* (1 G. W. 344).

benefit must be specially renounced.(f) Moreover, when the wife gives a general power of attorney, her agent has no power to renounce the *beneficia* in any deed signed by him under the power, unless such power of renunciation is given to him in express words in the power of attorney, or unless it may be fairly inferred from the words employed that the woman signing it had in view the renunciation of her privileges.(g)

The manner in which the renunciation of the benefits of the *Senatusconsultum Velleianum* and of the *Authentica si qua mulier* is to be made has not been definitely settled by any definite case or cases directly referring to this subject in South Africa. We have, however, two very distinct and hardly reconcilable *dicta* on this point. In the case of *Whitnall v. Goldschmidt*,(h) Shippard, J., who delivered the judgment in the Eastern Districts Court, gives as his opinion that by Roman-Dutch law the benefit of the *senatusconsultum Velleianum*, in order to be effectual, must be made either judicially on oath, or extrajudicially by a public or notarial instrument duly attested, without which, by Dutch as well as by Roman law, the engagement itself was null and void; and it is scarcely necessary to add that these rules applied with far greater force to the case of a married woman who becomes surety for her husband, and with that object renounces the benefit of the *authentica si qua mulier*. Numerous authorities were quoted by the learned judge in the course of his judgment to substantiate his view. In the case of *Oak v. Lumsden*,(i) on the other hand, De Villiers, C.J., maintained that a public or notarial instrument is not absolutely required for the renunciation of the above benefits, thus upholding the doctrine of Groenewegen (k) and Voet.(l)

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(f) Grotius, iii. 3, 19.

(g) *Mackellar v. Bond*, in Privy Council (L. R. 9 App. Cas. 715).

(h) 3 E. D. C. 314.

(i) 3 Juta. 144.

(k) Groen., Cod. 4, 29, 23, § 2.

(l) Voet ad Pand., 16, 1, 9.

Kotze, C.J. (S. A. R.), in his Appendix to his translation of Van Leeuwen's Roman-Dutch Law, vol. ii. p. 620, says, "As no direct decision of the South African courts on the point under consideration is to be found in the Reports, the probability is that, if the issue should at some future time be definitely raised, the result will be in accordance with the strict rule of law, that the renunciation *Ben. Sc. Vell.* and *Auth. si qua mulier* can only be made *publico instrumento*."

For a fuller account of the last point, reference should be had to Van Leeuwen's Rom.-Dut. Law, by Kotze, vol. ii., Appendix.

#### LEX HAC EDICTALI.

The Romans looked with disfavour upon second marriage, and tried to restrain it as far as possible. Consequently, they introduced certain legal disabilities, chief among which was an enactment that, upon a second or subsequent marriage,; the survivor of the previous marriage, if there were any children, could not benefit the other spouse by will, donation, or otherwise, to a greater extent than the least portion which comes to any of the children of the previous marriage, and all that is bequeathed or given in excess thereof is taken away and added to the shares of the children of the former marriage.<sup>(m)</sup> This law was known as the *lex hac edictali C. de secundis nuptiis*.<sup>(n)</sup> The law was introduced by the Emperors Leo and Anthemius, and was first introduced into Holland about the year 1529.<sup>(o)</sup> This law did not, however, abrogate the community of property which took place between the spouses of the subsequent marriage.<sup>(p)</sup> The hereditary portion to which the subsequent spouse was entitled was known as the "child's share" or *filiale portie*.<sup>(q)</sup> The *lex hac edictali* was abolished at the Cape of Good Hope

<sup>(m)</sup> Grotius, ii. 16, 7.

<sup>(n)</sup> Grotius, ii. 12, 6; ii. 16, 7. Cos on the *lex hac edictali*.

<sup>(o)</sup> Van Leeuwen, R. H. R. iv. 23, 5.

<sup>(p)</sup> *Ibid.*, but see Schorer ad Grot., Not. ci., for the opposite view.

<sup>(q)</sup> Van der Linden, i. 3, 10.

by Act 26 of 1873. Tennant, in his "Manual for Notaries at the Cape," gives a full account of the operation of this law, pp. 63-66.

Under the Roman-Dutch law, several provisions were made for the protection of the property of the children, and to secure their interests after the death of one of the spouses. The surviving parent was bound to maintain and educate the children during their minority, and upon the dissolution of the marriage by the death of the first dying, the survivor had to make a proper division of the estate and to file an accurate inventory.<sup>(r)</sup> According to certain local charters and customs, the community was continued as a penalty if the survivor failed to comply with the law.<sup>(s)</sup> This penalty was not, however, adopted everywhere in Zeeland and Holland,<sup>(t)</sup> and at the Cape of Good Hope it is customary for the survivor, whether the deceased spouse died testate or intestate, to remain in possession of the joint estate in order to preserve more fully to such survivor (*boedelhouder*) the means of supporting and educating the children from the usufruct until they marry or become of age; but when that period arrives, the children must be paid the share due to them.<sup>(u)</sup>

The estate is divided either by (1) "*witkoop*"—that is, by redemption by the survivor purchasing the interest of the children in the estate, after appraisement; (2) by sale; (3) by voluntary partition and agreement; or (4) by casting lots for separate portions (*blinde lotinge*).<sup>(v)</sup>

Division of the estate is effected by "*witkoop*," as a rule, in those cases where the assets consist for the most part of merchandise, industrial pursuits, or outstanding debts; but this cannot be done until a proper appraisement has taken place.<sup>(x)</sup> If the appraisement is to go to the Orphan Master,

(r) Grotius, i. 9, 6. Lybregt's Red. Vert. over't Not. Ambt., i. 13. V. d. Keessel, Thes., 142-146.

(s) Grotius, ii. 13, and V. d. Keessel, 266 *et seq.*

(t) Van d. Keessel, Th. Sel., 271.

(u) Tennant, Not. Man., p. 212.

(v) Grotius, i. 9, 7. Rechtsg. Obs. iii. 10.

(x) Regts. Obs. iii. 10 (1).

it must be done by a sworn appraiser appointed by the Master of the Supreme Court.(y)

*Voluntary partition* is resorted to either when there is no necessity to employ the method of redemption (*uitkoop*), or when the surviving spouse (*boedelhouder*) refuses to redeem the children's interests.

The division of the estate *by lot* (*kaveling* or *blinde lotinge*) is usually done—

(1.) If the parties cannot agree as to the division by redemption (*uitkoop*).

(2.) If they cannot agree in the division, one or more of them claiming their share in every portion.

(3.) Especially if the property to be divided consists of immovables which are susceptible of division and the parties refuse to have it sold. In order to preserve an equal distribution, those who draw the best lots must compensate those who draw the worst by paying a certain amount equal in value to the difference between the lots.(z)

After such division, the survivor can either pay out the minors' shares, by depositing the amounts due to them in the Guardian's Fund, which is controlled and administered by the Master of the Supreme Court; or he can retain under his administration the monies due to the minors if he passes a bond with sureties, the bond and sureties to be approved by the Master, securing to the minors their respective shares. This bond, because it secures and states the minors' portion, is called a "*kinderbewijs*." According to Colonial Law, the survivor is not allowed to remarry until the paternal or maternal inheritance of the minors shall have been previously ascertained and secured. Upon production of proper proof that the minors' shares have been paid or secured, the Resident Magistrate issues a certificate that no such impediment as above exists any longer. When this certificate has been obtained, the banns can be published, or a special license for the celebration of the marriage issued.

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(y) Tennant, *supra*.

(z) R. Obs. iii. 10.



The surviving spouse who remarries before the shares due to his or her minor children have been ascertained and secured or paid, forfeits one-fourth of his or her share in the joint estate for the benefit of the minor children.(a)

The deed of "*kinderbewijs*," like any other bond, must be registered in the Deeds Registry, and thereupon the minors have the right to proceed on the bond against the property of the *boedelhouder* and *against the sureties*, whilst under the Common Law minors have only a tacit hypothec over the property of the surviving parent.(b)

In referring to Grotius, Introduction, i. 9, 7, it was found that a somewhat serious error had crept into Mr. Maasdorp's excellent translation of that work. On page 29, the translator renders the 7th section of the ninth chapter, Book i., as follows:—"Division of property is effected either by redemption, *i.e.*, by buying out at an appraised value, or by lot."

Now the original reads "*Boedel-scheydinge geschiet of by uytkoop nae gedane schattinge, of by willige deeling, ofte by kaveling, anders genaemt blinde lotinge.*"

Grotius does not therefore give merely two methods of division of the estate, as would appear from the translation, but *three*, that by *voluntary partition* having been omitted.

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(a) Act No. 12, 1856.

(b) Grotius, ii. 48, 16 ; R. Obs. 1, Ob. 71.

## OPINION No. 9.

HOLL. CONS. III. B. 196.

[GROTIUS I. 13, 1, & II. 26, #2.]

*Domicilium originis*—Change of domicile—What constitutes domicile—Partnership and domicile—Intention to change—Succession *ab intestato*—Immovables regulated by the *lex loci situs*, movables not.

1. IN considering succession *ab intestato*, the succession to immovables was regulated according to the law of the place where the same was situated, but succession to movables according to the law of the domicile of the person, and not according to the law of the place where situated, *et quare*.

2. *Originis domicilium secundum jus Romanum est immutabile, et qui alibi habitat, censetur habere duo domicilia.*

3. According to the customary law of the Netherlands, and almost of the whole world, the *domicilium originis* was changed *sola voluntate*, so that such person in nowise remains subject to the jurisdiction of his domicile of origin.

4. *Ibi domicilium quis habere statuitur, ubi larem favet, ubi majorem bonorum partem possidet et assidue versatur. Also No. 11.*

5. Sola conductio domus non constituit novum domicilium, nisi aliud accesserit. This is also the case with those who have another fixed domicile.

6. Mutatio non facile præsumitur.

7. In what manner the acquisition of a domicile by ten years' residence is to be understood.

8. Si de voluntate appareat, uno momento domicilium constitutum intelligitur.

9. Illa voluntas probatur ex conjecturis et quæ sint firmissimæ conjecturæ.

10. Difficile est quemquam sine domicilio esse.

12. According to the customs of Holland, as well as of those of other places, domicile was acquired after the lapse of a year.

13. Forum sortiri et legibus subjici, a pari procedunt.

14. In dubio ubi respicitur persona, ratio habenda est domicilii, non originis.

15. A partner cannot be said to reside in a place where his company is fixed, unless he himself lives there.

16. The laws of the Emperors do not obtain in the Netherlands *pro jure communi* in questions of intestate succession. Such successions were always regulated according to the special customs of each nation.

(1) To decide this question, it must be observed that when intestate succession calls for consideration, the immovable property must be regulated according

to the law of the place where it is situated.(a) The movable property is regulated not so much according to the law of the place of its situation, but according to that of the person, *sequuntur enim personam*.(b)

This gives rise to the question whether in this respect the *domicilium originis* or the *domicilium habitationis* must be taken into consideration.

(2) In answering this question, it must be premised that there might have been some difficulty if we refer to the Civil Law and the commentaries of the juriconsults thereon, since, according to Roman law, *originis domicilium est immutabile et ideo qui alibi habitat, censetur habere duo domicilia*.(c) (3) This difficulty vanishes when we consider the universal custom of the whole of the Netherlands, and even of the whole world in our time, *secundum quam consuetudinem domicilium originis sola voluntate mutatur, ita ut originarius nullo modo maneat subjectus jurisdictioni originis; cui consuetudini testimonium etiam perhibet Gail lib. 2, obs. 36, dicens eam et in Germania et ubique obtinere*. For these reasons Johan van Cornput must be taken to have absolutely left his birthplace, since he had absented himself therefrom, not for a short period, but for fully seventeen years, without any subsequent residence there at a time when he had leave to absent himself from his partnership. It was further stated that his part-

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(a) Ut tractant doctores in C. i. 1, 1; Gail, lib. 2, Obs. 124; Præses Everb., Cons. 185, et in locis legalibus, loco a nom. dignit. No. 4; Peckins de Test. Conjug., lib. 4, c. 36, No. 4.

(b) Bald. in C. 4, 63, 4; Gail d. Obs. No. 8.

(c) C. 10, 38, 4; D. 50, 1, 6, et ibi Bart.

nership was at Embden, and that although he did no business at Groningen, he nevertheless went to live there with his whole family, and continued his residence there for a period of three years, until the time of his death. From this it may be inferred that he had *domicilium habitationis* there.(d) Si quis negotia sua non in colonia, sed in municipio agit, in illo vendit, emit, contrahit, eo in foro, balneo spectaculis utitur, ibi festos dies celebrat, omnibus denique municipii commodis, nullis coloniarum fruitur, ibi magis habere domicilium quam ubi colendi causa diversatur (e): (4) in qua lege (C.) domicilium quis habere statuitur, ubi larem fovet, ubi majorem bonorum partem possidet, et assidue versatur,(f) ubi dicitur, (*infra*) eodem in loco singulos habere domicilium nom ambigitur, ubi quis larem, rerumque ac fortunarum suarum summam constituit, unde rursus non sit recessurus, si nihil avocet.

(5) The passage of the *Digest*: Quod sola conductio domus non constituit novum domicilium nisi aliud accesserit,(g) is not opposed to this, for it only refers to cases in illis, qui alibi domicilium aliud certum habent, quia mutatio non facile præsumitur. (6) Hic autem nullum aliud dari potest domicilium; deinde non est hic sola conductio, sed habitatio continua, cum familia et rebus.

(7) So also the fact quod decennio quæeratur domi-

(d) Per textum egregium in l. ejus qui § 1. D. 50, 1, ubi ait jurisconsultus.

(e) Et C. 3, 24, 2.

(f) Et C. 10, 39, 7.

(g) D. 1, 3; D. 33. 7, 27. 3, &c.

cilium (*h*) does not apply. It does not follow quod minore tempore non quærat; sed quod in dubio decennium per se sufficiat ad probandum domicilium. (8) Alioqui si de voluntate appareat, vel uno momento domicilium constitutum intelligitur. (*i*) Ea autem voluntas ex conjecturis probatur. (*k*) Fermissima autem hæc est conjectura, quod prius domicilium quod habuit, plane extinctum sit: unde præsumendum est, electum ab ipso aliud domicilium. (10) Difficile enim est sine domicilio esse quemquam. (*l*) (11) Accedit altera conjectura, ex invectione familiæ et bonorum; et tertio, quod ea in urbe non habebat temporarium negotium. (12) Here must also be taken into consideration that according to the general customs of the Netherlands, as well as of other places, incolatus acquiritur anni tempore, quod et in Germania obtinere ait Gail. (*m*) And since the afore-mentioned Cornput was subject to the jurisdiction of the magistrate of Groningen in connection with certain contracts entered into by him during his lifetime, it follows that he was also subject to the customs and *Keuren* (charters) of the place. (13) Forum enim sortiri et legibus subjici a pari procedunt, (*n*) (14) et in dubio ubi respicitur

(*h*) Cyn. ad d. l. C. 3, 24, 2; Gl. et Bart. ad l. lex Cornelia § si tamen de injuriis; Ang. Cons. 20; Felin. ad C. dilectis 2, No. 12, vers. sed adverte Extr. de rescript.

(*i*) Dom. à S. Gem. in C. cum nullus, No. 11, de temp. ord. in 6; Joh. Andr. in addit. ad Spec. in § 1, de comp. jud. ad Marian. Soc. vers. 7, lib. 2.

(*k*) C. 2 Extr. de renunc. d. l. civis, § Celsus et ibi Dd.

(*l*) Ut inquit jurisconsultus in d. l. civis.

(*m*) Gail, lib. 2, obs. 35, No. 8.

(*n*) Dec. Cons. 284, No. 9; Alex. Cons. 157, No. 15, vol. ii. et Cons. 150, No. 3; Can. in C. licet ratione, Extr. de foro competent.

persona, rationem habendam domicilii, non originis. (o) (15) From all this it can be adduced that the laws of Breda are not to be followed in the present case, cum domicilium originis reliquerit, et satis ostenderit propositum non revertendi. Neither could the law of Leeuwaarden be applied, cum deseruerit illum incolatum domicilio et fortunis translatis; nor could the law of Embden regulate the case; for although the business place of his partnership was there, it is nevertheless stated that he himself had no residence in the place, et ita hic proprie locum habet. (p) (16) The laws of the Emperors do not, in my opinion, apply quia constat de domicilio per argumenta superposita, and also because these laws have never been received *pro jure communi* in matters of intestate succession in the Netherlands. Such successions were always regulated according to the special customs of each nation.

ROTTERDAM,  
October 31st, 1613.

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## DOMICILE.

In the Note to Opinion No. 1, reference was made to the different kinds of laws (*statutes*) and their intra- and extra-territorial effect. The extra-territorial effect of laws is necessarily closely associated with the domicile of the persons whose jural capacities are in question, and therefore the remarks there made may be conveniently treated as prefatory to what follows.

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(o) Bald. ad D. 1, 5, 2, quem sequitur Imbert. in ench. in verbo bonorum diversitas.

(p) D. 1. ejus § 1.

The subject of Domicile is treated of by the Roman juriconsults, but on a very meagre basis. Before the fall of the Empire the matter evidently called for very little attention, for the old Roman law affords us no instances of this matter ever having received any practical application. The Romans had their Civil Law as well as their *jus gentium* or Law of Nations, but the confusion between the *jus gentium* and International Law is entirely modern. The classical expression for International Law was "*jus feciale*," or the *law of negotiation and diplomacy*. The "*jus naturale*" or Natural Law was simply the *jus gentium* viewed in the light of a peculiar theory. The Roman lawyers themselves had no particular respect for the *jus gentium*. *It was the fruit of their disdain for all foreign law*. The "*jus civile*" was considered the sacred heritage of all true-born Romans, and the conservative Roman patriot sternly and strenuously refused to degrade his law by making it of universal application, and to apply it to matters in dispute between foreigners or natives and foreigners. As a matter of police and in furtherance of commerce, jurisdiction was at last assumed in those disputes. In order to adjudicate in such cases, the Romans resorted to a selection of rules and customs common among the nations with which they had come in close contact, the *jus gentium* being, in fact, the sum of the common ingredients in the customs of the old Italian tribes. It is perfectly certain that during the early days of the Empire foreign laws, as such, were neither respected nor followed by the Romans,<sup>(q)</sup> although Story<sup>(r)</sup> seems to think that many cases of contrariety or conflict of laws must have been embraced in the antecedent jurisprudence of Rome during the earlier periods. If Maine's account of the origin of the *jus gentium* is correct, we see at once the reason why so little is to be found in Roman law concerning the principles of International Law. The want of any distinct system of principles in Roman law

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(q) Maine's Ancient Law, chap. 3.

(r) Story's Conflict of Laws, § 2.



applicable to international cases of mixed rights is accounted for by Huberus on the supposition that at the time to which the Roman jurisprudence relates the Roman dominion extended over nearly the whole known world, and therefore cases of contrariety could scarcely occur.(s) Be that as it may, when the Lombards, Franks, Burgundians, and Goths finally established themselves in the Roman Empire, they allowed the different nations to be governed by their own laws and customs, and from this condition arose the capacity for civil rights, denominated *personal rights* or personal laws, as opposed to *territorial laws*.(t)

International Law, as we now know it, is the slow growth of modern times under the combined influence of Christianity and commerce.(u) For the protection and promotion of commerce it has been adopted as a matter of expediency and utility, and the more extended the sphere of commerce becomes, the more important will the question as to jural capacities of aliens become, and the greater necessity will there be for the extension and application of the principles of International Law.

When in the earlier periods questions cropped up as to the rights to certain property, the points in issue became difficult of solution when it was found that the claimant lived in one country and the goods were situated in another. A way out of the difficulty (as we have seen in the Annotation to Opinion No. 1) was to divide the statutes into personal, real, and mixed, and to allow the personal status acquired at the place of domicile to follow the individual everywhere, but in all other respects he was subject to the laws of the territory in which he resided. Immovables were regulated by the *lex loci rei sitæ*, whilst movables were presumed to belong to the person of the owner, and to follow him everywhere. At first no question arose as to what was exactly meant by domicile, for according to Roman

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(s) Huberus, 2, 31, 1.

(t) Savigny's History of the Roman Law in the Middle Ages.

(u) Ward, Law of Nations, chaps. 6 and 3.

law *originis domicilium est immutabile.*(*v*) As soon, however, as the law allowed a change of domicile, the want of a full and complete definition of the word was felt, for no definite rules as to its acquisition, loss, or change had as yet been accepted or acted upon.

The flight of years has certainly smoothed the way for a full and comprehensive definition of the word "domicile," thanks to the researches of many eminent writers on International Law; but, nevertheless, a considerable amount of difficulty has been experienced by reason of the different views adopted by different writers. It is interesting to follow the definition of the term as laid down by different lawyers at different times. Grotius, in the opinion which we are considering, gives us the definitions of the term as they appear in the Code: (*x*)—"In eodem loco singulos habere non ambigitur, ubi quis larem rerumque ac fortunarum suarum summam constituit, unde rursus non sit discessurus, si nihil avocet, unde cum profectus est, peregrinari videtur, quod si rediit peregrinari jam destitit." And in the Digest: (*y*) "Si quis negotia sua non in colonia, sed in municipio, semper agit; in illo vendit, emit, contrahit; eo in foro, balneo, spectaculis utitur; ibi festos dies celebrat, omnibus denique municipii commodis, nullis coloniarum, fruitur ibi magis habere domicilium, quam ubi colendi causa diversatur."

In the same book of the Digest (*z*) it is stated that he is deemed an inhabitant who has his *domicile* in any place, and whom the Greeks call *παροικον* or neighbour. For those are not only considered *incolæ* who live in the towns, but also those who cultivate lands near the boundaries thereof in such a manner that they deem their place of abode to be there: *Incola est, qui aliqua regione domicilium suum contulit, quem Græci παροικον (id est juxta habitantem)*

(*v*) C. 10, 38, 4, and D. 50, 1, 6.

(*x*) C. 10, 39, 7.

(*y*) D. 50, 1, 27.

(*z*) D. 50, 16, 239.

appellant. Nec tantum hi, qui in oppido morantur, incolæ sunt, sed etiam, qui alicujus oppidi finibus ita agrum habent, ut in eum se quasi in aliquam sedem, recipiant.

Grotius condenses these into "*domicilium quis habere statuitur ubi majorem bonorum partem possidet, ubi larem fovet et assidue versatur;*" and he adds: "*Hic autem nullum aliud domicilium dari potest; deinde non est hic sola conductio, sed habitatio continua, cum familia et rebus.*"

Pothier, in his introduction *ad lib.* 50 of the Digest, says that the seat of the fortune or property of a person in any place constitutes his chief domicile. *Domicilium facit potissimum sedes fortunarum suarum, quas quis in aliquo loco habet.*

In his *Introd. Gén. Cout. d'Orleans*, c. i. § 1, art. 8, he says that "it is the place where a person has established the principal seat of his residence and of his business."

Voet (a) defines *domicilium* as follows:—*Proprie dictum domicilium est, quo quis sibi constituet animo inde non decedendi, si non aliud avocet;* and he quotes the definition as given by Alfenus, who says it is the place where a person has his residence and account-books, and from whence he orders and manages his affairs; (b) *ubi quisque sedes et tabulas habet, suarum rerum constitutionem fecit.*

Van Leeuwen says, "Not the bare residence of a person, which often only lasts for a time, as where any one on account of serious illness removes out of the town, or for other reasons lives beyond the town, but the fixed resolve to be and continue in a place, without intention of returning, constitutes his domicile." (c)

Vattel defined it to be "a fixed residence in any place, with an intention to remain there always." (d)

With this definition Story (e) justly finds fault. Few people, if any, have an intention of remaining in one and

(a) Voet ad Pand., 5, 1, 94.

(b) Voet ad Pand., 5, 1, 92.

(c) Kozte's Van Leeuwen, iii. 12, 9.

(d) Vattel, B. 1, ch. 19, § 22.

(e) Story's Conflict of Laws, § 43.

the same place always. He says, "It would be more correct to say that that place is properly the domicile of a person in which his habitation is fixed without any present intention of removing therefrom."

This definition is practically adopted by Phillimore, who says that "domicile" is acquired "by residence at a particular place, accompanied with positive or presumptive proof of an intention to remain there for an unlimited time."<sup>(f)</sup> In his "Private Law among the Romans," the same jurist defines "domicile" as "the spot on which a person has fixed his permanent residence, and which he has chosen as the abode of his family and himself; to which, when he has left, he means in a short time to return; from which, during the continuance of his absence, he is a guest, a traveller, an inmate, or a stranger, and on the ending of his absence from which he is at home."<sup>(g)</sup>

Woolsey, in his "International Law," practically adopts the view of Story.<sup>(h)</sup>

Dacey considers domicile as the place or country which is considered by law to be a person's permanent home.<sup>(i)</sup>

Foote asserts that domicile may be most easily considered as "the relation of an individual to a particular State, which arises from his residence within its limits as a member of its community."<sup>(k)</sup>

In Dalloz, *Repet. de Legis.*, domicile is defined to be the place where a person's business is situated and where the centre of his interests is. A distinction is there drawn between what Foote calls the relation of the individual to the State and the actual place of residence.

Windscheid, in his treatise on Roman Jurisprudence, is of the same opinion.

There are two different kinds of domicile, that of *origin* and that of *choice*. The former is imposed upon an individual

(f) Phillimore's Law of Domicile, p. 13.

(g) Ibid., Private Law among the Romans, p. 75.

(h) Woolsey's Intern. Law, p. 104.

(i) Dacey on Domicile, p. 1.

(k) Foote's Private Intern. Jurisp., p. 8.

by law, and is presumed to be his domicile until such time as he has acquired another.

As regards the *domicilium originis*, it must be noted that the domicile of a child is taken to be the same as that of the parents. The domicile of origin of a child born on the high seas or on a journey is the domicile of his parents.<sup>(l)</sup> A child born in wedlock acquires the domicile of his father; an illegitimate child that of his mother.<sup>(m)</sup>

The domicile of birth of minors continues until they have acquired a new domicile.<sup>(n)</sup>

Persons not *sui juris* are deemed for the most part incapable of acquiring a new domicile until they do become *sui juris*. Minors, lunatics, &c., therefore retain the domicile of their parents or curators, and if these change their domicile, the domicile of the child or ward is changed also.<sup>(o)</sup>

On the same principle the domicile of the wife is that of her husband,<sup>(p)</sup> and a widow retains the domicile of her deceased husband until she has acquired another.

The doctrine that the domicile of origin remains until another *domicile of choice* is acquired at once brings us to discuss the point how a change of domicile is effected.

A domicile of choice can be acquired only *animo et facto*. There must be a concurrence (1) of residence and (2) of intention to make it one's home before a change can be effected. Mere residence without an intention of making it the home of the party will be inoperative either for the abandonment of a former domicile or for the acquisition of another; likewise as regards an intention of making a certain

(l) Vattel, 1, § 216.

(m) Cod. 10, tit. 31, l. 36.

(n) Story, p. 57.

(o) Hennings' Exors. v. The Master, J. 3, 235. Hennings was declared of unsound mind in the Cape Colony, where she as well as her parents were domiciled, although she was staying at the time in the Free State, where she continued to live till the time of her death. The court decided that her Colonial domicile remained unchanged, since she (Hennings) could not be said to have changed her domicile, the element of *intention* being wanting in one of unsound mind.

(p) Voet, 5, 1, 101.

place one's home without residence.(g) In many cases, however, actual residence is not absolutely required. It is sufficient, when a domicile has been acquired, that the absence therefrom is not with any intention of remaining away permanently. In the case of *Mason v. Mason* the husband and his wife were married and domiciled in the Cape Colony, but they afterwards went to Natal. The husband was unsuccessful in business there, and he sent his wife and children back to the Colony. He then proceeded to the Orange Free State, where he was rejoined by his family. Thence he absconded after having got into difficulties. Under these circumstances the court held that there was not such a concurrence of residence abroad, and an intention to make any particular place his home and to abandon his former domicile, as to debar the wife from instituting an action in the Cape Colony against her husband for divorce on the ground of malicious desertion.(r)

If there is any doubt as to the acquisition of a new domicile, the court will not presume an abandonment of the previous one. He who alleges such change must prove it,(s) and it is not sufficient that he merely proves that he intended to abandon his last domicile; he must further prove that by residence he had acquired a new one, *animo manendi*.(t) Thus in the case of *Hawkes v. Hawkes*,(u) the wife sued her husband for divorce on the ground of adultery. The parties were married in England, and came out to the Colony with the intention of settling there. After a year's residence the husband suddenly left again for England, leaving his wife and child in the Colony. The adultery was proved, and the husband was in default at the trial.

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(g) *Vide Voet ad Pand.*, 5, 1, 98.

(r) E. D. C. 4, 330.

(s) *Voet ad Pand.*, 5, 1, 99. *Digest*, 50, 1, 27, § 2.

(t) To constitute a new domicile, there must not only be the *factum* of residence in a place, but the *animus manendi* and the mere declaration of intention to change a domicile, without any actual change of residence, is inoperative to create a new domicile. *Brown v. Smith*, 15 *Beav.* 444. 21 *L. J. Chanc.* 356.

(u) 2 *J.* 109.

It was held that as he did not appear to object to the jurisdiction of the court, it was not bound under the circumstances to inquire minutely whether he was domiciled in the Colony or not, and the decree was granted. Likewise in the case of *Adams v. Adams*,<sup>(x)</sup> the court granted leave to the wife to sue her husband by edict for divorce on the ground of malicious desertion, the husband having left her four years previously and gone to the Transvaal, where he was living in adultery. De Villiers, C.J., delivering the judgment of the court, said, "In the case of *Adams v. Adams*, which was argued yesterday, the court had some doubt whether the summons could be served upon the defendant, and whether he could be sued in this court; but looking at the petition, I find there is nothing to prove to the court that the defendant has changed his domicile. What is said is that he is resident in the Transvaal, and has been there for some years; but it does not follow that he has changed his domicile from the sole fact that he has remained away for some time.<sup>(y)</sup> The ordinary maxim is *ubi uxor ibi domus*—that is, the supposition is that if a man leaves his wife behind, he does not intend to change his domicile. Of course, it is competent for the defendant to come into this court and set up the defence that his domicile is not in this country, but the court is not bound to presume that he has changed his domicile." Mere length of residence does not constitute a change of domicile, nor is the abandonment of the domicile of origin easily presumed.<sup>(z)</sup>

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(x) 2 J. 24.

(y) See also *West v. Carpenter*, 1. R. 434.

(z) Per Kotze, J., in *Weatherley v. Weatherley* (Kotze's Repts., p. 76), where he says, "It becomes necessary, therefore, to consider whether or not the plaintiff, Colonel Weatherley (for under the circumstances of this case the defendant's domicile is that of her husband) is actually domiciled in this country. The facts bearing on this point are the following:—The parties were married at Wingfield Church, near Windsor, England, in 1857. From that time until the commencement of this suit, they cohabited together as man and wife. The petitioner, at the time of his marriage, was a lieutenant in a cavalry regiment. After their marriage, Colonel and Mrs. Weatherley went to India, and afterwards returned to England. They had

In the case of *Udny v. Udny*, (a) Lord Westbury said, "Domicile of choice is a conclusion or inference which the law derives from the fact of a man fixing voluntarily his

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(a) L. R. 1 H. L. Sc. 458.

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a house of their own at Brighton. The plaintiff is a director of the Eersteling Gold Mining Company, formed in England for the purpose of carrying on operations in the district of Zoutpansberg, in the Transvaal. He left England in 1875 for the Transvaal, chiefly with the view of looking after the affairs of the Company, and partly also with the view of economising. The house at Brighton, at the time of their departure from England, still belonged to Colonel Weatherley, and Mrs. Weatherley left remaining in this house her Indian collection, plate, library, and other articles. They arrived in the Transvaal together with their two sons, Paulet and Rupert, in January 1876. The Colonel purchased a house in Pretoria, which has, however, since been advertised for sale. For the last three years he has been residing in this territory with his family, but carried on no business or occupation of his own. He has endeavoured to obtain employment in this country in a military capacity, but without success, until recently. After he determined to take proceedings for divorce, he was commissioned by Lord Chelmsford to raise a body of volunteers for service against the Kafirs. These volunteers are to serve under Colonel Weatherley for the period of six months. Colonel Weatherley's intention to return to England is indefinite, and he does not know what he will do at present, except remain here. This is what he says himself: 'When I left England, I came here only for a few months. I had not the slightest intention of staying here longer. I hope to go back, but I cannot say when exactly. I have every reason to expect that I shall stay here for some time to come.' The petitioner's eldest son, who is eighteen years of age, says: 'When my father left England, he came out, I believe, to superintend proceedings at the Eersteling mine. I believe he also came with a view to economising. I believe my father intends to go back to England as soon as prospects turn out favourably at home.' The view that Colonel Weatherley came out partly to economise is supported by the fact that the house at Brighton has since been sold, together with the heavy furniture, to pay debts. Mrs. Weatherley has also stated that her husband left England for six months only. She was averse to it at first, but at last consented to accompany her husband to Africa. Colonel Weatherley came out, she states, to look after the affairs of the Mining Company. She repeatedly expressed her wish to go back to England, and the Colonel on such occasions always replied that the Secocoeni war had broken out, that he had obtained a concession for the Company from President Burgers, and that when affairs got settled he would be glad to go home himself. In a subsequent portion of her evidence she says: 'Circumstances have made us stay longer than I thought we had intended. The war with Secocoeni, the promised concession to the Company, and various little matters, made us remain here longer than we otherwise would have done.' The plaintiff left for Cape Town in May



sole or chief residence in a place with the intention of continuing to reside there for an unlimited time. This is a description of the circumstances which create or constitute a domicile, and not a definition of the term. There must be a residence freely chosen, and not prescribed or dictated

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1878, on a temporary visit, leaving his wife and sons in Pretoria. While in Cape Town he wrote several letters to the defendant. In a letter dated 16th June 1878 he writes to Mrs. Weatherley: 'Don't buy a mattress for me, for our movements are uncertain;' and in the same letter, speaking of the high cost of living in the Transvaal, he says: 'A thousand a year down here would go as far as three up there. All I want, dear, is our concession, &c., and be off. It is not a country for a lady or gentleman either.' The evidence in this case clearly establishes that Colonel Weatherley left England with no intention of settling down in the Transvaal, or of making this country his fixed and permanent home. Does there then exist anything to show that his original intention of remaining here only for a time has, since his arrival in the country, become changed into a fixed intention of remaining here permanently, of making the Transvaal his home? I think not. The fact that he has been residing here for three years and has bought a house, since advertised for sale, *per se* proves nothing, for mere length of residence does not constitute a change of domicile, nor is the abandonment of the domicile of origin for a new domicile of choice easily presumed. It is true that the Colonel at one time endeavoured to obtain military employment here, but in this he failed. His letters to his wife, written from Cape Town, show that he also hoped to get military employment in the Cape Colony, but without success. He is recruiting volunteers, but only to serve for the limited period of six months. His residence in the Transvaal for three years, instead of six months, is explained by a variety of circumstances, viz., change of Government, the war of the Kafir chief, Secocoeni, the unsettled state of the country where the Eersteling Gold Mining Company, whose representative Colonel Weatherley is, carried on their operations, the promised concessions, pecuniary difficulties, and the like. He has frequently told Mrs. Weatherley that when affairs got settled he would be glad to go home; and in the letter of June 16, written before any proceedings for divorce were thought of, and consequently entitled to considerable weight, the Colonel writes to Mrs. Weatherley that his movements are uncertain, and all he wants is 'our concession and be off,' *i.e.*, to depart from the country. It seems to me from this evidence that circumstances have made Colonel Weatherley remain in this country longer than he originally intended; that it is not his desire to make this his home or to settle down here, and although he is at present obliged to remain in the country, there exists the *animus revertendi*, to be carried out as soon as a suitable opportunity offers. I can come to no other conclusion, therefore, than that Colonel Weatherley has not abandoned his English domicile of origin, in will and in deed, for a new domicile of choice, freely and voluntarily chosen, in the Transvaal."

by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness; and it must be a residence fixed, not for a limited period or particular purpose, but general and indefinite in its future contemplation." The case was a very strong one, and the Scotch court held that under the following circumstances there had been no change of domicile. The domicile of origin of Colonel Udny was Scotch. In 1812 he married, and leased a house for a long period in London, in which he resided with his family till 1844. Although he frequently visited Scotland, he never resided there. During that time he intended completing Udny Castle in Scotland, and was also appointed a Scotch magistrate. His predilection for the turf was the main influence for his choice of London as his residence. In 1844 he had to quit London, owing to the pressure of his creditors. He went to Boulogne, in France, and sold his London residence. Under these circumstances the Scotch court held that Colonel Udny had never changed his domicile of origin, notwithstanding his residence in London for thirty-two years. In the House of Lords this question was not touched upon, for it was there held that even if Colonel Udny had acquired an English domicile upon his leaving for Boulogne, his domicile of origin re-operated. Lord Westbury seemed to think that Colonel Udny had acquired an English domicile under the circumstances as above set forth. Lord Chelmsford, on the other hand, thought that during the whole of Colonel Udny's long residence in England, there was always wanting the intention of making it his permanent home, and that residence alone, however long, was wholly immaterial, unless coupled with such intention.

In doubtful cases, the law will always presume in favour of a retention of the domicile of origin, and slighter evidence will be required to warrant the conclusion that a man intends to abandon his acquired domicile, and to resume his domicile of origin, than will be necessary to justify the conclusion that he means to abandon his domicile of origin

for one of choice; (b) and for the same reason it requires stronger and more conclusive proof to justify the court in deciding that a man has acquired a new domicile in a foreign country than in one where he is not a foreigner. (c) But the strongest intention of abandoning a domicile, and actual abandonment of residence, will not deprive a man of that domicile, unless he has acquired another. (d) Where a domicile is alleged to have been acquired, the *onus* of proof, to be deduced from all the circumstances and facts of the case, lies on the person who alleges the acquisition of the new domicile. (e)

The change of domicile must be *voluntary*, or, in the words of Lord Westbury above quoted, "there must be a residence freely chosen, and not prescribed or dictated by any external necessity, such as the duties of office, the demands of creditors, or the relief from illness." Therefore, students pursuing their studies abroad retain their domicile of origin. The same rule is applicable to

Prisoners.	Ambassadors.
Lunatics.	Consuls.
Invalids.	Persons in military and naval service.
Exiles.	Ecclesiastics.
Officials.	Servants.

As regards exiles, however, Phillimore thinks that an exile for life loses his *domicilium originis*.

The position of officials is not quite settled, and the non-acquisition of a new domicile will depend very much upon the nature of the appointment. If the office or service is of such a nature that the official's abode is rendered uncertain by reason of his being liable to be removed to another place, it would be inconsistent with the established

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(b) Lord *v. Colvin*, 4 Drew, 366; 5 J. (N.S.) 351; 32 L. T. 377.

(c) *Ibid.*

(d) *Forbes v. Forbes*, Kay, 341; 2 Eq. R. 178; 18 Jur. 642.

(e) Burge on Col. and For. Laws, cap. i., *Maxwell v. M'Clure*, 6 Jur. N.S. 407; 2 L. T. N.S. 65; also *Crookenden v. Fuller*, 1 S. & T. 441; 5 Jur. N.S. 1220.

definition of domicile to regard him as having acquired a new domicile, and to have abandoned the old.(f)

Speaking of the domicile of servants, Voet thinks that their domicile is the domicile of their masters, and that they obtain a competent *forum* there; "for," says he, "male and female servants, although they may be free, and let their services to us for wages, and are not completely bound to us, yet we can hardly say that they retain their own domicile, because experience teaches us that they usually leave it with the intention of not returning to it."(g) According to Phillimore, the question depends almost entirely on the circumstances of each case. If a servant resides for a long time in one place in the employ of several masters, and collects his earnings and goods there, the legal presumption would be that the domicile of origin had been abandoned, and a new one acquired. If he, however, returns at intervals during his term of service to the place of his birth, and deposits his savings there, the conclusion must be that he has not abandoned his domicile of origin.

Ambassadors and consuls retain their domicile of origin. They will, however, be liable to the civil jurisdiction of the foreign courts if they engage in business as merchant traders, &c.(h)

We have discussed the meaning of the word "domicile," and the manner in which it could be changed. We have now to consider the effects of the law of domicile in relation to minors, to marriage, to divorce, to testate and intestate succession, to contracts, to foreign judgments, and to bankruptcy.

"The *status* of a person is determined by the law of his domicile" is an accepted rule of private international law. In treating of the effects of the law of domicile with

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(f) Voet, 5, 1, 98. Van Leeuwen, Cens. Forens., par. 1. lib. 3, c. 12. Burge on Col. Laws, c. 1.

(g) Voet, 5, 1, 96.

(h) Woolsey's Intern. Law, § 96. *Vide* Grotius, Opinion No. 1, § 7.

reference to the subjects above mentioned, we shall very frequently have to use the word *status*. It therefore becomes of great importance to see exactly what is meant by the term.

A definition of the word cannot easily be given, since most writers on international law employ the term without attempting any definition.

In Roman law the term indicated the position of a person vested with rights and duties. A full Roman citizen had to possess the *status libertatis, civitatis et familiae*, which was called the *tria capita*. In brief, it might have been called the law of inequality, classifying men into freeborn and slaves, citizens and aliens, equals and unequals. All the forms of *status* taken notice of in the law of persons were derived from, and to some extent are still coloured by, the powers and privileges anciently residing in the family. If then we employ *status*, agreeably with the usage of the best writers, to signify these personal conditions only, and avoid applying the term to such conditions as are the immediate or remote result of agreement (for the word has a secondary significance of some disability, which is attached to it in connection with the law of contract), we may say that the movement of the progressive societies has hitherto been *from status to contract.*(*i*)

Savigny (*j*) considers the *status* of a person as equivalent to his "capacity to have rights and capacity to act," whilst Story (*k*) uses the words "capacity, state, and condition," and quotes as examples, minority, emancipation, and power of administration of one's own affairs. Woolsey (*l*) uses the expression "jural capacity," and gives citizenship, minority, legitimacy, lunacy, the validity of marriage, the legal capacity of a married woman, as examples. Wheaton does not employ the word *status*, but uses in its place the words "civil con-

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(*i*) Maine's Ancient Law, p. 170.

(*j*) Private International Law, § 362.

(*k*) Conflict of Laws, § 51.

(*l*) International Law, § 74.

dition and personal capacity," giving as examples (*m*) "those universal personal qualities which take effect either from birth, such as citizenship, legitimacy, and illegitimacy; at a fixed time after birth, as minority and majority; or at an intermediate time after birth, as idiocy and lunacy, bankruptcy, marriage, and divorce, ascertained by the judgment of a competent tribunal."

There are several very important exceptions to the rule that the *lex domicilii* is to determine in regard to personal *status* and jural capacity. (*n*) These exceptions arise from the natural unwillingness of nations to allow laws to have force in their courts which are opposed to their political systems, or to their principles of morality, or their doctrine of human rights.

(1.) One of these is, that if a person suffers in his *status* at home by being a heretic, a country which regards such a reason as immoral, and perhaps is of the same religion with the heretic, cannot permit his *lex domicilii* in this point to have any effect in its courts, but applies its own law.

(2.) Where the laws forbid or limit the acquisition of property in mortmain or by religious houses, the ecclesiastical foundations of another land may be affected by such limitations. On the contrary, in a state which has no such laws, religious corporations which at home lie under restrictive legislation may be exempt from it.

(3.) A man passing from a country where polygamy has a jural sanction into a state under Christian law can obtain no protection for his plurality of wives; the law, not of his domicile, but of the place where the judge lives must govern.

(4.) "So in a state where negro slavery is not tolerated, a negro slave sojourning there cannot be treated as his master's property,—as destitute of jural capacity." And this for two reasons: "Slavery, as a legal institution, is

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(*m*) International Law, § 84.

(*n*) Woolsey's International Law, § 74.

foreign to our polity, is not recognised by it; and at the same time, from our point of view, it is something utterly immoral to regard a man as a thing." So Savigny. To the same purport Fœlix says: "On ne reconnaît pas aux étrangers le droit d'amener des esclaves et de les traiter comme tels." And to the same effect Heffter: "No moral state can endure slavery. In no case is a state bound to allow the slavery which subsists in other although friendly lands to have validity within its borders."

It is to be observed, however, in regard to applications of foreign law which the moral sense or political principles of a nation reject, that questions *growing out of a status which cannot be recognised by the courts*, if they do not affect the personal capacity itself, may be decided according to the foreign law. Thus a contract relating to the sale and purchase of slaves might be held legal, if legal in the domicile of the contracting parties; and it is probable that the children of a polygamist Turk by a second or third wife would not be treated as bastards in all respects by Christian courts.

Many disputed points would be settled if the rule that *status* is decided by the law of the domicile were universally accepted. Unfortunately this is not the case. The Continental jurists insist more strongly than the English and American writers on the observance of this rule; but the former admit that there is a difference, as regards such observance, between the actual qualities of an individual and the jural effects of these qualities. Thus the question as to the validity of a marriage is to be decided according to the law of the domicile of the parties, but the rights and restrictions of a married woman are among the juridical effects, and cannot therefore be judged according to the law of the domicile.

The consequence of this is that the rule above quoted is of little practical importance when we wish to apply it universally. A set of special rules have, however, come into existence to determine questions of *status* which arise under the different heads of minority and majority, marriage, divorce,

succession, &c. It will, therefore, be more convenient to consider each branch by itself.

### 1. MINORITY AND MAJORITY.

These subjects are of importance, but the conflicts of laws regarding them have become few in number, both by reason of a series of very widely accepted decisions and of the unanimity of the later jurists. In deciding questions arising under this head, the court generally keeps in view the following three rules:—

(1.) The acts of a person done or executed in the place of his domicile in respect of property there situated are to be judged by the laws of that place, and will not be allowed to have any other legal effect or consequence than that which they have in that place.<sup>(o)</sup> The exceptions to this rule are when any country has a statutory or recognised customary law in conflict with the law regulating the act at the place of domicile. Under ordinary circumstances, therefore, if a person has a certain capacity or suffers from a certain legal disability to do an act by virtue of the provisions of the law of his domicile, the validity of the act will be decided according to such law, if it should ever be contested in any other country. Thus an act done by a minor in respect of his property or a contract entered into by him, if valid by the law of his domicile, will be valid everywhere, and if invalid there, it will be considered invalid everywhere else. In the absence, as we have before said, of any positive or implied contrary municipal regulations, this principle is generally recognised by all civilised communities,<sup>(p)</sup>—*quando lex in personam dirigitur, respiciendum est ad leges illius civitatis, quæ personam habet subjectam.*

(2.) Another rule closely connected with the preceding one is that the personal capacity or incapacity attached

(o) Burge, Col. and For. Law, p. 1, ch. 4. Story, Conflict of Laws, § 64.

(p) Huberus, De Conflict. Leg., lib. 1, tit. 3, § 12, 13, 15. 1 Hertii Opera, De Collis. Leg., § 4, art. 8. Story, Conflict of Laws, § 64.



to an individual by the law obtaining in the place of his domicile is considered to follow him in every country, as long as his domicile remains unaltered, even in respect of transactions in a foreign country, where they might otherwise be obligatory.

Voet says, "I think that the law, not of the place where the contract or transaction was executed, nor the place where the question of restitution is raised, but rather of the domicile should be applied, whenever, in fact, in a question whether a person is a minor or a major, it is the rule to follow the law of the domicile, so that a person being considered a minor in the place of his domicile, he should be considered a minor everywhere else, *et contra*."(*q*)

Therefore, if a minor is deemed to be incapable to transact any business by the law of his domicile, he will be deemed incapable everywhere, both as regards transactions in the place of his domicile and in every other place.

Thus, if a man marries a woman of the age of twenty-two at the Cape without the consent of her parents, and were to change his domicile to a place where the age of majority is fixed at twenty-five (France, for instance), the marriage will be considered valid there.(*r*)

The same rule will hold in respect of dispositions of personal or movable property by any person who is a minor or a major in the place of his domicile, for the validity thereof will depend upon the law of the domicile wherever such property may be situated.(*s*)

The reason for this rule is based on convenience, for it would be extremely inconvenient for all nations to have a perpetual fluctuation of capacity, state, and condition upon every accidental change of place of the person or of his movable property.(*t*)

(3.) The other rule is that, upon a change of domicile,

(*q*) Voet ad Pand., iv. 1, 29, *in med.*

(*r*) Huberus, De Conflictu Legum, lib. 1, tit. 3, § 12.

(*s*) Story, Conflict of Laws, § 66.

(*t*) Rodenburg, De Divers. Stat., tit. 1, c. 3, n. 4.

the capacity or incapacity of the person is regulated by the law of the new domicile.

In the case of *Greef v. Verreaux*(*u*) the court held that the question whether the defendant, by a promise of marriage which he was proved to have made to the plaintiff, and the *concubitus* which in consequence had taken place, at a time when he was under the age of twenty-five years, had created such an obligation on him to marry the plaintiff as to entitle her to enforce performance of it by the judgment of the court, was one which must be decided by the law of this Colony, as the *lex loci contractus*, without reference to that of France, his *forum originis*.

As regards the second rule above quoted, there seems to be a slight difference between the English and American and the Continental jurists. According to the best established decisions in the English and American courts, the operation of this rule is restricted, and therefore, as to acts done, and rights acquired, and contracts made in other countries touching property therein, the law of the country where the acts are done, the rights acquired, or the contracts made will generally govern in respect of the *status* of the person.(*v*) Speaking of this rule, Burge(*x*) says, "This doctrine promotes, whilst that to which it is opposed is inconsistent with, those principles of mutual convenience which induce the recognition of foreign laws. The obstacles to commercial intercourse between the subjects of foreign states will be almost insurmountable if a party must pause to ascertain, not by the means within his reach, but by recourse to the law of the domicile of the person with whom he was dealing, whether the latter has obtained the age of majority, and consequently whether he is competent to enter into a valid and binding contract. If the country in which the contract was litigated was also that in which it had been entered into, and if the party enforcing it were

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(*u*) 1 Menz. 153.

(*v*) Story, Conflict of Laws, § 102.

(*x*) Burge on Col. and For. Laws, p. 1, ch. 4.

the subject of that country, it would be unjust, as well as unreasonable, to invoke the law of a foreign state for the benefit of the foreigner, and to deprive its own subject of the benefit of the law of his own state."

In other words, the *lex loci celebrati contractus* is to be applied in such cases. The *dictum* in the case of *Greef v. Verreaux* above quoted is based on this rule, and on reference to the reported case, it will be seen how aptly the argument of Burge applies where he holds that it would be unreasonable to apply the *lex domicilii originis* where it would work a great hardship as against a litigant suing for justice in his own country.

## 2. MARRIAGE.

We now come to the most important of the branches that have been set aside for separate consideration—that of MARRIAGE. It would be difficult to conceive any more important set of rules than those which govern the validity of marriages, the legitimacy of the offspring, and the consequences of marriage; and therefore the rules applicable to and affecting marriages contracted in a foreign country are deserving of the greatest consideration. If international law contained no rules to meet the case of foreign marriages, the whole fabric of civilised society would be shaken to the core; for a man may find, upon going to another country, and thus changing his domicile, that his marriage is invalid, that his children are illegitimate, that he has committed bigamy or incest; whereas in the place of his former abode he had contracted a valid marriage, or had obtained an effectual judicial decree of divorce. The delicacy of the subject alone is a sufficient plea for a full and decisive body of rules, universally adopted, to govern and regulate it. Nevertheless, this much-desired unanimity does not exist, although the English and American jurists have, as far as their courts are concerned, almost succeeded in laying down a series of rules, embodied in a lengthy roll

of decided cases, which will meet every case, and do away with all former doubt and uncertainty.

As regards the validity of a marriage between two domiciled subjects of a state, celebrated according to the law of their domicile, there can be no doubt, for such marriage is considered valid everywhere. The difficulty, however, arises when two persons domiciled in one state leave such state and contract a marriage in a foreign country. Is the validity of such marriage to be decided according to the *lex domicilii* or the *lex loci contractus*? Some jurists are in favour of the *lex domicilii*, but by far the majority hold that the *lex loci contractus* should prevail.<sup>(y)</sup> The old Roman-Dutch writers were of opinion that the law of the place where the marriage was celebrated should be applied, unless the parties had actually left their domicile with a view of evading the provisions of the law obtaining there;<sup>(z)</sup> for this would be practising a deceit and fraud upon the laws of their country.<sup>(a)</sup>

The English law, as gathered from the decisions, seems to adopt a middle course, for as regards marriages contracted by British subjects, either in Scotland or Ireland or in any foreign country, they are considered valid so far as the *manner* or formality is concerned, provided they be made in such form as is sufficient by the law of the place where contracted;<sup>(b)</sup> and the case appears to be the same even though the parties eloped to that country on purpose to evade the *forms* of marriage prevailing in England.<sup>(c)</sup> It is, however, otherwise if the *marriage itself* is one prohibited by the laws of the country, as in the case of one contracted with a

(y) Story, Conflict of Laws, § 122, 123, 124.

(z) Voet ad Pand., 23, 2, 4; 23, 2, 85. Paul Voet, De Stat., § 9 ch. 2, n. 9. Huber, i. 3. Van der Keessel, Thes. Sel., 39.

(a) The practical result of this doctrine must necessarily be very much the same as that followed by the English courts in *Brook v. Brook* and *Simonin v. Mallac*.

(b) *R. v. Brampton*, 10 East, 282. *Scrimshire v. Scrimshire*, 2 Hagg. 395. *Forster v. Forster and Berridge*, 4 B., and *Smith*, 187.

(c) *Crompton v. Bearcroft*, Bul. N. P. 113. *Dalrymple v. Dalrymple*, 2 Hagg. 52.

deceased wife's sister.(d) In accordance with this view, the marriage contract is divided into two parts: (1) the outward form or the external formalities, and (2) the capacity of the contractors; or, to put it in a different way, the marriage contract is composed of *forms* and *essentials*. The forms are decided according to the *lex loci celebrati contractus*, whilst the essentials must be referred to the *lex domicilii*.

The four most important cases in connection with this matter, as setting forth the manner in which the two divisions of the marriage contract just referred to have been applied in the courts of law, are *Crompton v. Bearcroft*,(e) *Brook v. Brook*,(f), *Simonin v. Mallac*,(g) and *Sottomayer* otherwise *De Barros v. De Barros*.(h) In the case of *Crompton v. Bearcroft* the court recognised the validity of Gretna Green marriages, *i.e.*, those marriages contracted by domiciled Englishmen who go to Scotland for their marriage in order to escape from the formalities of the English marriage law, for only certain formalities, and not the essentials of marriage, had been evaded.

In *Brook v. Brook* it was decided that the *forms* of entering into a contract of marriage are regulated by the *lex loci contractus*; the *essentials* of the contract depend upon the *lex domicilii*. If the latter are contrary to the law of the domicile, the marriage, though duly solemnised elsewhere, is void. And the rule that a marriage, if good in the country where it was contracted, is good everywhere, is subject to the qualification that the marriage must not be one prohibited by the country to which the contracting parties belong. On these grounds the court held that a marriage contracted by a man with his deceased wife's sister (both being domiciled in England) in Denmark, where such

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(d) *Q. v. Chadwick*, 11 Q. B. 173; *Brook v. Brook*, 9 H. and L. Ca. 193. Stephen's Com. on the Laws of England, ii. 275.

(e) Bull. N. P. 114.

(f) 9 H. L. C. 193.

(g) 2 Sw. and Tr. 67.

(h) L. R. 2 P. D. 81; L. R. 3 P. D. 1.

a marriage was valid, was null and void. This case is easily distinguished from that of *Crompton v. Bearcroft*.

In the case of *Simonin f.c. Mallac v. Mallac*, the principle was laid down that a marriage duly solemnised in England, in the manner prescribed by the law of England, between parties of full age and capable of contracting according to that law, cannot be held null and void because the parties to that marriage, being foreigners, contracted it in England in order to evade the laws of the country to which they belonged, and in which they were domiciled at the time. Briefly the facts were as follows:—A. and B., domiciled French subjects, of the respective ages of twenty-one and twenty-nine, were married by license in England in June 1854. On the following day they returned to Paris. The marriage was never consummated. In December 1854 a decree was made by the Civil Tribunal of the First Instance of the Department of the Seine, whereby this marriage was annulled, on the ground that it had been celebrated without the publication prescribed by the French law, and without the parties having sought or obtained the consent of their parents; and more especially that the parties, in crossing to England, had a formal intention to evade the laws of France. In 1857 A. came to reside permanently in England, and in 1859 he petitioned the court to annul the said marriage with B. B. was personally served with the citation and petition at Naples and did not appear. The court entertained the suit and held the marriage valid. Lord Campbell quotes this case in *Brook v. Brook*, and says with reference thereto, "The objection to the validity of the marriage in England was merely that the forms prescribed by the Code Napoleon for the celebration of marriages in France had not been observed. But there was no law of France, where the parties were domiciled, forbidding a conjugal union between them, and if the proper forms of celebration had been observed, this marriage by the law of France would have been unimpeachable." The *ratio decidendi* is therefore the same as that in *Crompton v. Bearcroft*.

In *Sottomayer* otherwise *De Barros v. De Barros* two natives of Portugal, one of whom was domiciled in England, the other in Portugal, contracted a marriage in England in 1866. They were first cousins, and were incapable, according to the law of Portugal, to contract a valid marriage, on account of consanguinity, without Papal dispensation. The petitioner (the wife) filed a petition praying that her marriage with the respondent might be declared null and void. Held that the *lex loci contractus* should prevail in the matter, and the marriage being valid according to the law of England, the court dismissed the petition. On appeal, however, the court reversed the judgment of Sir R. Phillimore, who thought himself bound by the case of *Simonin v. Mallac*, holding that the personal capacities of parties to enter into the contract of marriage depend upon their domicile, and where both parties had a foreign domicile, and by the law of their domicile their marriage was invalid by reason of consanguinity, a marriage which was contracted in England, and which would have been valid according to the English law, was invalid.

The converse to the case of *Crompton v. Bearcroft*, namely, that a marriage invalid according to the *lex loci celebrationis* on account of the non-observance of certain formalities required there, will be considered invalid in every other country, although the formalities of such other country may have been observed, is not universally and generally followed. For whenever there is a local necessity, from the absence of laws, or from the presence of prohibitions or obstructions in a foreign country, not binding upon other countries, or from peculiarities of religious opinion and conscientious scruples, or from circumstances creating exemption from the local jurisdiction, marriages will be considered to be valid according to the law of the native or of the fixed actual domicile.(i)

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(i) Story, *Conflict of Laws*, § 79 and 119, where he quotes a case of *Ruding v. Smith*, 2 Hagg. Consist. R. 390, from the Cape of Good Hope. *Vide* also *Harford v. Higgins*, 2 Hagg. Consist. R. 423, and the judgment there delivered by Sir George Hay.

In the Transvaal the matter is in some respects set at rest as regards the marriage in a foreign country of persons domiciled there. The Marriage Ordinance (Act No. 3 of 1871, § 11) lays down that no marriage shall be considered valid if both parties are resident within the state, and they proceed to another state or country for the purpose of having their marriage celebrated there before a minister of religion or Government official, unless special permission has been obtained to that effect from the State President, and the requisite proofs of the celebration of the marriage have been handed in to the Government Secretary of the state within six months after the marriage has taken place.

To the established rule that a marriage validly contracted in accordance with the formalities required by the *lex loci* is valid everywhere, there is one great and important exception.

The courts of law of Christian countries will not recognise so-called marriages which are celebrated contrary to the spirit of Christianity and forbidden by Christian authorities, amongst which are polygamous and incestuous marriages. The rule as to the exception is, however, applied with difficulty in some cases, for, as regards incestuous marriages, all nations do not hold the same views, except as regards the intercourse between ascendants and descendants, or between brother and sister. Thus the marriage of a man with his deceased wife's sister according to English law, or with his half-sister (see Grot. Op. No. 2 of this work), would be incestuous, whereas such marriage would be perfectly valid according to the law of some other countries.

As regards polygamous marriages the decisions are fairly unanimous. Thus in the case of *Hyde v. Hyde*,<sup>(k)</sup> Lord Penzance in 1866 pronounced a Mormon marriage to be null and void on account of the plurality of wives allowed by Mormon customs.

The decision in *Hyde v. Hyde* seems, at first sight, to conflict with the holding of the court in *Brook v. Brook* (9 H. L. C. 193, 241), which established clearly the rule that

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(k) L. R. 1 P. and D. 130.



a marriage contracted according to the *lex loci* is binding everywhere. Upon examination, however, it will be found that such is not the case. The difference lies in the Christian interpretation of the term "marriage." According to Lord Penzance—*vide* his judgment in *Hyde v. Hyde*—marriage in a Christian sense must be defined "as the voluntary union of one man with one wife, to the exclusion of all others." Very much the same idea finds expression in the Marriage Service as contained in the Book of Common Prayer—"Wilt thou . . . forsaking all others, keep thee only unto her so long as ye both shall live?"

It is instructive to notice that in 1860, and therefore about six years previous to the leading case of *Hyde v. Hyde*, the Supreme Court of the Colony of the Cape of Good Hope decided almost the same point of law in the same way in the case of *Bronn v. Frits Bronn's Executors.* (1) In that case it was decided that a marriage celebrated according to Mohammedan law, which allowed plurality of wives, is null and void, and the children born during the so-called marriage are illegitimate. Mr. Justice Watermeyer could not have given a decision more in conformity with the rule established by *Hyde v. Hyde* if that case had preceded instead of succeeding the Colonial case. He says, "Marriage is said by jurists to be a contract *sui generis*—so completely *sui generis* that some of the most eminent have contended that it should rather be called a '*status*,' a civil institution, than a contract. It is the union and cohabitation of one man with one woman, to endure till the death of the first dying, with the intention of having and rearing legitimate offspring. It is based on consent between the individuals; it cannot be dissolved by such consent. . . . Where the contract is cohabitation, not for life, but for a period long or short, terminable at the caprice of the man, it is concubinage and not marriage. Where the contract is with one woman, the man so cohabiting with her having the right of introducing three other women to his bed, with the dignity

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(1) 3 S. 313.

of equal wifehood, the intention of the first woman in entering into this contract is not marriage, but likewise concubinage.”

The same rule was followed in the case of *Nanto v. Malgass*, (m) where the court held that a native is not entitled to damages from a person who has had carnal connection with his wife, to whom he was married according to native custom, which allows polygamy, for the so-called marriage is merely concubinage and not binding.

The case of *In re Bethell* (n) was decided on the same grounds. The facts of that case were, shortly stated, as follows: (o)—Christopher Bethell, a domiciled Englishman, took up his residence at Mafeking, in British Bechuanaland, and there married a native girl named Teepoo, a member of the Baralong tribe. The form of marriage gone through was that which obtained among the Baralongs, which simply consisted in the husband killing a sheep, buck, ox, or cow, sending the hide and head to the bride's parents, and then taking the girl to live with him. The marriage was then, provided the consent of the bride's parents had been previously obtained, considered complete. According to Baralong custom a man may have more than one wife at one and the same time, but the first wife is considered the principal. There was at the time a Wesleyan church and minister at Mafeking, but Bethell distinctly refused to be married in church and expressly stated to the chief of the Baralong tribe that he was a Baralong and wished to be married according to Baralong custom. Bethell, in letters to his friends, never spoke of Teepoo as his wife, or mentioned his marriage, but he did allude to her as “that girl of mine.” The marriage between Christopher Bethell and Teepoo according to Baralong custom took place in October 1883. Bethell was killed in an engagement with the Boers in July 1884, and in August Teepoo gave birth to a female child of which Bethell was the father. During his lifetime Bethell

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(m) 5 Jura. 108.

(n) 38 Ch. D. 220.

(o) C. L. J. v. 182.

was entitled to the revenue of certain estates in England under his father's will, and at his death the estates were, in terms of the will, either to be sold for the benefit of his child or children, or, in case he left no children, they were to pass to his elder brother.

Hence arose the question, to whom did the estates belong, to the elder brother or the female child of Bethell? Mr. Justice Stirling, before whom the case was heard, followed the rule laid down in *Hyde v. Hyde*, and decided that the Baralong union celebrated at Mafeking did not constitute a marriage in accordance with English ideas, and was not such a one as an English court would give effect to.

Courts of law have not yet decided whether under any circumstances a marriage entered into with a man or woman of a tribe which admitted polygamy and divorce at will, in accordance with the customs and usages of that tribe, could be recognised as valid. The intention of the parties should be the test. If there is conclusive proof that the intention of the husband was to take the woman as his one and only wife, to the exclusion of all others, such marriage ought to be considered valid and effectual.(p)

In connection with this subject another point claims our attention—the effect of a foreign marriage contract on *the property of the spouses*. This point is of very great importance, for according to the different legal systems of different countries, husband and wife stand in different relations as regards the property possessed by them previous to or acquired subsequent to their marriage. For instance, the law of the matrimonial domicile may in this respect differ from that of the domicile of origin, or of a subsequent domicile of choice, or from that of the place where the property is situated. The different claims of the matrimonial

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(p) *Bronn v. Frits Bronn's Exors.* (3 S. 313), per Bell, J., and Watermeyer, J. *Warrender v. Warrender* (2 Cl. and F. 488), per Lord Brougham; and see the remarks of Stirling, J., in *Hyde v. Hyde* with reference to the case of *Connolly v. Woolrich*.

*The State v. Manoko* (S. A. R.), C. L. J. x. 245.

domicile, of the subsequently acquired domicile, and of the *lex loci rei sitæ* must be taken into consideration.

The three chief factors that have created this difference are: (1.) The *communio bonorum*, which is recognised by some legal systems and rejected by others. (2.) The existence of ante-nuptial and post-nuptial contracts. (3.) The rule or maxim of the jurisprudence of certain countries that as regards immovables the *lex loci rei sitæ* must be followed exclusively.

There is a great divergence of opinion among the jurists who have treated of this subject. Story is of opinion that if there is an express contract between the intended spouses respecting their rights and property, present and future, the contract will be valid everywhere as regards the movable property. If the future rights and property were not taken into consideration, the property acquired subsequent to a change of domicile will be regulated according to the law of such domicile. If there is no express contract, the law of the matrimonial domicile will govern as to all the rights of the parties to their present and future property in that place, and as to all personal property everywhere. Immovable property will be regulated by the *lex rei sitæ*.(q) Burge is of the same opinion.(r)

Savigny (s) and Phillimore (t) maintain that both personal and immovable property must be regulated according to the law of the matrimonial domicile. The Colonial courts have followed the views of Savigny and Phillimore, basing their decisions on the authority of Voet,(u) who says: "If at the beginning of the marriage, according to the law of the domicile of the husband, universal communion of goods between the spouses was introduced, or, to take the other view, was excluded, and then, after a lapse of time, through

(q) Story, Conflict of Laws, § 183-186.

(r) Burge on Col. and For. Law, pt. 1, ch. 7, § 8.

(s) Savigny, § 24.

(t) Phillimore, § 445.

(u) Voet ad Pand., 23, 2, 87. See also Grotius' Opinion No. 14 (Holl. Cons. iv. 22), pp. 138-140 (*infra*), and Opinion No. 33 (Holl. Cons. 3, b. 151 *infra*).

change of mind, the spouses change their domicile to another place—for instance, if they should go from Holland to Friesland, where opposite effects of marriage obtain by law, and only the communion of acquisitions is introduced by marriage—that removal of itself alone cannot alter the communion of goods once introduced, but in the new domicile that will remain which was introduced, and that will continue excluded which was first excluded, for removal cannot change the contracts made before marriage.”

Thus in the case of *Blatchford v. Blatchford's Executors* (x) the Supreme Court of the Cape of Good Hope decided that the law of the domicile of marriage will prevail to regulate the rights of the spouses in regard to property acquired in the Colony by persons married elsewhere, but who have subsequently removed to the Colony *animo remanendi* and the *communio acquæstum* is not introduced by change of domicile to the Colony, where at the domicile of marriage no community existed between the spouses.

Likewise in the case of *In re Estate of Barnes*, (y) Smith, J., held that where by the law of the domicile of the marriage no community of property between the spouses exists, the subsequent change of domicile to the Colony does not introduce community in regard to immovable property acquired and situated within the Colony. Two other cases decided on the same grounds are *Black v. Black's Executors* (z) and *Aschen's Executrix v. Blythe*. (a) In the former case, Black and his wife were married in Scotland in community of property as understood by the Scotch law in 1825. Subsequently they became domiciled at the Cape of Good Hope. Mrs. Black died, intestate. Black subsequently died, leaving a will in which he disposed of all the immovable property to other persons than the children of the marriage. Upon the children claiming one-half of the joint estate as it existed at the time of the death of their mother, it was held that the

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(x) R. 1, 3, and E. D. C. 1, 365.

(y) 1 E. D. C. p. 5.

(z) J. 3, 200.

(a) J. 4, 136.

law of the matrimonial domicile must regulate the rights of the wife, and after her death of her children as her heirs *ab intestato*, and that by that law they were not entitled to one-half of the joint estate.

Although, as above set forth, the rights of the spouses acquired by the law of the matrimonial domicile will be ubiquitous (as expressed by Watermeyer, J., in *Blatchford v. Blatchford's Executors*), yet these rights will not prevail as against a positive prohibition by the law of the country where the property is situated and whither the parties have removed. Thus the law of South Africa, where the Placaat of the Emperor Charles V. of 1540, § 6, still obtains, will not allow the wife to claim any preference under a deed of hypothecation granted to her by her husband at the time of marriage, in security of her marriage settlement over the concurrent creditors on his estate, and any preference given to her at the time when he contemplated the sequestration of his estate will be considered an undue preference in case of insolvency.(b)

With respect to the effects of a marriage contract, it may also be remarked that if a woman who has property in one country marries a man in another where community of property obtains, all her property will go in *communione bonorum*, and will be subjected, with respect to such community, to the laws of the matrimonial domicile. "The reason for this is," says Grotius, "that the custom as to the marital power *primario disponit de persona et secundario de bonis*" (Opinion No. 14 in this work, Holl. Cons. iv. 22).

### 3. DIVORCE.

Having considered the law as to foreign marriages, we naturally come to the subject of DIVORCE, in order to see how far the courts of one country will recognise a dissolution of a marriage decreed by the courts of another, where the spouses are or were domiciled in the former or had been

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(b) *Thurburn v. Steward*, Buc. 1869, p. 95, and 7 P. C. (N.S.) 333.

married there. The question might be treated as falling under the heading of "Jurisdiction," for we shall have to consider what forum ought to take cognisance of the question of divorce—the forum of the matrimonial domicile, of the subsequent domicile of the spouses, of the place of *bona fide* residence, of the domicile of the husband only, or of the wife only, or of either; but it will be more advantageous to treat of the matter here.

The Roman-Dutch lawyers have not touched on the subject, nor have they laid down any rules of procedure for the courts in decreeing the dissolution of foreign marriages.

In *Lolly's case*,<sup>(c)</sup> decided in 1812, followed by *McCarthy v. Decaix*, decided in 1831, the English courts held that it was not competent for a foreign tribunal to dissolve an English marriage, although the spouses were at the time actually domiciled in such foreign country. This is certainly a very extreme and exclusive position to take up, and the English courts have since that time modified their views very much indeed. Thus *Niboyet v. Niboyet*,<sup>(d)</sup> *Wilson v. Wilson*,<sup>(e)</sup> and *Shaw v. Gould*,<sup>(f)</sup> restrict the judgment in the previous cases, and have laid down that the courts of a foreign country have power to dissolve a marriage contracted in England between English subjects, provided the parties were at the time actually and *bona fide* domiciled in such foreign country. In *Harvey v. Farnie*<sup>(g)</sup> the facts were as follows:—A domiciled Scotchman married an Englishwoman in England. The spouses, upon the completion of the ceremony, went to Scotland and established their home there. Two years later the wife obtained a divorce in Scotland by reason of her husband's adultery—a cause not recognised as sufficient under English law, and yet it was held that the divorce was effectual and entitled to recognition everywhere.

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(c) 1 Russ. and Ry. 237; 2 Russ. and Ry. 614.

(d) L. R. 3 P. Div. 57.

(e) L. R. 2 P. Div. 442.

(f) L. R. 3 H. L. Cas. 55.

(g) L. R. 8 App. Cas. 43.

But can a divorce be sued for in a country where the spouses have a *bona fide* residence short of actual domicile, and will a divorce granted under those circumstances be recognised as effectual by the courts of the matrimonial domicile? In answering these questions the authorities are certainly not consistent. The English law, as interpreted by the courts of justice in England, incline to a negative answer, although no direct decisions have been given on this point, and the question has been left open whether *bona fide residence* short of domicile will entitle a foreigner to sue for a divorce in the English courts; (*h*) but it seems fairly definitely decided that if the matrimonial domicile is English, and the actual domicile English, a divorce granted by a foreign court will not be effectual in England. (*i*)

In the United States of America the courts require actual domicile in such cases. (*k*)

There are two ways of looking at a divorce—it may be considered either in the light of a personal wrong or in the light of *status*.

The doctrine of the English law is based upon the principle that divorce operates as a change of *status*, and that therefore foreign tribunals cannot grant a divorce of English subjects who have no civil domicile in such foreign country.

The Scotch law is perfectly clear. A person who has remained in Scotland for a sufficient length of time (forty days) to found ordinary civil jurisdiction is entitled to sue for a divorce in the Scotch courts. (*l*) This doctrine is based upon the right of the Scotch courts to redress any personal wrong.

Coming to Roman-Dutch law, we may observe that, as regards personal wrongs, it is clearly established that *bona fide* residence is sufficient to found jurisdiction in order

(*h*) *Le Sueur v. Le Sueur*, L. R. 1 P. Div. 142. *Wilson v. Wilson*, *supra*.

(*i*) *Niboyet v. Niboyet*, in appeal L. R. 4 P. Div. 1. *Manning v. Manning*, L. R. 2 P. and M. 223.

(*k*) Story, *Conflict of Laws*, § 230a. Bishop, vol. ii. § 141.

(*l*) Erskine, *Instit.*, Bk. 1, tit. 2, § 20, *in notis*.



to claim redress.(*m*) It is true that Rodenburg lends his support to the view that divorce is pre-eminently a matter of *status*, and must be referred to the *lex domicilii*. This doctrine is, however, distinctly denied by Voet.(*n*)

In the case of *Weatherley v. Weatherley*,(*o*) Kotze, C.J., reviewed at great length the different authorities in connection with this matter, and held that on the ground of public policy the court of the *domicilium habitationis* should exercise jurisdiction in matters of divorce. This case is the first direct South African decision on this point. In the case of *Reeves v. Reeves*, in 1 Menz. 246, reference is made to the case of *Newberry v. Newberry*, not reported, by which an English marriage was dissolved by the late Court of Justice at the Cape, on the ground of adultery committed at sea, although the parties merely touched there as passengers in the course of their voyage to England.

As regards the *forum domicilii* of the wife, this is taken to be that of the husband, whether she be at the time actually resident there or not, and this for the trial of all questions, not only arising between herself and third parties, but between the wife and the husband, and respecting the rights and obligations and duties of both parties which result from their relation as husband and wife.(*p*)

If the husband deserts his wife at their domicile, and there is no clear proof that he has acquired a new domicile of choice, the law will not presume such change, but will rather admit the presumption that his absence is temporary, and that he intends to return (*ubi uxor ibi domus*), and the wife will be entitled to sue him before the tribunal of the country in which she had been thus left for a restitution of

(*m*) Van der Keessel, Thes. Sel., 30, 42. Huber, Prælectiones ii., De Conf. Leg., § 2. Bynkershoek, De Foro. Legatorum, cap. 3. Voet ad Pand. de Statutis, l. 1, 8.

(*n*) Ad Pand. de Stat., 1, n. 8.

(*o*) Kotze's Reps., p. 83.

(*p*) Per Menzies, J., in *Reeves v. Reeves*, 1 Menz. 249. *Loots v. Loots* (Transvaal), in appeal, 1893. Voet, 5, 1, § 95, 101. Voet, 23, 2, 40. Codex, 10, 39, 1, 9.

conjugal rights or divorce,<sup>(q)</sup> or to have a bigamous marriage declared null and void.<sup>(r)</sup>

#### 4. SUCCESSION, TESTAMENTARY AND INTESTATE.

With regard to this subject, the much desired unanimity among jurists is also wanting.

The German jurists hold with Savigny that succession to both movable and immovable property should be governed by the law of the last domicile of the deceased.

Others, again, hold that the law of the place where the property is found should prevail.

The middle course is adopted by the jurisprudence of England, France, and the United States,<sup>(s)</sup> according to which the movable property is subjected to the law of the domicile of the deceased, and the immovable to that of the *situs*. Thus in the case of *Enhoin v. Wylie* (10 H. C. L. 1), where an Englishman had become domiciled in Russia, where he drew up his will and died, the English courts held that the administration of the *personal* estate of the deceased belongs to the control of the country where he was domiciled at his death. All questions of testacy or intestacy belong to the judge of the domicile, and he can appoint the executor under the will. To the court of the domicile belongs the interpretation and construction of the will, and the determination of the next of kin, and that court is the *forum concursus* to which the legatees under a will or the parties entitled to the distribution of an *intestate estate* are required to resort.

Voet says that, as regards movables, these should be governed by the law of the domicile of the owners; but as regards immovables, it has been handed down to us that they are only governed by the law of the place of situation.<sup>(t)</sup> In respect

(q) *Adams v. Adams*, J. 2, 24. *Hawkes v. Hawkes*, J. 2, 109.

(r) *Cunningham v. Cunningham*, Buc. 1875, p. 99.

(s) *Vide* C. L. J. vol. i. p. 310.

(t) Voet ad Pand., 1, 4, P. 2, § 12.

of immovable property, Story says that the doctrine is clearly established at common law that the law of the place where the property is situated is to govern as to the capacity or incapacity of the testator, the extent of his power to dispose of the property, and the forms and solemnities to give the will or testament its due attestation and effect; and he proceeds to state that the great weight of authority is in favour of this doctrine.<sup>(u)</sup> The same rules apply to intestate succession. Thus the succession to movable property is regulated by the law of the domicile of the deceased, and this law will decide whether primogeniture gives any right of preference, whether a person is legitimate and entitled to succeed or not;<sup>(v)</sup> but as regards immovables, the *lex loci rei sitæ* prevails, and all questions pertaining thereto must be settled according to that law,<sup>(w)</sup> according to the maxim *mobilis sequuntur personam; immobilia situm*.

Supposing, however, there is a difference between the laws of a domicile where a will was made and the last domicile of the deceased, the question arises—which law is to obtain? Story decides in favour of the law of the actual domicile, holding that a will validly made according to the law of the place where it was drawn up, but invalid according to the law of another country, will be considered invalid if, at the time of death, the testator had changed his domicile to such country. In support of this view he quotes Voet, ad Pand., b. 28, t. 3, § 12.<sup>(x)</sup> Foote holds a more equitable opinion, and says that it will be sufficient if the will is valid by either law.<sup>(y)</sup>

## 5. FOREIGN CONTRACTS.

When considering this subject, it becomes clear that a series of well-established rules is required in order to

<sup>(u)</sup> Story, Conflict of Laws, § 474, 475, and authorities there quoted.

<sup>(v)</sup> Voet, ad Pand., 38, 17, 34. 1 Gail, Pract. Obser. l. 2, obs. 12, n. 18. Sande, Decis. Fris., l. 4, t. 8, def. 7. Story, 481–483. Opinion No. 33 *infra*.

<sup>(w)</sup> Cf. *In re Bethell*, quoted above. Voet, l. 4, P. 2, § 3.

<sup>(x)</sup> § 473.

<sup>(y)</sup> P. 184.

obviate all mercantile inconveniences which would otherwise arise, and to promote commerce and free commercial intercourse between the domiciled subjects of different countries. For a contract may be drawn up in one country between domiciled subjects of another, to be executed in a third, whilst payment is to be made in a fourth.

It will be sufficient if the main rules are here given according to which these contracts are adjudicated upon, together with the best authorities, and the South African cases upon the subject.

(1.) As a general rule, the validity or invalidity of a contract is to be decided according to the law of the country where the contract is entered into.(a)

If the performance of the contract is to take place in another country, the law of the place of performance is to govern, and likewise if a foreigner enters into a contract in another country where the performance is to take place, the *lex loci contractus*, and not the law of the *forum originis*, will govern.(b)

It is therefore absolutely necessary that the forms and rules prescribed by the *lex loci contractus* should be complied with, failing which the contract will be considered invalid.

The nature, obligation, and interpretation of the contract will be governed by the law of the place where the contract is entered into. *Locus contractus regit actum* is the broad principle on which this rule is based.

To the rule that a contract validly made according to the *lex loci contractus* is valid everywhere, there is one exception. No country will recognise as valid a contract made in another country the terms of which are opposed to the interests of the former or of its subjects.(c)

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(a) Huberus, 2 De Conf. Leg., lib. 1, 2-3, § 3. Code, lib. 1, tit. 14, 1, 5.

(b) Story, § 280. Greef v. Verreaux, 1 Menz. 153. Grotius, 2, 11 5, n. 2.

(c) Huberus, 2 De Conflic. Leg., lib. 1, tit. 3, § 2. Blatchford v. Blatchford's Exors., R. 1, 3, and E. D. C. 1, 365. Van der Bijl's Assignees v. Van der Bijl, J. 5, 170.

With regard to foreign contracts, the courts will not assume jurisdiction where the *forum domicilii*, the *forum rei sitæ*, and the *forum loci contractus* are all wanting,(*d*) and no arrest *ad fundandum jurisdictionem* will be decreed.(*e*)

## 6. FOREIGN JUDGMENTS.

Vattel, who is followed in this respect by many Continental jurists, lays down that it is the province of every sovereignty to administer justice in all places within its own territory and under its own jurisdiction, and to take cognisance of crimes committed there, and of the controversies that arise within it. Other nations ought to respect this right, and as the administration of justice necessarily requires that every definitive sentence, regularly pronounced, be esteemed just and executed as such, when once a cause in which foreigners are interested has been properly decided, the sovereign of the defendants ought not to hear their complaints. To undertake to examine the justice of a definitive sentence is an attack upon the jurisdiction of the sovereign who has passed it.(*f*)

The Common Law has not followed Vattel, but in spirit at least the rule he laid down is adhered to.

If a foreigner has obtained in a foreign country a proper judgment against a defendant residing at the Cape, the Colonial courts will not allow summary execution to be taken out upon the foreign judgment; but the courts will, in due course, grant provisional sentence for the amount of the foreign judgment, and the plaintiff will then have the same remedies for the satisfaction of the Colonial

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(*d*) *Cookney v. Anderson*, 31 Beav. 452.

(*e*) *Hornblow v. Fotheringham*, 1 Menz. 365. *Heineman v. Jenkins*, 2 S. 10. *Wilhelm v. Francis*, Buc. R. 1876, 216. *Einwald v. The German West African Company*, J. 5, 86; and *cf. Dunell v. Van der Plank*, 3 Menz. 112, and *Poultney v. Van Santen*, Buc. 1874, p. 76.

(*f*) Vattel, Bk. 2, ch. 7, § 84.

judgment which are given to residents within the territory of the Cape Colony.(g)

The court will always take cognisance of the judgments of a foreign court having jurisdiction over the parties.(h)

It is usual to prove a foreign judgment by means of a copy of such judgment, certified to be a correct copy of the recorded judgment by the Registrar of the court and sealed with the seal of the court, accompanied by a certificate signed by the Secretary of State under the public seal of the state, stating that the person certifying the copy of the judgment is the Registrar of the court.(i) But the court will in certain instances dispense with the certificate of the Secretary of State, if it is otherwise satisfied that the copy is authentic.(k)

If the defendant is outside the jurisdiction of the court of any country, but has property in such country, the plaintiff can, by order of court, attach the property within the jurisdiction of the court *fundandæ jurisdictionis causa*, but care should be taken that, where possible, sufficient goods are attached to cover the amount of the judgments *plus* costs and costs of writ; for although jurisdiction may have been founded by such attachment, the jurisdiction will be confined to the amount attached, and cannot be extended to property outside the country. The court of the domicile of the defendant will not recognise the judgment of a foreign court. The defendant must be sued before the tribunal of his domicile.

Thus in the case of *Acutt, Blaine, & Co. v. The Colonial Marine Assurance Company*, the plaintiffs, domiciled in Natal, had attached certain property in Natal belonging to the defendants, who were domiciled in the Cape Colony, in order to found jurisdiction, and had obtained judgment against the defendants in Natal. The amount attached was quite in-

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(g) *The Bank of Africa v. Hare*, G. 3, 286. *Lipman & Herman v. Kohler*, J. 5, 420.

(h) *Brissac v. Rathbone* (6 H. and N. 301).

(i) *Benjamin v. Benjamin*, E. D. C. 1, 273.

(k) *In re Roos*, Sup. Court, Jan. 12, 1893.

sufficient to cover the judgment, and thereupon the plaintiffs sued the defendants in the Supreme Court of the Cape Colony for the Natal judgment; but absolution from the instance was granted. De Villiers, C.J., said, "If it had been proved that the defendants were residents of Natal at the time judgment was given, no difficulty would arise, because the court would be bound by the comity of states to give effect to the judgment against persons domiciled in the state in which judgment was given; but in the present case the defendants resided within this Colony, and judgment was given against them at Natal. If a person in Natal wishes to sue any person within this Colony, he must come into this court to do so, and I cannot accede to the proposition that because there had been an attachment of the defendant's property in Natal, the court of Natal obtained jurisdiction over his property here. By the attachment of the property in Natal the court obtained a jurisdiction in respect of that particular property, but the defendants not having appeared in that court at all, I do not think that this court is bound to give effect to the judgment." (l)

In *Fass & Co. v. Stafford* (Natal *Law Times*, Sept. 1885) the defendant resided in Natal. The Standard Bank in Griqualand East obtained judgment against the defendant there on a certain promissory note; certain property having been attached to found jurisdiction, this attachment was subsequently withdrawn. Afterwards *Fass & Co.* became the holders of the note and sued the defendant, who pleaded the previous judgment; but the court was of opinion that the foreign judgment against the defendant was no bar to a suit in Natal on the original cause of the debt.

The foregoing are the main points that have come before the South African courts with reference to foreign judgments. Owing to its importance, the question of foreign bankruptcies will be treated as a distinct subdivision.

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(l) *Juta*, 1, 406.

## 7. FOREIGN BANKRUPTCIES.

We have seen under the preceding heading that the judgment of the court of a country concerning a person or property within its jurisdiction is respected and recognised everywhere. In accordance with this doctrine, the Colonial courts will recognise an order for the assignment of an estate in bankruptcy or the sequestration of an estate as insolvent when officially brought to the notice of the court. Owing, however, to the distinct and peculiar effects of insolvency, the courts have from time to time, in the cases which came before them, laid down certain rules of practice, which, whilst recognising the comity of nations, yet aimed at a fair and equitable distribution of the estate, at the security of the interests of the Colonial creditors, and at as speedy and inexpensive a settlement of the claims as possible.

The English doctrine with regard to an assignment under the bankruptcy law of a foreign country is that it passes all the personal property of the bankrupt locally situated. The American courts hold an opposite view, on the ground that the vesting of the personal estate in a foreign receiver or trustee is prejudicial to the state and to the interest of its citizens.<sup>(m)</sup>

As already stated, the movable property, *fictione juris*, is supposed to be situated at the domicile of the insolvent, and the distribution of the estate will be in terms of the law of that domicile.<sup>(n)</sup> This is not only the doctrine of the English courts, but also of the majority of French and Roman-Dutch jurists. The principle is not recognised by the preponderance of authority in the American courts, but it appears to be in accord with the doctrine of the Roman-Dutch jurisprudence. The object of the distribution of the insolvent's effects being perfect equality among those who have equal rights and no preferent claims, it was held that this could only be conveniently and effectually attained

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<sup>(m)</sup> Story, § 410.

<sup>(n)</sup> 3 Burge, Commentary on Colonial and Foreign Laws, pt. 2, ch. 20.



in one place, which was called the *locus concursus creditorum*, and if any other place was selected by the creditor for the recovery of his debt, he might be met by the plea *ne contentia causæ dividatur*. As to what should be the *locus concursus*, it was generally admitted to be the domicile of the insolvent. The assignment under the law of his domicile would operate as an assignment of his movable property wherever situate, subject, of course, to any rights which preferent creditors attaching any property before the date of the assignment may have acquired by the law of the country in which the property is situate.(o)

Without a "process in aid" being sought from and granted by a Colonial court, the foreign trustee will have no right to deal with the immovable property situate in the Colony, for the *lex loci rei sitæ* will obtain.

The English case of *Selkraig v. Davis* (p) recognises the same rule. It was held there that a bankrupt under an English commission of bankruptcy could not be compelled to assign his foreign real estate to his assignees. The case of *Harrison v. Harrison* (q) is directly applicable. Unless there is a personal equity affecting the owner of real estate situate abroad, an English court cannot claim to control such estate by acting on him, and it is quite clear that no English court would recognise such a claim as to English land by the trustees or assignees under a foreign bankruptcy.

The sequestration of an estate in a foreign country will not, by itself, operate as a sequestration of the Colonial estate. An individual whose estate has therefore been sequestrated in a foreign country will nevertheless be bound to meet his obligations in South Africa.

The earliest case bearing directly on this point is that of *Alexander & Co. v. Lioni*.(r) There the plaintiff sued the defendant for the balance of the purchase price of certain goods. The defendant pleaded specially that his estate had

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(o) *Trustee of Howse, Sons, & Co. v. Trustees of Howse, Son, & Co.*,—*Jocelyne v. Shearer & Hine*, J. 3, 14.

(p) 2 Dow, 245.

(q) L. R. 8 Ch. 342.

(r) Buch. 1875, 79.

been compulsorily sequestrated in the province of Griqualand West, and that at a meeting of creditors held in that province the plaintiffs had filed their claim. To this plea an exception was taken on the ground that it was no defence, and the court sustained the exception. Unfortunately no reasons are given for the judgment, nor are the authorities set out on which the decision was based. This decision was followed in the case of *Reynolds v. Howse & Early*,<sup>(s)</sup> where it was held that the mere sequestration in England of a partnership estate, which had both an English and Colonial domicile, was no bar to an action against the estate in the Colony. Likewise in *Ferguson v. Stanton*<sup>(t)</sup> it was held that a previous sequestration and rehabilitation in the Free State was no bar to an action on a debt contracted in the Cape Colony. Ferguson applied for leave to attach certain moneys belonging to Stanton, who was domiciled in the Free State, in order to found jurisdiction in an action for debt. The debt had been incurred some years before, and was for goods supplied by Ferguson, a Kimberly merchant, to Stanton in the Free State. Stanton alleged that subsequently to incurring the debt his estate had been sequestrated in the Orange Free State and he had been rehabilitated there. The court, however, held that as the original contract was made in Griqualand West, the Free State insolvency and rehabilitation were no bar to the present action, and granted the order for an attachment *ad fundandum jurisdictionem*. When the debt has been incurred in the country where sequestration and rehabilitation had taken place, the court has refused the claim of such creditor upon subsequent sequestration in another country, on the ground that debt had been extinguished by the previous rehabilitation.<sup>(u)</sup> In the case of *Trustees of Howse, Sons, & Co. v. Colonial Trustees of Howse*,

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(s) E. D. C. 3, 304.

(t) G. 3. 289.

(u) *In re Percy Hope* (Transvaal), June 29, 1885, C. L. J., vol. ii. p. 274. On the authority of Story, *Conflict of Laws*, § 338-343; Burge, *Comm. on Col. and For. Laws*, vol. iii. p. 924-925.

*Sons, & Co.*,<sup>(v)</sup> it was decided that where a firm had two domiciles, one in England, the other in the Cape Colony, and the estate of the firm was sequestrated in England and trustees appointed, the estate in the Colony, which consisted of movables, vested in the English trustees.<sup>(w)</sup> It is difficult to reconcile with this judgment the holding of the court in *The Trustees of the Natal Estate of Zeederberg v. The Trustees of the Cape Town Estate of Zeederberg*.<sup>(x)</sup> This was an action by the Natal trustees of the insolvent Zeederberg to have paid to them the proceeds of the movable property of the insolvent in the Cape Colony. Zeederberg was domiciled in Natal, and his estate was sequestrated in both countries. The court decided against the claim of the plaintiffs. The report of the case is most meagre, and contains no reasons on which the judgment was based.

Notwithstanding a sequestration in a foreign country, the courts of the Colony will protect the interest of a preferent creditor who has attached property in the Colony to satisfy his judgment debt. Thus in the case of *Norden v. Solomon*—the assignee of Charke,<sup>(y)</sup> the plaintiff, as agent of Charke, an English insolvent, brought an action to have it declared that he was entitled by the law of this Colony to a tacit hypothec upon the vessel *Justitia*, of which Charke was the owner at the time of his bankruptcy, for certain sums of money, which, as agent for the *Justitia*, he had expended for the repair and otherwise of the boat, and to have the proceeds of the vessel adjudged to him. The defendant pleaded the exception *ne continentia causæ dividatur* in bar, on the ground that the *concursum creditorum* was in England, and that the plaintiff had to go there to assert his rights. The court, however, held that if, prior to the insolvency of Charke, the plaintiff had by the law of the Colony acquired a hypothec of the vessel or any other property of Charke within

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(v) J. 3, 14.

(w) See also the judgment of De Villiers, C.J., in *Richards v. Doveton's Trustees*, J. 3, 123.

(x) R. 2, p. 3.

(y) *Menz.* 2, 395.

the jurisdiction of the court, he was entitled to make that hypothec effectual by an action in this court, and that the sale of the vessel and the payment of the proceeds into court was equivalent to an arrest *jurisdictionis fundandæ causa*, and overruled the exception.

The court of the Orange Free State has allowed a foreign trustee of an insolvent estate to institute an action for the settlement of claims due by the insolvent, who was living in the Free State, and whose estate had not been sequestrated there. The case in point is that of *Craven v. Reinach*.<sup>(z)</sup> The salient facts were as follows:—Reinach was the owner of a farm lying on the frontier between Griqualand West and the Orange Free State. His estate was sequestrated in Griqualand West, and the plaintiff, as trustee, sold the farm. Before transfer could be passed, the frontier line between the two countries was definitely defined, and it was found that the farm was consequently divided, part falling within the territory of Griqualand West, and part within that of the Orange Free State. The consequence was that the trustee could not pass transfer of the Free State portion of the farm without an order from the court there. Reinach's Free State estate had not been sequestrated. The trustee thereupon sued him before the High Court at Blomfontein for transfer of that portion of the farm. Reinach excepted to the summons on the ground that the Griqualand West trustee had no *locus standi in judicio* in the Free State courts, but the court in the first instance, as well as on appeal, overruled the exception and gave an order *ad factum præstandum*. The same court decided in September 1890 that upon the sequestration in Natal of the estate of one of the partners of a firm carrying on business in Natal and the Orange Free State, the trustees there appointed had a *locus standi* in the Free State courts to sue for the sequestration of the partnership estate in the Free State.<sup>(a)</sup>

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(z) O. F. S. Reports, April 29, 1880.

(a) *Mitchell & Dore v. Lamjee Dharsey & Co.*, C. L. J., vii. p. 263, and see § 5 of Insolvent Ordinance.

If an insolvent has a foreign as well as a Colonial domicile, or if he has property abroad and in the Colony, the Colonial courts, upon request, will issue a process in aid when the estate has been sequestrated abroad, and will then recognise the appointment of the foreign trustee.(b) The application or *request seeking aid* is made by petition to the court by the trustees, setting forth in full the circumstances why they desire to be recognised as such in the Colony, or, in the case of a Colonial sequestration, in England. The concluding prayer is—

1. To act in aid.
2. To declare the foreign property vested in the trustees.
3. To order that the administration shall be proceeded with by the trustees or their lawfully appointed agents.
4. For general relief.(c)

In conformity with the section quoted in footnote (b), the Colonial courts, upon an order and request of the English court seeking the aid of the Colonial courts, recognised the appointment by the English court of a receiver and manager of a firm carrying on business in London and the Cape Colony.(d) The Supreme Court has even gone farther, and cancelled its order for sequestration and the appointment of trustees to an estate of a firm domiciled in England and the Cape Colony, the estate having been previously sequestrated in England, and a receiver there appointed. The case referred to is that of the *Trustee of Howse, Sons, & Co.*

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(b) *Vide* § 74 of the English Bankruptcy Act of 1869. This section provides "that British courts and their officers shall severally act *in aid of and be auxiliary to each other in all matters of bankruptcy*, and an order of the court *seeking aid*, together with a *request* to another of the said courts, shall be deemed sufficient to enable the latter court to exercise, in regard to the matters directed by such order, the like jurisdiction which the court which made the request, as well as the court to which the request was made, could exercise in regard to similar matters within their respective jurisdiction."

(c) Van Zijl's Jud. Practice, "*Commissions.*"

(d) Ross, Priest, & Page *v.* Saber Brothers, G. 2, 1. *In re* Estate of Howse & Co., E. D. C. 3, 367.

v. *Trustees of Howse, Sons, & Co.*,—*Jocelyne v. Shearer & Hine.*(*e*) The firm of Howse, Sons, & Co., domiciled in London and the Cape Colony, presented a petition for liquidation in London, and a receiver was appointed. Subsequently the firm surrendered in the Cape Colony, the estate consisting of movables, and the respondents were duly appointed trustees of the estate in the Colony. After this the English court appointed a trustee in London, and an order was made requesting the aid of the Colonial courts. Thereupon the Colonial court ordered the appointment of the respondents and all subsequent proceedings to be set aside, whilst the appointment of the English trustee was recognised.

A similar practice obtains in the Transvaal(*f*) and the Orange Free State(*g*)

The same aid will be extended upon request by one South African court to another that is accorded to courts outside South Africa, but the proceedings must be regular and formal; for if one court were to assume jurisdiction in matters of insolvency, when in point of fact no such jurisdiction existed, the court whose aid is sought will not recognise the proceedings. Thus, where a person domiciled in the Cape Colony gave a general power of attorney to an agent in Griqualand West, and the High Court there, subsequent to a judgment obtained against the principal on the power of attorney, sequestrated the principal's estate and appointed a trustee, and the Supreme Court in the Cape Colony afterwards also sequestrated the estate of the principal and appointed a trustee, the Supreme Court refused to set aside its appointment in favour of the Griqualand West trustee, upon his request, on the ground that the High Court of Griqualand West had no jurisdiction at the time the first order for sequestration was granted.(*h*)

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(*e*) J. 3, 14.

(*f*) *Re Liquidation of the Cape of Good Hope Bank* (1890).

(*g*) Arg. ex judgment *Craven v. Reinach*, *supra*.

(*h*) *Richards v. Doveton's Trustees*, J. 3, 123.

## OPINION No. 10.

HOLL. CONS. III. B. 340. ?

[GROTIUS II. 1. 29.]

The rights of His Highness the Admiral of the Sea over conquered ships—Interpretation of laws and legal phrases.

1. VERBA generalia, generaliter sunt interpretanda.  
2. Appellatione navis, omnes naves, atque etiam rates et scaphæ continentur.

3. Whenever one adjective succeeds several different substantives, it qualifies them all, unless such cannot be done conformably with good reasoning.

4. Verbum in dubio debet intelligi secundum vim suam maxime propriam.

5. Sicut relativorum ita et adjectivorum proprium est, ut quam maxime restringant præcedentia.

6. Qualitas rei, quæ potest congruere uniformiter diversis rebus, in eadem oratione, positis, per vim copulæ omnibus adaptatur.

7. What ships are classed among merchant vessels. Cannon, ammunition, *et cetera*, sunt in eodem genere, quatenus sunt instrumenti belli.

8. Sequentia ex collatione minuunt significationem sequentem, et No. 14.

9. Restrictiones omnes sunt restringendæ et non ampliandæ.

10. Adjectivum non extenditur ad alia, quando hoc ipsum, ut non extendatur, continet favorem; et quando ad omnia.

11. The post of Admiral is one of the most important and honourable offices of the Government.

12. Beneficia Principum lætissime sunt interpretanda, et latius ultimis voluntatibus, præsertim ubi princeps aliquid largitur de suo.

13. Sicut beneficia principum latissime sunt interpretanda, ita strictissimæ interpretanda sunt, quæ ejus dispositionem restringent.

15. Why His Excellency as Admiral gets no share in the ships captured in war. This rule was also practised by the King of Spain.

16. Jurisconsulti Hispani naves bellicas agris comparant, qui jure Romano, nemini communicantur, sed publici fiunt.

17. In dubio nihil præsumi debet mutatum.

Omnes abrogationes sunt odiosæ et stricte accipiendæ.

18. It cannot be presumed that the rights to which an Admiral is entitled under his commission are to be taken away when the desire was to favour him.

I have seen a certain resolution of the States-General of the United Netherlands, passed on the 1st of April 1602, whereby it was ordained, *inter alia*, that His Excellency, as High Admiral of the said Netherlands, should receive a tenth of



all prizes and spoil captured north of the Tropic of Cancer, ships, guns, and ammunition of war excluded.

I have been asked whether His Excellency would be excluded under the said resolution from a tenth share in captured ships which were not fitted out for war.

(1) I am of opinion, that although at first sight the words of the said resolution seem to imply as much, *quia verba generalia generaliter sunt interpretanda*, (2) *et appellatione navis omnes naves atque etiam rates et scaphæ continentur*,<sup>(a)</sup> yet the contrary must be held to be the case, namely, that ships *of war* only, and not all others, were excluded.

(3) The words “ships, guns, and ammunition of war,” *hoc est*, *ad verbum*, *naves, machinæ et ammunitiones bellicæ*, *illud adjectivum bellicæ*, *postremo locum positum, ad omnia, quæ præcedunt, referri debet, juxta regulam, quod quando aut ponuntur diversa substantiva, et postea ponitur unum adjectivum, illud veint ad determinationem omnium substantivorum, quando hoc potest fieri salva ratione recti sermonis*; <sup>(b)</sup> *ubi est textus, et probatur*,<sup>(c)</sup> (4) *a contrario sensu*. Ratio est, quia verbum in dubio debet intelligi secundum vim suam maxime propriam. Proprium autem est sicut relativorum ita et adjectivorum omnium (nam et his inest

(a) D. 14, 1, 1, 6. D. 43, 12, 1, 14. D. 21, 2, 44.

(b) Ita tradit Bart. in D. 4, 2, 13.

(c) D. 34, 2, 8.

vis relativa) ut quam maxime restringant præcedentia. Ideo non tantum ad proximum referri debent, sed ad omnia, quæ in eadem oratione sunt, dummodo aliud nihil obstat.(d) (5) The words "of war" are much more significant when thus interpreted, for when otherwise merely read in connection with "ammunition," they appear to be of no effect and superfluous; multæ enim sunt naves, quæ in bello usui non sunt, ut piscatoriæ et actuariæ. et quæ voluptatis causa parantur.(e)

(6) Nec alienum est quod dicimus qualitatem rei, quæ potest congruere uniformiter diversis rebus, in eadem oratione positis, per vim copulæ, omnibus aptari.(f) These words can be aptly applied to ships of war, which, in the common acceptation of the term, are ships fitted out against an enemy, together with the armament and ammunition destined for offensive warfare, as opposed to others, generally called "merchant vessels." (7) The armament, &c., omnia sunt in eodem genere, quatenus sunt instrumenta belli. (8) Altera huc etiam pertinet regula, quæ dictat, quod sequentia ex collatione minuunt significationem præcedentem. With reference thereto, such ships must be taken to have been meant as were of the same nature as the armament and ammunition mentioned later. All this ought to be specially applicable to the present case, quia versamur in oratione restringente, ut patet per verbum

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(d) Textus est apertus in D. 32, i. 100, 1.

(e) Textus est D. 49, 15, 2, ubi similiter in jure prædæ ea distinguuntur quæ in bello usum habent, atque non habent.

(f) Bart. in l. Seizæ de fund. instr.

(“excluded”—“uytgesondert”). (9) Restrictiones autem omnes sunt restringendæ, non ampliandæ, quod hic foret, si alteram interpretationem sequeremur, (g) notat similem vocem stricte intelligi, ubi agitur de legato restringendo: amplè, ubi de ampliando, et magis in terminis *ad Digest*, (h) (10) tradit adjectivum non extendi ad alia, quando hoc ipsum ut non extendatur, continet favorem, scilicet benigniorem præstationem legati. Quod si deficeret, debere referri ad omnia.

(11) In this matter the above should be particularly observed. For here the States-General, both in consideration of the post of Admiral, which is one of the most important and honourable offices of the Government, and also to honour and reward His Excellency for his special merits and reputation, gave him a share in the prizes as specified in the resolution above-mentioned. (12) Nihil autem tam certum est, quam beneficia Principum latissime interpretanda, et quidem latius quam ultimas voluntates (de quibus loquuntur textus supra allegati) præsertim ubi Princeps aliquid largitur de suo, ut hic de præda, quæ primario ad solos ordines pertinet, deinde ad eos, quibus illi eam concedunt. (i) Maxime vero ubi tale beneficium merita respicit ejus, in quem confertur. (k) *Jason* dicit, sicut ipsa beneficia latissime interpretanda sunt, ita omnia illa strictissime interpretanda esse, quæ dispositionem ejus restringerent.

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(g) Ita Bart. ad l. quibus de leg. 3.

(h) Ad D. 34, 2, 8.

(i) C. dicat aliquis 24, quæst. 5. Digest 48, 13, 13.

(k) Ut late Dd. ad Digest 1, 4, 3, ad quam *Jason*, num. 32.

Et sic naves hic intelligi debent duntaxat bellicæ, etiam juxta regulam, quod sequentia ex collatione minuunt significationem præcedentium ut apparet infra, (l) ne justa liberalitas in arctum redigatur.

15. All this is further borne out by the reasons which prompted the States-General to make the said allowance, namely, that since battle-ships and other instruments of war could immediately be re-employed against the enemy, and must on that account not be sold, His Excellency could not share therein. This is quite clear, for the same rule is also followed by our enemies. (16) Nam constitutionibus Regni Hispaniæ in cæteris navibus maris præfectus certam partem prædæ habet, sed naves bellicæ soli regi acquiruntur, ut expressum est in constitutionibus Regni; (m) ita ut jurisconsulti Hispani naves bellicas agris comparant, qui ex jure Romanorum nemini communicantur, sed publici fiunt. (n) It is evident that the reasons afore-mentioned do not apply to all ships, but only to ships of war. The foregoing must also be taken to apply, if by the said resolution some new honour or remuneration was conferred on His Excellency. There is less room for doubt since it is alleged that His Excellency and other Admirals before him always received the tenth part afore-mentioned, and if the States-General had wished to alter this, they would have done so in clear and express terms: (17) quia

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(l) Per text in l. nam quod, in fin. de poen. legat l. cum quidam de sup. legata l. si cum fundum de V. S.

(m) Lib. 19, tit. 20, part. 12.

(n) Digest, 49, 15, 20, 1. Ita tradit Balth. Ayala Medicus Regii exercetus lib. i. de jure et offic. bellicis, num. 3.

in dubio nihil præsumi debet mutatum, cum omnes abrogationes sint odiosæ et strictè accipiendæ.(o)

18. Furthermore it cannot be presumed that the States-General, who allege in their resolution that they were desirous of favouring His Excellency, should wish to take away a right to which he was entitled by virtue of his commission, as stated in the commencement. This is worthy of especial notice.\*

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The rules laid down by the courts from time to time for their guidance in the interpretation of Statutes and the Common Law have been collected and published by Maxwell, whose "Interpretation of Statutes" has become an authority of great weight. This work is so exhaustive, that it will not be necessary to go over the subject here by way of annotation to this Opinion.

In courts where the Roman-Dutch law obtains, the following authorities on this point may prove valuable:—

Digest, 1, 3.

Code, 1, 14.

Digest, 44, 7.

Paul Voet, Tract. de Statutis.

J. Voet, Comm. ad Pandectas, I. 4, Part 2, and I. 3, especially 1, 3, 16–22.

Ord. Zeeland, cap. ii. art. 22.

Loenius, Decis. (Boel.), 99.

Loenius, Decis. 55.

Bynkershoek, Quæst. Jur. Priv., lib. 2, cap. 1.

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(o) Dd. ad C. 6, 56.

\* I have found it very difficult to assign to this Opinion its proper place with reference to the *Introduction of Grotius*. The main object of the opinion is of little importance, but since it contains certain rules as to the interpretation of words and laws which were approved of by Grotius, it was thought advisable to insert the Opinion *in extenso*.—[ED.]

Van der Keessel, *Thes. Sel.*, 6–25.

Pothier, *Pand. Inst. ad tit. ff. de leg.*, art. 4.

Boehmer, *De Interpretationis Grammaticæ fati et usu vario in Jure Romano*, in *exerc. ad ff. tom. 1, exerc. 3, p. 22 et seq.*

Eckhard, *Hermeneutica Juris cum Not. Walchii* (1799).

Van der Linden, *Inst. of Holland*, p. 4–6.

## OPINION No. 11.

HOLL. CONS. III. B. 187.

[GROTIUS II. 3, 2.\*]

Patent right—When transferable—Contravention.

1. A PATENT granted in respect, not of a certain person, but of an invention, can be transferred to another.

2. The officer of the place must stop all contraventions by removing the instruments used.

I have seen two letters-patent granted by the States-General to Klaas and Frans Dirks for a certain invention in sawmills fully specified therein, the one bearing date 1st August 1630, and the other 16th March 1632.

I have also seen a certain notarial deed whereby Klaas Dirks, both for himself and as the representative of Frans, sold, ceded, and transferred his right to the said patent to the Timber Merchants, a body constituting a wood sawmill company formed within the jurisdiction of Amsterdam, together with a deed approving of the said transfer, signed by Frans Dirks.

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\* In the *Introduction of Grotius* no reference is made to this subject.

(1) In reply to the question asked, I am of opinion that the transfer of the rights acquired under the afore-mentioned patent to third parties, who are to continue the work, is valid and legal, since the patent was not granted as a personal matter, but in respect of the invention. The afore-mentioned Timber Merchants, vested with the said right, can, after they have duly warned those who have infringed upon the patent, apply to the officer of the place should they still persist in such infringement. (2) This officer can immediately stop such contravention by removal of the instruments specified in the patent, or by other adequate means in protection of the said patent, and under the general instructions given to all officers. Moreover, the officer or the Timber Merchants can institute an action against those who have infringed the right, and sue for the confiscation of the spurious work and for the penalties mentioned under the said patent.

*April 6, 1632.*

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#### TRADE-MARKS.\*

With a rapid growth of trade comes keener competition, and as a necessary consequence, a smaller percentage of profits. The ordinary tradesman finds no great fault with this altered state of affairs. He does a larger business, and finds himself fully compensated. It is not, however, every one that can be brought to look upon this change with

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\* This article first appeared in C. L. J., vol. ix. p. 18, but has been partly rewritten for the present work.



satisfaction. The more unscrupulous will submit with an ill-grace, and will avail themselves of any opportunity to keep up a record of large returns. One way out of the difficulty is found in the commercial "ring," but this involves capital, and is seldom practicable. Another device is therefore resorted to, and is by no means uncommon. Articles of commerce are passed off on the unwitting public as the manufacture of well-known firms, when in reality they are of far inferior value, and the manufacture of some obscure and unknown tradesman. The growth of trade affords great facilities for the practice of this kind of deception, and such counterfeits are more numerous than is thought to be the case. There is a prevalent idea among the public that a trade-mark or trade-name, as such, has no existence in a country where no legislation has taken place for the special protection of trade-marks and devices in connection with diverse trades, or where such legislation has been passed, unless these marks or devices have gone through the formal process of registration. The idea is, of course, erroneous. Infringement of the rights of trade-marks and devices occur almost daily, and, as premised above, commercial prosperity is an extra inducement for these malpractices. It thus becomes necessary to inquire into the remedies and protection which the Common Law affords to the general public and to the tradesman whose articles of commerce are being simulated in the market.

For the purposes of this treatise, it will be sufficient to consider the nature of trade-marks, names, and devices; the rights in connection with the trade symbols under the Common Law and Equity, and the remedies afforded by these branches of the law; the right to assign or cede a trade-mark; and lastly, the right of a foreigner to protection under the Common Law of the country where his trade-mark rights are invaded.

There are various ways in which title or rights in certain things, personal or real, can be obtained. Firstly, by occupation, so amply dealt with by Grotius, and so clearly and

well expounded by Sir Henry Maine; then follow title by discovery, title by assignment, title by contract, title by will, and *title by invention*, and it is this last title or right that at present claims our attention. Just as things real include both the land itself, and also such incorporeal rights as spring from them or are connected with them, so things personal comprise both those tangible movable subjects of property and also the incorporeal rights or interests which may be incident to them. Of such kinds (*incorporeal chattels*) are patent right, copyright, trade-mark, or trade-name and design. We shall occupy ourselves more particularly with the last three—trade-mark, name, and design. The industrial revolution effected by steam power from the time of that great inventor, James Watt, aided more recently by the inventive genius of Franklin and Edison, whose researches in electricity have led to such marvellous results, has created large markets all over the world by an enormous supply of vendible commodities manufactured in larger quantities, in shorter time, and at lower prices than before. The impetus thus given to trade greatly increased the number of manufactories and the varieties of articles manufactured. It therefore followed that the competition in the world's markets became keener, and tradesmen were compelled to use their best endeavours to supply the public with reliable commodities. Once having established a market reputation, the producer took good care to inform purchasers that such and such articles came from his manufactory. The easiest way in which this could be done was by labelling or printing on the articles for sale the name of the manufacturer or of the manufactory, or some special name by which the goods are known in the market, or some distinctive device. In this way originated the system of trade-marks and devices with which we are now so well acquainted, since they are used in every trade in every civilised country.

What shall be considered as a trade-mark in the Colony is clearly set forth in the 9th Article of the Trade Marks

Registration Act, 1877, where it says, "A trade-mark consists of one or more of the following essential particulars:—

"A name of an individual or firm, printed, impressed, or woven in some particular and distinctive manner.

"A written signature, or a copy of a signature of an individual or firm.

"A distinctive device, mark, label, or ticket.

"And there may be added to any one or more of the said particulars any letters, words, or figures, or combinations of letters, words, or figures."

Now the manufacturer has no exclusive right or ownership in the symbols which constitute a trade-mark or design apart from their application to a vendible commodity; yet, for the invasion of the exclusive right *to apply* such symbols, the law provided a remedy, and this right was recognised in Equity and by the Common Law as founded on a quasi-right of property similar to copyright.<sup>(a)</sup> When once a manufacturer has used a certain symbol in his trade to indicate where, by whom, and at what manufactory the article to which it is affixed was made, his right *in its application* becomes exclusive, and will be protected by law.<sup>(b)</sup>

We see thus that, by the Common Law, the right of a manufacturer who is wont to distinguish his articles by some distinct mark was clearly recognised. His articles acquired a certain celebrity in the market, and he chose to inform the public that if they bought certain articles stamped or marked in a distinctive manner, they would be buying his manufactures. Once having used this original distinctive mark, the law gives him a quasi-right of property therein, and no one will be allowed to invade this right.

It must not be thought, however, that this right is only created by Statute, because nearly every civilised country

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(a) Roscoe, N. P. 764.

(b) *Leather Cloth Co. Ltd. v. American Leather Cloth Co. Ltd.*, 11 Jur. (N.S.), 513.

has its legislation for the regulation of trade-marks and designs. As already stated, it is a right recognised by the Common Law and Equity, and might conveniently be considered as an evolution of the right derived from occupation. All that the Statute law did was to lay down the method of applying trade symbols to marketable articles, to grant greater protection to the manufacturer and the public, and to inaugurate an accurate register of all recognised trade-marks. In England, the Patents, Designs, and Trade Marks Act of 1883 embodies all the English legislation on the subject. The registration of trade-marks in the Cape Colony is regulated by the Trade Marks Registration Act of 1877. It provides for the keeping of a complete register of trade-marks by the Registrar of Deeds, and further lays down that registration shall be *prima facie* evidence of the right of the person in whose name the trade-mark is registered to the exclusive right of such trade-mark, and after five years it shall be *conclusive* proof of his right to the exclusive use thereof. Certain trade-marks, however, are not to be registered without special leave of the court, viz., trade-marks similar to the registered trade-marks for the same class of goods; trade-marks so nearly resembling registered trade-marks for the same goods by which the public are likely to be deceived, any words, as part of or in combination with a trade-mark, which might deceive, and therefore would not be protected in a court of Equity in England, and any scandalous designs.<sup>(c)</sup> This special legislation is only the outcome of a right already recognised under the Common Law. Thus, before the passing of the Acts in England establishing a register of trade-marks, it was held that a person who was in the habit of using a particular name may prevent other persons from fraudulently taking advantage of the reputation which his goods have acquired by using his mark in order to pass them off as his, to his injury.<sup>(d)</sup> In the case of

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(c) The Statutory law in the South African Republic with regard to this subject is Law No. 6 of 1892.

(d) *Collins Co. v. Brown*, 3 Kay and J. 423.

*Seixo v. Provetzendi*,<sup>(e)</sup> Lord Cranworth, L.C., said, "When the manufacturer has been in the habit of stamping his goods which he has manufactured with a particular stamp, mark, or brand, so that thereby people purchasing goods of that description know them to be his manufacture, no other manufacturer has the right to adopt the same mark. The law considers this to be a wrong towards the person whose right is then assumed." The decision of the court in the case of the *Singer Manufacturing Co. v. Wilson*,<sup>(f)</sup> is to the same effect, where it was laid down that when the first producer of an article has identified with it a particular name, whether his own or another, such name becomes a trade-mark, and cannot be adopted or employed by another person. Again, in the case of *De Bouley v. De Bouley* (2 L. R. P. C. 441), Lord Chelmsford in his judgment remarked, "The right to the exclusive use of a name in connection with a trade or business is familiar to our law, and any person using that name, after a relative right of this description has been acquired by another, is considered to have been guilty of a fraud, or at least of an invasion of another's right, and renders himself liable to an action, or to be restrained from the use of the name by injunction." On this point we also find an important decision in the American courts.<sup>(g)</sup> It was held there that a coach proprietor, running carriages between a railway station and a town, has no right falsely to hold himself out as being in the employment of a particular hotel-keeper, by fixing to his carriage the name of the hotel, this being done to the detriment of some other party lawfully entitled to the privilege in question. It was a fraud on the plaintiff and a violation of his rights, for which an action would lie without *proof of actual or specific damage*.

Nor are we without South African precedents. In the case of *Mills v. Salmond*, decided in the Supreme Court in

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(e) 1 L. R. C. Ap. 196.

(f) 3 Ap. Cas. 376; 47 L. J. (Ch.), 481.

(g) *Marsh v. Billings*, 7 Cush. (U.S.), R. 322.

1863 (4 Searle, 230), it was held that a person who sells his own flour as that of another, in bags marked with the brand of such other dealer, is liable to an action for damages. This case in part served as an authority for the decision of the court in the important case of *Combrinck & Co. v. De Kock*, decided in the Supreme Court in January 1888 (5 Juta, 405). The facts in this case were briefly as follows:—Gous, a trader in cattle, came to Piquetburg Road with the intention of selling some cattle he had. On his way he met an agent of Combrinck & Co., a large and well-known firm of butchers of Cape Town, and Gous promised him that he would not sell the cattle until Combrinck's buyer had had an opportunity of purchasing them. Combrinck & Co. were informed of this, and another cattle-dealer (De Kock) was also told of this promise of refusal to Combrinck. He intercepted Gous on the road, and represented himself as Combrinck's agent. Gous believed De Kock, and thinking that Combrinck & Co. always paid the highest market price, sold the oxen. Thereupon Combrinck & Co. sued De Kock for damages, and prayed for an interdict restraining De Kock from representing himself as a member or agent of the firm. The court gave judgment for £1 damages and costs, but since there was no reason to believe that De Kock would repeat the offence, the interdict was not granted. Here there was no real question of a trade-mark or of a trade name affixed to a vendible commodity. As his Lordship, Sir J. H. De Villers, C.J., said in delivering his judgment, "The simple question is whether a person who, by falsely and fraudulently representing himself to be the agent of a particular tradesman, induces a third party to sell to him articles which have been offered for sale to such tradesman (who is known to be an extensive purchaser of such articles), is liable to an action at the suit of such tradesman? . . . The liability of the seller is based upon the ground that it is a fraud on his part to attract to himself that course of trade or custom which, but for the false representation, would have flowed in the ordinary course to the tradesman or manufacturer who has established

a reputation as a vendor of certain articles. But the reputation of being a liberal purchaser of cattle may be as valuable to a butcher as that of being a vendor of particular articles to a tradesman, and the damage done to a butcher requiring cattle for slaughter by the fraudulent representation of another that he is a purchaser on behalf of such butcher, may be as great as the damage done to a manufacturer *by the infringement of his trade name*. Fair and honest competition, however active, is open to every one; but no one has the right to take an undue and improper advantage by means of falsehoods, the effect of which is to benefit himself at the expense of another."

Lastly comes the case of *Rose & Co. v. Miller*, decided in the Transvaal High Court in August 1891. The plaintiffs in this case prayed for an interdict restraining defendant from selling a certain lime-juice cordial in bottles of the same characteristic shape as that of the plaintiffs, and bearing a label similar to that used by the plaintiffs. Rose & Co. are the well-known manufacturers of Rose & Co.'s lime-juice cordial. The distinctive greenish labels on their peculiar bottles need no description. It appeared that the defendant Miller of Johannesburg, S.A.R., made lime-juice, and sold it in bottles of Rose & Co., and in others similar in shape, and labelled these with an almost exact imitation of plaintiffs' label. On it appear, however, the words "Rosen & Co.'s" instead of "Rose & Co.'s," and a small representation of a windmill took the place of the lime twig in the original. It was contended for the defence that no Roman-Dutch authorities treated of the subject, that it was therefore not a Common Law right in South Africa, and that, in the absence of special legislation, Rose & Co.'s trade-mark could not be recognised in the Transvaal. The court, however, held that such a right did exist, that Miller's representation was calculated to mislead the public, and under these circumstances granted the interdict prayed for. Whatever contentions there may have been in the past, they are now done away with by the above South African decisions,

which so clearly lay down the principle of the right to the use of a trade-mark. From the principles established by these decisions, the elements of a right of property in a trade-mark may be represented as being the fact that the article is in the market as a vendible commodity with a stamp or trade-mark at the time that it is imitated, and that the mark must have been applied properly—that is to say, that it had not been copied from any other person's mark.(*h*)

Next in order, we must consider the REMEDIES that the law affords against an infringement of such trade rights as are above described. There is no exclusive ownership to the symbols which constitute a trade-mark apart from the use or application of them, yet the exclusive right to use such mark in connection with a vendible commodity is rightly called *property*, and the jurisdiction of a court of equity to *restrain* the infringement of a trade-mark is founded upon the invasion of such property, and not upon the fraud committed upon the public, and also upon the fact that an injunction is the only mode by which the property can be protected.(*i*) Such an injunction may be defined as a writ-remedial issuing by the order of a court of Equity or of Common Law in those cases where the plaintiff is entitled to equitable relief, by restraining the commission or continuance of some act of the defendant.

A further remedy is suggested by Grotius in the Opinion under discussion (No. 11, Holl. Cons. iii. (b) 187), namely, that upon application to the legal authorities of the place where the infringement is committed, such authorities can destroy the counterfeits and implements used in their execution.

A copyright will be protected in the same way as a trade-mark or patent.(*j*)

(*h*) *M'Andrew v. Basset*, 10 Jur. (N.S.), 492-500.

(*i*) *Joyce on Injunctions*, 311.

(*j*) *Dickens v. Eastern Province Herald*, S. 4, 33 (1861). In this case, Charles Dickens, the famous novelist, then residing at Gadshill House, Rochester, obtained an interdict against the editor of the *Eastern Province*



As was remarked by De Villiers, C.J., in *Combrinck v. De Kock*, "The Roman-Dutch authorities throw very little light upon this subject, nor is it to be expected that they should. It is, however, perfectly clear that by an infringement or misuse of a trade-mark or trade-name by another a wrong is committed towards the owner and the public, and courts of justice will always under such circumstances afford equitable relief." This is recognised by Grotius in the second portion of the present Opinion, where he states that such relief will be afforded by the officer of the place.

The question of patents and trade-marks is nowhere fully discussed by the Roman-Dutch law authorities. Slight references to the subject, however, appear in Van der Berg's *Nederlandsche Advijs-boek*, I. Cons. 68, p. 161, and in Zurck's *Codex Batavus*, *sub voce* "Wapenen," § 4, note 1; also *sub voce* "Falsiteit," § 10; "Garen," § 1; "Messen," § 5; "Papieren," § 2; "Thee," § 1; and in Carpzovius, *Praxis Rerum Crim.*, 2, 93, 89, 90; Voet, 48, 10, 30. As regards patents, see Koren's *Observatien op Oordeelen van den Hoogen Raad*, No. 27.

The right of a manufacturer to obtain redress from the court rests upon his quasi-right of property, and it is not therefore necessary to prove fraud on the part of the defendant; (*k*) although, of course, if fraud be proved, the plaintiff's claim to protection will be strengthened, and he will, moreover, have an action for damages sustained, and the court will compel the defendant to repay any profits made by him out of his fraudulent transactions. (*l*) So, in the same way, ignorance on the part of the defendant of the existence of a trade-mark will not bar the plaintiff's right to obtain an interdict from the court. (*m*) It is,

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*Herald*, a newspaper published in the Cape Colony, restraining him from printing in the said newspaper a work of fiction entitled *Great Expectations*, then being published in a weekly periodical, *All the Year Round*, and the copyright of which belonged to the plaintiff.

(*k*) *Hall v. Barrows*, 38 L. J. (Ch.), 204.

(*l*) *Gous v. De Kock*, 5 Juta, 405.

(*m*) *Edelsten v. Edelsten*, 9 Jur. (N.S.), 479.

however, not necessary that a specific trade-mark should be infringed to give a right to an interdict. If the court is satisfied that there was, under the circumstances of the case, a fraudulent intention on the part of the defendant to palm off his articles as those of the plaintiff, an order will be granted restraining the defendant from persisting in the misrepresentation; but then it is required that the imitation should be calculated to deceive. This was the finding of the court in the Transvaal case of *Rose & Co. v. Miller*, above referred to. In the same way, the court will grant an injunction where not the whole, but only a part of a trade-mark had been imitated; and where it is of opinion that such imitation is likely to deceive, it will not even require evidence of deception.<sup>(n)</sup> In such cases it is for the court to decide whether the public would probably be deceived by the alleged spurious imitation, and not whether experts and manufacturers could distinguish between the articles, or would have noticed the difference between the original and the imitation.<sup>(o)</sup> No general rule can be laid down as to what would or would not amount to an infringement of a patent or trade-mark, but every case must be decided on its own merits.<sup>(p)</sup> But the court will not restrain the use of a label on the ground of its general resemblance to the trade-mark of another manufacturer, if it is different in the points a customer would look at in order to see whose manufacture he is purchasing.<sup>(q)</sup> The case of *Stephen v. Peel* <sup>(r)</sup> may be taken as an instance of what would be considered a colourable imitation. A trader produced and sold an ink which he designated "Stephen's Blue Black," and it was shown to the public with a label in white capital letters of large type, and the defendant sold an ink in bottles similar in size, designated as "Stephen's Blue Black," also in white capital

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<sup>(n)</sup> *Braham v. Bustard*, 11 W. R. 1061.

<sup>(o)</sup> *Shrimpton v. Laith*, 18 Beav. 164; per Kotze, C.J., in *Rose & Co.*

<sup>(p)</sup> *Reiners Von Laer & Co. v. Fehr*, 9 J. (April and June 1892).

<sup>(q)</sup> *Blackwell v. Crabb*, 36 L. J. (Ch.), 504.

<sup>(r)</sup> 16 L. T. (N.S.), 145.

letters of large type. This was held by Sir W. P. Wood to be a colourable imitation.

Such false representations are not confined to trade symbols. They are extended to trade-names, even where the articles are not branded with them. It is only an extension of the principle, and is founded on the same grounds as those upon which the rights to trade-marks are based. This was definitely decided in the case of *Combrinck v. De Kock* (5 Juta, 405), to the facts whereof reference has already been made.

We have seen that the right in a trade-mark is an incorporeal chattel. The public know the article in the market by the device attached. A question thus arises whether the manufacturer can *assign or cede* this right, like other incorporeal matters, to another without notice to the public. This question cannot be answered without reservation. It was laid down by Lord Cranworth in the case of the *Leather Cloth Co. Ltd. v. American Leather Cloth Co. Ltd.* that, "as an accessory of property, a trade-mark may be sold and transferred upon the sale and transfer of the manufactory of the goods on which the trade-mark has been used to be fixed, and may be lawfully used by the purchaser." "But if the goods derive their increased value from the personal skill or ability of the adopter of the trade-mark, he cannot give any other person the right to affix his name or mark upon their goods, for the effect thereof would give them a right to practise fraud upon the public," *per* Lord Kingsdown, *ibid.* It is thus a question of fact, Did the public rely on the skill and ability of the original manufacturer? This will be a matter for the court to decide. How far by the general law a trade-mark is assignable depends greatly on the nature of the mark and the mode in which it has been used.(s)

Grotius says that a patent granted in respect of an invention, and not of a certain person, can be transferred

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(s) *Bury v. Bedford*, 33 L. J. (Ch.), 465. Cf. Opinion No. 11, § 1.

and ceded to another.(*t*) In the case of a partnership, each partner has a right to use the firm's trade-mark on its dissolution.(*u*)

There is one more point of interest to be noticed. The Common Law recognises a right in a trade-mark, sets forth how that trade-mark shall be applied, and affords protection against an invasion of the right. This certainly holds with regard to manufacturers in the country where the plaintiff and defendant reside, where the article is manufactured and the invasion takes place. Will the law, however, recognise the rights of a foreign manufacturer, and at his suit restrain an infringement of his rights of trade-mark? This question arose in the case of *Rose & Co. v. Miller*. There was no trade-mark register in the Transvaal. *Rose & Co.* were English manufacturers, and the imitation of their labels took place at Johannesburg. The court held that the action was rightly brought, and that the plaintiffs were entitled to protection in the Transvaal, that an infringement of their rights had taken place, and on these grounds granted an interdict against the defendant. So too, in the case of *Taylor v. Carpenter*,(*v*) (U.S.), a recent case quoted by Phillimore in his *International Law*, an *alien ami* manufactured in his own country goods which he distinguished by a peculiar trade-mark. The defendant imitated his trade-mark, and sold in England and elsewhere his own goods under the copied design. The court held that the plaintiff had a remedy by suit for an injunction and account of profits.(*w*) In a case of a similar nature, it was laid down that an alien can in the courts of England sue to restrain the fraudulent appropriation of his trade-mark, although the goods on which such mark is affixed are not usually sold by him there.(*x*) Alluding to this case Phillimore says, "The

(*t*) Opinion 11, Holl. Cons. iii. (b), 187.

(*u*) *Condy v. Mitchell*, 37 L. J. 766.

(*v*) 11 Paige, 292 (Amer.).

(*w*) *Collins Co. v. Brown*, 3 Kay and J. 423.

(*x*) *Collins Co. v. Reeves* (per V. C. Stuart), Ir. L. J. (Ch.), 56.

doctrine seems to be that a person on whom an injury is fraudulently committed may have a remedy in the court of any country where the fraud occurs, and even although he be at the time an alien enemy.”(y)

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(y) International Law, p. 445.

## OPINION No. 12.

HOLL. CONS. III. B. 178.

[GROTIUS II. IV. 3, 5, 17-24.]

*Res nullius*—Rights of fishing—Reciprocity—*Occupatio*.

1. QUOD nullius est, id naturali ratione occupanti conceditur.

2. According to the Civil Law, any one can fish in the open sea; and further, the use of the beach is free to any one in so far as he requires the same for fishing purposes.

3. To what extent the English, Danes, and other nations allow friendly countries to fish on their coast, and what right other nations have to enforce the same rule.

4. Nemo aspernabitur idem jus sibi dici, quod ipse aliis dixit, vel dici effecit.

5. The inhabitants of a country, being in possession for ten years for the purpose of fishing along the coast, may prevent strangers from fishing there.

I have been asked whether the inhabitants of this country may prevent strangers from fishing in the waters of the Island of Spitzbergen, who go thither for that purpose with passes from their kings

or princes; and how far the said inhabitants may exercise their rights over both land and sea. It appears that the Island of Spitzbergen, in the North Sea, was first discovered by the inhabitants of this country, who took possession thereof; that they first joined together in small parties, and afterwards formed a company to carry on the fisheries in the waters of Spitzbergen, which they did for many years. Subsequently they obtained a special grant from the States-General.

(1) I am of opinion that the afore-mentioned Island of Spitzbergen, having been first discovered and taken possession of in the name of the United Netherlands, necessarily falls under the ownership, sovereignty, and full jurisdiction thereof—assuming that the island was previously uninhabited and unappropriated, *quod enim nullius est, id ratione naturali occupanti conceditur.*(*a*) *Sunt, inquit Cicero, privata nulla natura, sed aut venti occupatione, ut qui quondam in vacua venerunt aut victoria, ut qui bello potiti sunt. Et hinc jus summ. imper. Venetis asserunt doctores, quod insulas vacantes primi occupaverint.* (2) With reference to the fisheries, although, according to the Civil Law, these were free to anybody in the open sea, together with the use of the beach in so far as he required it for that purpose,(*b*) (3) nevertheless the English, Danes, and several other nations have adopted a law whereby no stranger is allowed to fish on their coast within

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(*a*) L. *quod enim*. D. de acq. rer. dom.

(*b*) D. 1, 8, 4; Inst. 2, 1, 1.

cannon-range, and others still farther. These nations may therefore be compelled to abide by this law by the inhabitants of this country. Summam enim non habet æquitatem et sine cujusquam indignatione justam, (4) quis enim aspernabitur idem jus sibi dici quod ipse aliis dixit vel dici effecit.(c)

(5) The inhabitants of this country may also prevent all strangers from fishing in the bays and inlets without reference to the customs of other nations, since they have used the said fisheries for a period of more than ten consecutive years. This is in accordance with the opinion of nearly all juriconsults.(d)

AMSTERDAM,

March 27, 1632.

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The open sea is, strictly speaking, *nullius territorium*. By nature it is not capable of being reduced into the possession of any particular nation, and there is no natural warrant for any nation to seek to take possession thereof, or to restrict its use by other nations.(e) This doctrine dates back to very early times, and traces of it are found amongst the Athenians. The Rhodian laws of the sea are supposed to be a collection of maritime customs which obtained among the Mediterranean nations of that time; a few fragments are still preserved in the Digest (L. 14, tit. 2). Grotius, *De Jure Belli et Pacis* (ii. cap. 3), quotes various instances and authorities in support of his contentions. In 1609 Grotius wrote his *Mare Liberum* against the pre-

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(c) D. 2, 2, 1.

(d) Ad l. sane D. de injuriis, addita l. si quisquam D. de divers. et temp. præscript.

(e) Bynkershoek, *De Dominio Maris*, p. 134 *et seq.*; Wolfii, *Jus Gentium*, § 1277; Grotius, *De Jure Belli et Pacis*, ii. 3; Klüber, § 132; Vattel, lib. 1, c. 23, § 279.



tensions, more especially of the Spanish and Portuguese nations, for a monopoly over certain portions of the high seas. The English in the seventeenth and eighteenth centuries also claimed a qualified right of ownership or sovereignty over the seas washing the shores of Great Britain. Now, however, the liberty of the sea and of navigation is admitted universally.

Although the liberty of the high seas is now fully established, a national jurisdiction is nevertheless claimed by maritime nations over that part of the sea which adjoins the shore, to a distance of a marine league seawards. The reason for this, according to Vattel, is, that it is of considerable importance to the safety and welfare of states that a general liberty be not allowed to all comers to approach so near to their possessions, especially with ships of war, as to hinder the approach of trading nations and molest their navigation.<sup>(f)</sup> Writers on public law often refer to the open sea (*mare vastum*), within the distance of a maritime league along the coasts of a nation, as its *maritime territory*, or *See-gebiet*. With this term Twiss finds fault, suggesting as a substitute the term "*jurisdictional waters*."<sup>(g)</sup> As an amendment it has this in its favour, that it avoids the confusion of ideas which might arise from the use of the former expression. Treating of the acquisition of property by occupation, Grotius says, "Rivers may be held as by occupation, and it therefore also appears that a portion of the sea may be occupied by him who possesses the land on each side, although it be open at one end, as a bay, or at both, as a strait."<sup>(h)</sup> Applying this principle in detail, we see that nations can claim an exclusive right, depending on the will of the sovereign, over certain portions of water, such as bays, gulfs, straits, inland seas, and rivers. These claims are in many cases either

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<sup>(f)</sup> Vattel, *Droit de Gens*, l. 1, § 288. See also Bynkershoek, l. 2, c. 3, § 13.

<sup>(g)</sup> Twiss, *Law of Nations*, vol. i. p. 250.

<sup>(h)</sup> Grotius, *De Jure Belli et Pacis*, ii. 3, 8.

doubtful or to be rejected,<sup>(i)</sup> or have been greatly modified by treaties.

The rights of all nations to the free use of the high sea having been established, it follows that the right to fish upon the high seas, or on banks and shoal places in them, are open to all. This, however, does not include the right to fish freely in bays and mouths of rivers, which depends upon the will of the sovereign. The right to fish in the open sea does not include the right to cure fish upon the shore. The shore is under the jurisdiction and control of the sovereign of the maritime country, and cannot be used for that purpose without consent. "The liberty of the sea being now admitted," says Woolsey, "there seem to be no reasons of absolute right why a nation should exclude the fishing vessels of another from within a marine league of its coasts. There is a difficulty in ascertaining, especially along a curved shore, how the line between the open and the territorial sea is to run, and it is equally difficult for the fishermen to know where the line runs, or to keep outside of it when it is known. We look for a time when no such lines, and no restriction on the transport of fish by any fisherman to any market, shall exist. And yet the right of excluding foreign fishermen from certain waters is received and practised—for instance, as between France and England—and the same right exists, by decision of the Supreme Court of the United States, in any one of the States, of prohibiting by law the inhabitants of another from fishing within the tide-waters of its territory. The right to prohibit foreign fishermen from catching shell-fish seems to have reasons of its own. They are caught near the shore, within tide-water, and need laws for their protection at certain seasons; they may be cultivated by private persons on their own lauds; they need, in short, a police which is not required for fish in the proper sense of the term." <sup>(k)</sup>

The third paragraph of the above opinion of Grotius is

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(i) Woolsey, *International Law*, § 60.

(k) Woolsey, note (2) ad § 59.

very instructive reading when reference is had to his *De Jure Belli et Pacis*, Book II. chap. iii. §§ 8, 9-15. In § 9 (1 and 2) he briefly refers to this *jus piscandi in mari*, but it is only in the present Opinion that his views are definitely expressed and reasons assigned for the rule which obtained during his time.

The right to use the seashore itself between high and low water-marks belongs to the public,<sup>(l)</sup> and the Government have no right to its exclusive use. The rights of the Government in respect of the seashore are those of custodians on behalf of the public, and any grants by the Government are subject to the condition that they do not materially interfere with the public rights.<sup>(m)</sup>

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(l) Voet, i. 8, 9.

(m) *Anderson & Murison v. The Colonial Government*, 8 J. 296.

## OPINION No. 13.

HOLL. CONS. III. B. 306.

[GROTIUS II. V. 19.]

Diking marsh lands—Rights of the dikers—Treaty of Trefves.

THE rights to which His Excellency is entitled with regard to the diking of the marsh lands of the Heyninge, Schuddebors, Slobbegors, and Appelaar, given out by him for drainage, which said rights he had obtained by confiscation, as opposed to the rights of Count Harman van den Berg, who was reinstated in the Marquisate by the Treaty of Trefves.

I have seen a certain *casus positio* with reference to the diking of the marsh lands of the Heyninge, Schuddebors, Slobbegors, and Appelaar, which belonged to the Marquises of Bergen, and have been asked to what rights His Excellency is entitled in respect of the said diking, since he had given out the marsh lands to be drained, having obtained such rights by confiscation, on the one side, and Count Harman van den Berg, who had been reinstated in the Marquisate by the Treaty of Trefves, on the other.

I am of opinion that, by virtue of the 22nd Article of the Treaty of Trefves, the dikers are entitled to retain the ground drained by them, and that Count

Harman may enjoy during the existence of the Treaty of Trefves the rents, in lieu of the capital amount promised but not paid, together with the ground dues and tithes,\* as included under the word *redevances*. Further, His Excellency is entitled to all annuities imposed upon the Marquisate of Bergen which were given in satisfaction of the rents to be paid in lieu of the capital, with full right to the moneys mentioned in the annuities; provided that the possessors of the Marquisate be freed from all such rents which may become due during the term of the Treaty, or that His Excellency cede the right to such rents to them for the period mentioned. As regards the piece (*cavel*) of land stipulated for by His Excellency, this came to him not as diker, but on account of his issue of the marsh lands aforementioned, and must therefore be returned to Count Harman, on condition that the Count pays His Excellency during the period of his possession the interest on thirty pounds for the survey, should His Excellency be found to have paid that amount. This is both reasonable and equitable, for Count Harman is not entitled to the said *redevances* in a more free and less burdened manner than His Excellency, to whom they originally belonged.

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\* *Grond-chijns*, ground rents or dues. The word *chijns* also appears in Old Dutch as *cheyns*, *cheins*, and *chens*, later *cijns*, *cijns*. Cf. *accijns*, meaning impost or duty, and *cijnzen en tijnzen*. Vide Melis Stoke, Bk. i. v. s. 1138. —[ED.]

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Holl. Cons. vi. (part 2) 54, treats of the draining, &c., of the Moortsche Polders, and the expenses incurred in connection with the dykes. It is of no importance, being entirely of local interest.—[TR.]

## OPINION No. 14.

HOLL. CONS. IV. 22, & III. A. 106.\*

[GROTIUS II. XI. 8.]

Community of property—Place of marriage—Property in another State.

COMMUNITY of property is introduced by the customary law of the place where the marriage was contracted without ante-nuptial contract, even as regards property situate outside the place, and beyond the operation of such custom.

A resident of Holland married a young lady of Friesland at Amsterdam. She had certain property in Friesland, and the marriage was contracted, after the consent of the guardians of the bride had been obtained, without ante-nuptial contract, and it was celebrated in the usual manner.

The question now is, whether the husband can sell the property of his wife and invest the proceeds as he may think fit, and whether the ex-guardians, should they wish to interpose, could interdict him in Amsterdam, and contend that he should be restricted in the disposal at his pleasure of the estate to such property as was situated there?

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\* This opinion occurs twice in the *Hollandsche Consultatien*, in vol iii. (a) 106, and vol. iv. 22. See footnote, p. 17.

I am of opinion that the husband is entitled to act as above, for, according to the customary law of Holland, where the marriage was contracted, community of property ensued, if there be no antenuptial contract, and the husband is entitled to the full and free disposition of such property during marriage.

The fact that different customs may prevail in Friesland does not affect the case, for we must consider the custom of the place where the marriage was contracted. The reason for this law is that the custom as to the marital power, primario disponit de persona et secundario de bonis, sicut in tutela dicimus; (a) and also because this custom is of such a nature as if in this manner it were expressly stipulated, when the marriage was contracted, that also property situate in places where community is not in vogue would nevertheless come under the community *tanquam ex contractu*. In the same way a woman marrying in Holland must be considered to have delegated to her husband the power customary in Holland. This power will be of effect everywhere, without recognising any difference of place, sicut et de testamento dicitur, in quo servata est loci, ubi factum est, consuetudo, porrigi etiam ad bona facta jam loco ubi alia est consuetudo.(b)

AMSTERDAM,

February 26, 1632.

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(a) D. 27, 7, 12.

(b) Pres. Ever., Cons. 185.

The subject here discussed by Grotius is one of very great importance, and has been fully commented upon in a previous Opinion (Opinion No. 9 (Holl. Cons. III. (B.) 196) under "Domicile"—subdivision "Marriage," p. 87 *et seq.*, *supra*).

The reason here assigned by Grotius for the recognition of the custom prevailing at the matrimonial domicile, viz., that the marital power relates chiefly and principally to persons, and only indirectly to property, coincides exactly with the conclusions arrived at by Bell, J., in the case of *Blatchford v. Blatchford's Executors* (E. D. C. 1, pp. 369 and 370, referred to in annotation to Opinion No. 9, p. 89, *supra*). The present opinion is, however, not referred to in the judgment, owing, no doubt, to the fact that the consultations of Grotius in the *Hollandsche Consultatien* cannot be readily consulted, and that the original text presents a somewhat uninviting appearance.

As regards movables, at all events, the law of the domicile of the husband will govern the marriage contract and settlement as to its incidents (*Van der Bijl's Assignees v. Van der Bijl*, 5 J. 170).



## ANTE-NUPTIAL CONTRACTS.

(*PACTA ANTE-NUPTIALIA.*)

AD OPINIONS NOS. 15-18.

AN ante-nuptial contract is an agreement made by two intending spouses regarding the rules by which their future marriage is to be governed, and regulating the disposal of the property acquired by them before marriage, or of that which they may subsequently acquire. *Pacta ante-nuptialia cum latissime pateant, vix aliter definiri posse videntur, nisi ut sint conventiones inter futuros conjuges, aliosve, quorum interest, de legibus sive conditionibus, quibus regi debeat matrimonium.*(c)

The reasons for entering into a contract of this description are twofold. The circumstances of the future spouses may be very unequal, and each, or at all events one of them, may desire to retain his or her property intact and free from community; or the future spouses may desire to be free from liability for each other's debts, or to avoid the loss which may be incurred under a community of property.(d) A third reason, closely connected with the last, is that the husband sometimes wishes to protect his estate against his lawful creditors in case of insolvency. There can be no doubt that ante-nuptial contracts, if not originally expressly entered into for that purpose, do in practice afford a shelter to many an insolvent against the just claims of his creditors. Of course, this is not due to any inherent fault in the contract itself, but must be attributed to the apathy and carelessness of creditors, not sufficiently vigilant to guard their own interests,

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(c) Van der Keessel, Thes. Sel., 228.

(d) Van Leeuwen, Rom. Hol. Recht., iv. 24, 1.

and to the difficulty with which undue preferences, under cover of the ante-nuptial contract, are sometimes detected.

Formerly an ante-nuptial contract could *ab initio* be entered into verbally,(*e*) but now it must be made before a notary and witnesses, and must be registered. An underhand contract cannot be registered, and is therefore of no effect.(*f*) Before the law which compels the registration of ante-nuptial contracts (Act 21, 1875) came into force in the Cape Colony, the Supreme Court there had decided that an ante-nuptial contract, in order to be valid and effectual against third parties, must be in writing,(*g*) and must be notarially executed and signed by two witnesses. (Vide Van der Linden, Institutes, Book i. 3, 3, and Voet, xxiii. 4, 50.)

When registered, a duplicate of the original contract must be filed in the Deeds Registry.(*h*)

Apart from local ordinances, the registration of an ante-nuptial contract is essential to its validity, and such a contract had, according to the weight of Roman-Dutch authorities, to be a public instrument, and had to be registered.(*i*)

If the ante-nuptial contract does not fully comply with the requirements of law, the courts will always grant equitable relief, if such non-compliance is to be ascribed to ignorance, mistake, or the force of circumstances.(*k*) Thus when, through ignorance, a contract has been executed underhand, the court will, upon petition, order a notarial deed of like import to be executed.(*l*)

When the notary to whom the execution and registration

(*e*) Grotius, Introd., ii. 12, 4. Van der Keessel, Thes. Sel., 229.

(*f*) Tennant, Notary's Manual, p. 228. Act 21, 1875, § 9.

(*g*) Wright v. Barry et Uxor (1850), 1 Menz. 175. Twentyman and Another v. Hewitt (1833), 1 Menz. 156.

(*h*) § 2, Act 21, 1875.

(*i*) Wright v. Barry et Uxor, 1 Menz. 175, and 1 S. 6.

(*k*) Twentyman and Another v. Hewitt, 1 Menz. 156. *In re Moolman*, J. 1, 25. *Ex parte Purchase and Wife*, J. 3, 84. *Schoombie v. Schoombie's Trustees*, J. 5, 189. *Hutcheon v. The Registrar of Deeds of Kaffraria*, E. D. C. 3, 229.

(*l*) Twentyman and Another v. Hewitt, *supra*. *Ex parte Purchase and Wife*, *supra*.

of the contract is intrusted dies before effecting registration, or fails to register the contract within the prescribed time, the court will allow the contract to be registered subsequently; but such registration will not affect the rights of creditors who became such between the date of the marriage and subsequent registration.<sup>(m)</sup>

The case of *Schoombie v. Schoombie's Trustees* (J. 5, 189) takes this matter a step farther, and is a very strong case to show the equitable discretion exercised by the courts. Schoombie and his wife signed a power of attorney on February 8, 1879, in favour of a notary to enter into an ante-nuptial contract. The power set forth the conditions and stipulations desired. On February 11 the parties got married, and subsequently, on February 15, the notary executed and registered the contract. In 1883 Schoombie became insolvent. Under these circumstances the court held that the ante-nuptial contract as registered was valid and effectual; that the only creditors who might be heard in opposition were those who became such between the date of the marriage and of the subsequent registration, and that creditors whose claims arose after the registration could not impeach the contract, for they had notice of the contract through its registration, and were not prejudiced in their rights.

An ante-nuptial contract can be drawn up upon entering a first, second, or third marriage, and the relations thus introduced between husband and wife will take the place of the community of property which would otherwise subsist either at a first or subsequent marriage;<sup>(n)</sup> but where the *lex hac edictali* still prevails, a man or woman who enters into a marriage with a widower or widow who has children by a previous marriage cannot stipulate to receive more than a child's share out of the estate of such widower or widow.<sup>(o)</sup>

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<sup>(m)</sup> *In re Moolman*, J. 1, 25, and per De Villiers, C.J., in *Schoombie v. Schoombie's Trustees*, J. 5, 189. *Dale v. The Registrar of Deeds*, G. 5, 184.

<sup>(n)</sup> *Bynkershoek*, Quæst. Jus. Priv., l. ii. c. 2. *Van der Keessel*, Thes. Sel., 232.

<sup>(o)</sup> *Grotius*, *Introd.*, ii. 12, 6. *Van Leeuwen*, *Cens. For.*, i. 12, § 13.

If no ante-nuptial contract is entered into, community of property will at once prevail as soon as the marriage has been solemnised, and all the property of the spouses will become common.(p)

From the definition of an ante-nuptial contract as given above it appears—

(1.) That this contract cannot be legally entered into where the spouses, even when minors, are unwilling.

(2.) That the consent of the relatives is not required when the contracting parties are majors.

(3.) That strangers or relatives who may wish to exercise any liberality towards the spouses can become parties to the contract.

(4.) That the parties, in case of diversity of statutes, can choose generally or specially any particular statute by which they desire their marriage to be regulated.(q)

The subjects of this *pactum dotale* are chiefly three in number:—(1) The property of the future spouses; (2) the property of the children, and (3) the property of some third party.

Van der Keessel, in Theses 234–244, gives *in extenso* the usual conditions inserted in different dotal contracts.

It is of the very essence of an ante-nuptial contract that it should be made before marriage, and since gifts between husband and wife are not allowed, this contract cannot be altered *inter vivos stante matrimonio*, for thereby one of the parties would presumably benefit the other. Nor can the contract be revoked by mutual consent, for the same reasons.(r) Thus where it was stipulated in an ante-nuptial contract that there should be community of property, subject to this exception, however, that certain property belonging to the wife should be vested in trustees (appointed for that purpose by deed of even date with the contract), as

(p) Grotius, *Introd.*, ii. 12, 5. Van der Keessel, *Thes. Sel.*, 231. Van Leeuwen, *Rom. Hol. Rech.*, iv. xxiv. § 4 and 5.

(q) Van der Keessel, *Thes. Sel.*, 227.

(r) Van der Linden, i. 3, 5. Grot., *Introd.*, 3, 2, 9.

the sole and separate property of the wife, the interest to be duly paid to her, and the property so vested not to be disposed of otherwise than by last will, the Supreme Court of the Cape Colony decided that this appointment of the trustees could not be revoked by the wife after marriage, nor by the husband and wife jointly.(s)

It does not appear to have been definitely decided whether ante-nuptial contracts with respect to future succession (*pacta successoria*) are irrevocable or not. Van der Linden says that in this respect they are like last wills, and should therefore be considered revocable,(t) in the same manner as testaments, and he is borne out in his contention by Grotius in Opinion No. 15, 1 Holl. Cons. III. (b.) 185.

If the ante-nuptial contract regulates the succession to the estates of the children of the marriage, the children can depart therefrom by last will; but if they fail to do so, they will be considered to have acquiesced in the terms of the contract.(u)

It is usual to annex to the contract an inventory or schedule of the separate property brought in at the time of the marriage. If this is not done, the ownership and value of the property will have to be proved *aliunde*.(v) In order to ensure the proper carrying out of the terms of the ante-nuptial contract, and a full and unquestionable separation of the estates of the spouses, trustees are often appointed in the interests of the wife, either in the contract itself or by separate deed. The trustees, as such, have a *locus standi in judicio*, and can compel the husband to execute the terms of the contract by order of court, and he may be civilly imprisoned for non-compliance with such order.(x) In the same manner that the other terms of an ante-nuptial contract cannot be revoked or modified after marriage, so the appointment of

(s) Buisinne and Another v. Mulder et Uxor, 1 Menz. 162.

(t) Van der Linden, Institutes, 1, 3, 5, et in notis.

(u) Opinion 16, Holl. Cons. III. (b.) 307.

(v) Boyes v. Verzigman, Buc. 1879, p. 229. Grotius, Opinion No. 15. Grotius, Opinion, No. 26, Holl. Cons. III. (b.) 164. Van der Keessel, Thes., 230.

(x) Twentyman and Another v. Hewitt, 1 Menz. 156.

trustees under it cannot be annulled or altered either by one or both spouses.(y) Upon the death or insolvency of a trustee appointed by ante-nuptial contract, the court will appoint a trustee or trustees in his place; and likewise the court will remove a trustee who absents himself from the country and has become insolvent.(z) When no trustees have been appointed to administer certain property which the husband conferred on his wife by ante-nuptial contract, and the husband continued to control and administer such property, the property will be considered as merged in the joint estate, and will be at the disposal of the husband's creditors.(a) The appointment of trustees, or strong evidence of the sole control of the wife, will, however, rebut the presumption of merger.

If community of property only is excluded and the *marital power* is not revoked, or the wife does not stipulate that she, and not her husband, shall have the sole and uncontrolled administration of her property, he may at his pleasure, and without her consent, alienate or encumber her property.(b) She may, however, stipulate that her husband shall not have the administration of her property. If, contrary to this stipulation, he alienates her property, she has an action *rei vindicatio* against him, as well as an action for damages sustained. She also has the right to apply for a judicial interdict restraining her husband from administering her property, if he attempts to do so.(c)

In Holland, and also formerly in South Africa, a woman married out of community of property by ante-nuptial contract could institute or defend an action against her private estate without the assistance and authority of her husband,(d) yet the practice now is that she must sue or be sued, *assisted in as far as necessary* by her husband,

(y) *Buissinne and Another v. Mulder et Uxor*, 1 Menz. 162.

(z) *Sinclair v. Meintjes*, Buc. 1874, 40.

(a) *Steyn v. Trustee of Steyn*, Buc. 1874, 16.

(b) *Grotius*, *Introductio*, i. 5, 22.

(c) *Ibid.*, i. 5, 24.

(d) *Rechtsgeleerde Observatien*, pt. 4, obs. 7.

and a copy of the summons must be served on him as well.(e), (f) The "assistance" rendered by the husband is confined to his signing the power of attorney with his wife to institute or defend the action.(g)

If the *jus mariti* is excluded, the wife can give her husband a general power of attorney, and any alienation or mortgage by him by virtue of such power will be held valid and effectual;(h) but in the absence of any such power the wife can always institute an action for the recovery of her property alienated by her husband contrary to the terms of the ante-nuptial contract.(i)

Donations between husband and wife are voidable,(k) and the wife will be liable for any *damnum* or loss in connection therewith as against a third innocent party; and if such third party has been led to believe through the actions of the wife that the property belonged to her, she will be estopped from setting up the defence that the gift was *ab initio* null and void.(l)

Gifts or donations before marriage are of course allowable.

*Donatio propter nuptias* is a gift or settlement by the man to the woman and is intended to be devoted to the marriage expenses.(m)

*Dos* or *dowry* is a settlement made by a woman, or by some one on her behalf, upon the man to whom she is

(e) Prince q.q. Dieleman *v.* Anderson and Others, 1 Menz. p. 176. Landsberg *v.* Marchand, 1 Menz. 200.

(f) Tennant in his Notary's Manual says, on p. 229 (edit. 1877), "If the wife has reserved to herself by ante-nuptial contract the uncontrolled administration and alienation of her property, she may act in law without her husband's consent," and quotes in support of this statement the Rechtsgeleerde Observatien, pt. 4, obs. The cases quoted in the preceding footnote were decided in 1829 and 1834 respectively, but they are not referred to by Tennant.

(g) Van Zijls, Jud. Prac. "Actions," C. L. J., vol. ii. p. 300.

(h) Laing *v.* Zastron's Executrix, 1 M. 229.

(i) Morkel *v.* Holm, 2 J. 60.

(k) *In re* Insolv. Estate of Williams (Natal, Aug. 25, 1885), C. L. J., vol. ii. p. 271.

(l) Union Bank *v.* Spence, 4 J. 339.

(m) C. 5, 3; C. 5, 12, 20; D. 23, 3, 7.

betrothed, and this is likewise intended to be devoted to the marriage expenses. Under the Civil Law there were two kinds of dowry. The first was called *dos profectitia*, arising from the estate or deed of the bride's father, and *dos adventitia*, arising from some other source.<sup>(n)</sup> The distinctions are, however, not observed in Roman-Dutch law.

Marriage settlements are to a certain extent favoured transactions,<sup>(o)</sup> but it must not be forgotten that they are entered into in opposition to the Common Law. They must, therefore, be construed and interpreted strictly, and the exact terms of the contract must be adhered to. That which is omitted in the contract must be decided according to the Common Law. Thus, as has before been stated, if the *communio bonorum* is excluded, the *jus mariti* will still be of force. Likewise the exclusion of community of property does not include an exclusion of profit and loss, unless this is also specifically or impliedly excluded.<sup>(p)</sup> In construing the terms of an ante-nuptial contract, the intention of the parties must be inferred from the whole tenor of the deed. Thus, if community of property and community of debts be excluded, community of profit and loss will be taken to have been excluded also.<sup>(p)</sup>

The wife cannot stipulate that she is to participate in the profits without being liable for a share in the losses.<sup>(q)</sup>

The fruits of the property become part of the community, unless it was expressly stipulated to the contrary.

A child cannot renounce his right to his legitimate portion, and this must be left absolutely free and unencumbered, but an important exception to this rule is where the rights of the child have been restricted by ante-nuptial contract.<sup>(r)</sup>

(n) D. 23, 3, 5.

(o) Grotius, *Introd.* 2, 12, 11. *Cens. Fors.*, 4, 11, 5. Van der Keessel, *Thes.*, 93. Voet, 23, 4, 50.

(p) *Boyes v. Verzigman*, *Buc.* 1879, p. 229.

(q) Grotius, *Introd.* 2, 12, 9.

(r) Voet, 5, 2, 36. Sande, 4, 2, 4.



And therefore if a child settled by ante-nuptial contract, during her father's lifetime, all her property in possession and *expectancy* upon trustees, she cannot, upon the death of her father, claim to have her legitimate portion paid to her personally. This portion will have to be paid to the trustees appointed under the ante-nuptial contract.(s) The private estate of the wife will be liable for any debts contracted by her, and if she incurs any liability "assisted by her husband," her private estate can be attached in execution after the joint estate of herself and her husband has been excused.(t)

The spouses may, before marriage, not only prescribe by ante-nuptial contract the rights which they shall enjoy in respect of their separate property, but they may also regulate the course of succession thereto. Thus it may be stipulated that the survivor shall be entitled to the whole or a defined portion of the estate of the deceased; that the property shall go to the side whence it came; that the heirs of the deceased, on receiving a certain part of the inheritance, shall have no further claim upon the estate of the deceased. They may also, in conjunction with their friends if necessary, choose, according to Roman-Dutch law, the law, whether Aasdoms or Schependoms, by which the terms of the contract and the devolution of the property is to be governed. (See Opinion No. 55 *infra*.) These and similar agreements, although they create an order of succession different from that established by law, will be held valid and effectual, and they (*pacta successoria*) closely resemble last wills.(u) The wife has a tacit hypothec over the estate of her husband for the restitution of her separate property (*dotal*), and she is preferred to creditors whose debts were contracted during marriage. This hypothec is still in force, and lasts for a

(s) *Buyskes v. Russouw's Executors*, Buc. 1875, 19.

(t) *Brink v. Oliviera*, 1 S. 270.

(u) *Voet*, 24, 4, 57. *Sande, Decis. Fris.*, 2, 2, def. 7. *Groenewegen ad l. 5, C. de Pact. Convent.* *Grotius, Introd.* 2, cap. 29. *Neostadius de Pact. Antenup.*, obs. 2 *in notis*. *Burge on Colonial and Foreign Laws*, vol. i. cap. 6, 8.

third of a century.(v) It must, however, be observed that this hypothec of the wife only operates when the parties are married by ante-nuptial contract, and the husband's control and administration of the separate property brought in by the wife is not excluded. When the wife has the sole management of her estate, there can be no *dos* and no hypothec.(x) Therefore the wife has no such hypothec for money lent by her to her husband. In insolvency she can only rank as a concurrent creditor, and if she desires any preference, she must obtain a mortgage bond covering the advances made by her.(y)

Although the wife may reserve to herself the full enjoyment and administration of her property, yet she cannot by so doing escape from the liability to which she would otherwise have been subject under the provisions of the Common Law. Therefore the tacit hypothec of a landlord for arrears of rent will extend over the separate property of the wife *invecta et illata*.(z) The wife can stipulate by ante-nuptial contract that the property brought in by her at the time of the marriage shall not be liable to execution for the debts of her husband (Opinion No. 62).

The wife cannot claim any benefit whatever, nor any compensation out of the estate of the husband, until all the other creditors have been paid, when there has been no community of profit and loss between them.(a) If the wife has stipulated to have her property free and unencumbered, and excluded from community, or has reserved her option with regard thereto, and has renounced all profit and loss after the death of her husband, she is entitled to com-

(v) Voet, 23, 4, 52. Placaat of Emperor Charles V., 1540. Neostadius de Pact. Antenup., obs. 9. Groenewegen ad l. 30, C. de Jur. Dot. Holl. Cons. p. 2, Cons. 79 et part 4, cons. 266. Censura Forensis i. 1, 12, n. 3. Sande, 2, 2, 8, and 3, 12, 3.

(x) Ruperti's Trustee v. Ruperti, 4 J. 22, and Mostert's Trustee v. Mostert, 4 J. 35.

(y) Ibid.

(z) Crowley v. Domony, Buc. 1869, 205.

(a) Grotius, Introd. 2, 12, 17. Groenewegen, footnote to Grotius, 2, 12, 17. Neostadius de Pact. Anten. obs. 10. Sande, 1, 2, 5, def. 8.

pensation in preference to the other creditors of her husband.(b)

The Placaat of the Emperor Charles V. of the 4th of October 1540 postpones the claims of wives under marriage settlements until the claims of the creditors of their husbands are satisfied. This Placaat formed part of the Roman-Dutch law,(c) which was introduced by the Dutch colonists upon their settling at the Cape of Good Hope in the year 1650.(d) The sixth section of this Placaat reads as follows:—

“Further, whereas many merchants take upon themselves to constitute in favour of their wives large dowries and excessive gifts and benefits upon their property, as well in consideration of marriage as to secure their property with their aforesaid wives and children, and afterwards are found to become incapable to pay and satisfy their creditors, and wish to have their wives and children preferred before all their creditors, to the great injury of the course of commerce: We will and ordain that the aforesaid wives, who henceforward shall contract marriage with merchants, shall not be entitled to pretend to have or receive any dowry, or any other benefit on the property of their husbands, or to take part and share in the acquisitions made *stante matrimonio* by the husband, even in cases where property has been actually transferred or specially bound for the purpose, until such time as all the creditors of their aforesaid husbands shall be paid and satisfied, and whom we will in respect hereof to be preferred to the aforesaid wives and widows, saving to the latter their right of preference, to which they are entitled by reason of their marriage portion brought into the marriage by them, or obtained by them by gift or succession from their friends and relatives.”

This rule has been extended by several decisions to all marriage settlements by husbands (not necessarily merchants)

(b) Groenewegen, De Leg., c. 5, 12, 30. Placaat of Oct. 4, 1540. C. 8, 17, 12.

(c) Grotius, Introd. 2, 12, 17. Van der Keessel, 262-265.

(d) Thurburn v. Steward, L. R. 3 P. C. C. 478, Buc. 1869. *In re Insolv. Estate of Edward L. Chiappinni*, Buc. 1869, 143.

in favour of their wives.(e) Therefore if by an ante-nuptial contract, excluding community of property and profit and loss, the husband cedes his life policy to his wife, and subsequently assigns the policy to a third party for valuable consideration, the claim of the wife will be postponed to that of the assignee.(f)

The wife can, however, by ante-nuptial contract, protect her own property against any claim on the part of her husband's creditors, and if such property is wrongfully attached and sold in execution, an action for damages will lie.(g) (Opinion No. 62.)

In the Cape Colony this Placaat has been repealed by Act 21, 1875, § 1, and other provisions substituted, viz. :—

An ante-nuptial contract, whereby one of the spouses settles upon the other any movable or immovable property, may be impeached by the creditors of such spouse, should his or her estate be sequestrated within two years of the date of such settlement.(h) And if the contract contains a stipulation that a certain sum of money or other beneficial provision shall be given or made by one spouse in favour of the other at death or any other time, the creditors may impeach the contract and subsequent payment, cession, or mortgage, to satisfy or cover the amount or provision stipulated, upon the insolvency of the grantor, and it be proved that such stipulation was made to defraud the said creditors. Five years after the making of such payment or provision, it cannot be impeached. Nor can a special conventional hypothec by one spouse in favour of the other be impeached by creditors, if made at the time the convention was entered into to secure the performance thereof.(i)

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(e) *S. A. Bank Trustees v. Chiappinni*, Buch. 1869, 143. *Steyn v. Steyn*, Buch. 1873, 105, and 1874, 16. *Re Paterson's Marriage Settlement*, 1869, 96. *Thurburn v. Steward* (Appeal), L. R. 3, P. C. C. 478. *Hurley v. Palier*, 1 J. 154. *Curator of Van der Merwe's Estate v. Van der Merwe* (Transvaal), *Kotze's Rep.*, p. 148.

(f) *Hurley v. Palier*, 1 J. 154.

(g) *Van der Merwe v. Turton and Juta* (Transvaal), *Kotze's Rep.*, p. 155.

(h) Act 21, 1875, § 3.

(i) Act 21, 1875, § 4.

If, by ante-nuptial contract, a conditional or contingent provision is made by one of the spouses in favour of the other, the claim cannot be ranked either as preferent or concurrent, yet it will not be disregarded entirely upon insolvency of the spouse who made the provision; but it must be admitted as a contingent claim, and the trustee in conjunction with the claimant can put a present value on this contingent proof of debt.(k)

The law of the matrimonial domicile will regulate the marriage settlement or ante-nuptial contract everywhere in the same way that the other incidents to a foreign marriage are regulated.(l)

If no *communio bonorum* existed between the spouses at the matrimonial domicile, the *communio acquistuum* is not introduced upon a change of residence to a place where such community is in force,(m)—*durabit et in novo domicilio, quæ inducta est, manebitque exclusa, quæ ab initio exclusa fuit.*(n)

If the matrimonial domicile is foreign, the spouses cannot have their ante-nuptial contract registered in a country where they have no domicile and no real property.(o)

If a divorce is granted by reason of the adultery of one of the spouses, the guilty party may be declared by the court to have forfeited the benefits in his or her favour which were provided for in an ante-nuptial contract between the parties.(p)

The forfeiture of benefits is also decreed in case of divorce on the ground of malicious desertion.(q)

(k) Trustees of Leigh v. Leigh, 1 J. 75.

(l) Aschen's Executrix v. Blythe, 4 J. 136. Black v. Black's Executors, 3 J. 200. Blatchford v. Blatchford's Executors, 1 E. D. C., Appendix, p. 365.

(m) Blatchford v. Blatchford's Executors, 1 E. D. C. 365.

(n) Voet ad Pand., 23, 2, 87.

(o) In re Orpen, 2 S. 274.

(p) Voet ad Pand. 48, 5, 11. Van Leeuwen's Cens. For., 1, 15, 9. Higgins v. Higgins, 5 E. D. C. 344, and authorities there cited. Biccard v. Biccard, 2 Shiel (C. T. L. R.).

(q) Dawson v. Dawson, 1 and 2 Sheil, 333, and Censura Forensis, 1, 15, 15.

## OPINION No. 15.

HOLL. CONS. III. B. 185.\*

[GROTIUS II. 12, 5 ; II. 23, 7 ; II. 24, 9.]

Ante-nuptial contracts only effective *ab intestato* can be annulled by testament or tacitly—Donation and legacy—The cities of Holland not sovereign—Their privileges—*Domicilium* of the wife—Mistaken motive when leaving a legacy.

1. DISPOSITIONS under an ante-nuptial contract are only effective *ab intestato*, and can be cancelled and annulled either by testament or tacitly.

2. *Omnis voluntas de successione, qualiscunque sit, ambulatoria esse debet, usque ad supremum vitæ exitum.*

3. Legacies and institution of heirs are not included under the word “donation,” and this is specially the case in *statutis prohibitoriis et præsertim restringentibus testandi libertatem.*

4. *Quod est favorabile inter vivos, in ultima voluntate reputatur odiosum.*

5. The cities of Holland and Zeeland, unlike some in Italy, are not sovereign, and have not the right to create customs *ex vi jurisdictionis, sed ex vi privilegii.*

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\* In connection with this Opinion read Opinion No. 44 (Holl. Cons. III. (b.) 186).—[ED.]

6. The privileges of the cities of Holland and Zeeland empower them to make laws (*Keuren*) for the city management, such as in matters of industry or city police, and whatever relates thereto, but questions of succession and testaments are not included thereunder. If they wish to legislate in matters of this kind, they must obtain authority and consent from the sovereign.

7. If a person makes a disposition according to a certain article of the customs of his place of residence, and afterwards indicates, either by testament or codicil, that he does not wish it to remain of force and effect, the testament and codicil must be followed, and the heirs and legatees allowed to succeed to whatever was left them under it.

8. If a person resides in a city without being a citizen there, and having neither citizenship nor fixed *domicilium* in any other place, his widow remains a citizen of that place unless she alters her domicile.

9. *Falsa causa legato adjecta, non vitiat legatum.*

10. *Statutum restringens testandi libertatem, non extenditur ad bona sita extra territorium statuentium.*

11. This is also true, *etiamsi statutum loquatur non in rem, sed in personam.*

I have seen an authenticated copy of the antenuptial contract of Sr. Hannibal Bobython and Miss Agatha Ockerts, bearing date 18th December 1613, and also a copy of a mutual will and a codicil made by the afore-mentioned spouses.\*

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\* See Opinion No. 44 (Holl. Cons. III. (b.) 186).—[Ed.]

(1) In response to the questions asked (1) with reference to the ante-nuptial contract, wherein the following provision occurs: "The property of the said Agatha shall devolve upon her heirs, and be divided among them according to the customs, *Handvesten* and *Voorboden*, of Zierikzee, in case she predeceased her husband," I am of opinion that it cannot prevent the said Agatha from disposing of her property for the benefit of her husband. For according to the recognised customs of Holland and West Friesland, such a disposition by ante-nuptial contract is only of force and effect *ab intestato*, and can be cancelled or annulled not only by testament, as in the present case, but also tacitly. (2) *Omnis enim voluntas de successione, qualiscunque tandem sit, ambulatoria esse debet usque ad vitæ supremum exitum.*(a)

(2) Regarding the 73rd Article of the Rules (*Voorboden*) of Zierikzee mentioned in the said testament, and reading as follows:—"It is further enacted that where husband and wife wish to make any donation to one another after they are married, these donations must be equal. Two memoranda shall be made thereof, to be kept by them, and if the donation is made in any other than the prescribed form, it will be null and void, save and except where there are married children, who will then be entitled to one-half of the property, not only in use and usufruct, but in full ownership. Where there are no children, the heirs will be

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(a) D. 34, 4, 4.



entitled to a third unless the donation is very trivial and of no importance." After careful consideration of this article, I have come to the conclusion that it is not applicable to the present case, since it refers to the making of donations, and not to the institution of heirs or of legatees; quod voce *donationis* non comprehenditur legatum aut heredis institutio,(b) (3) quod maxime locum habere debet in statutis prohibitoriis et præsertim restringentibus testandi libertatem.(c) (4) Quod est, Bald. inquit, favorable inter vivos, supple donatio prohibita inter conjuges, in ultima voluntate reputaretur odiosum.(d) It must also be observed that in the preceding Article the making of testaments and donations is distinctly prohibited except under seal of the Schepenen or before an official, &c. If, therefore, the enactments contained in Article 73 were intended to refer to testaments as well as to donations, mention should have been specially made of testaments. On good grounds too the question may be raised whether the city or the rulers of Zierikzee had the power to enact a prohibition which so greatly conflicts with the common law of the country and restricts the right of free disposition by testament. (5) It is well known that the cities of Holland and Zeeland are not sovereign, like some Italian towns frequently referred to by juriconsults *in materia statuaría*, and are therefore incompetent

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(b) Arg. Digest, 24, 1.

(c) Instit. 1, 7, 1. Hinc Bald. ad C. 1, 1, 1.

(d) Idem tradit Paris. Cons. 16, lib. 3, et Peck. de Testam. Conjugam, lib. 4, cap. 28.

to create customs *ex vi jurisdictionis*. (6) It is also well known that most of the privileges granted to the cities of Holland and Zeeland empower them to make laws regulating the city management—that is, in matters of industry and city police, and whatever relates to these, but questions of succession and wills do not seem to be included thereunder. This is the reason why we notice that in days of old, and even at the present time, when the cities wish to make any law regulating such important matters, they solicit the sanction and approval of the sovereign.

(7) Presuming all this to be correct, it follows that Sr. Hannibal would be entitled under the testament to inherit as heir two-thirds of the property of the testatrix, and could claim in addition the household and other furniture mentioned in the aforesaid codicil out of the remaining third left to the relatives, as legatees. For although the said Agatha Ockerts intended really, at the time she made her testament, that her relations should inherit a third of her property, thinking that such was in conformity with the aforementioned 73rd Article, yet she clearly showed subsequently, when making her codicil, that she did not wish to be bound by that Article. (8) The testatrix based her exemption from the operation of the said Article on the fact that her husband was no citizen of the city of Zierikzee, and therefore she could lay no claim to such citizenship either. To this it may be answered that her husband was not a citizen of any other place, nor had he a fixed *domicilium*

anywhere else, and that she therefore remained a citizen of Zierikzee, et quod non translato domicilio, mulier civis maneat. Still it is sufficient that her intention was not to remain bound by the afore-mentioned Article, as indicated by the said codicil ; (9) falsa enim causa legato adjecta, legatum non vitiat.(e)

(10) Taking it for granted that the city of Zierikzee had a special privilege, or exercised the right from time immemorial, to create customs *contra libertatem testandi*, and that the said 73rd Article was always understood in *judiciis contradictoriis* to refer to testaments and codicils as well as to donations, and further that there is sufficient evidence to establish this custom, it would follow that the nearest relatives of the testatrix would be entitled to succeed to one-third of her property found and situated within the city and freedom of Zierikzee, and the said Sr. Hannibal would be entitled under the testament (presuming this not to have been abrogated in any respect by the codicil) to succeed to all the property situated outside the city and freedom, together with two-thirds of the property situated therein. Quia statutum restringens testandi libertatem, non extenditur ad bona sita extra territorium statuentium.(f) Imo addunt dicti infra Doctores hoc locum habere,

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(e) C. 6, 44 ; Instit. 2, 20, 31.

(f) Bald. Cons. 137, factum proponitur esse tale, lib. 1, et Cons. 131 circa prædicta lib. ii. ; et in l. si arrogatos ff. de adopt. et in l. 2, C. quæ sit longa Cons. Anchor. in c. canonum statuta ; Ext. de constit. Alber. Brunus in tract. stat. art. 8 ; Gail, lib. ii. obs. 124, Nos. 8 and 9, ubi multos allegat et Peckius de tract. lib. 4, cap. 28, ubi loquitur in nostris terminis.

etiam si statutum loquatur non in rem, sed in personam.(g) This can be applied to the present case with still greater reason, since the afore-mentioned Article lays down that the heirs are entitled to one-third, which is a disposition *in rem*.(h)

ROTTERDAM,  
16th April 1616.

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(g) Anch. Cons. 143; Alex. Cons. 16 lib. i. Doctores fere omnes in C. 1, 1, 1; Molin. Cons. 31, No. 25, lib. i.; Gail, obs. 11, Peckius d. loco No. 7.

(h) Per ea quæ tradit Bart. in C. 1, 1, No. 32.

## OPINION No. 16.

HOLL. CONS. III. B. 307.

[GROTIUS II. 12, 8; VAN DER KEESEL, THES. 241.]

Stipulation as to succession by ante-nuptial contract—  
Succession to the children of the spouses.

1. ACCORDING to the customs of Holland, parents could regulate the order of succession, not only to their own estates, but also to that of their children; and if the children made no contrary disposal by testament, they are taken to have acquiesced in the disposition of their parents.

2. When a father has entered into an agreement with reference to his children, and did not renounce his succession to their estates, such succession having been stipulated for by ante-nuptial contract, he is taken to have reserved the same unto himself, and the terms of the ante-nuptial contract will be followed.

I have seen a certain ante-nuptial contract, dated 15th of April 1579, between Adriaan Frans and Annetge Heyndriks, and also a certain agreement made by the said Adriaan Frans and the guardians of his children after the death of Annetge Heyndriks.

I have been asked whether Adriaan Frans, aforementioned, is entitled to one-half of all the property left by Frans Adriaans, his son, who died at the age of about twenty-eight, intestate, and without children.

(1) I am of opinion that the decision of this question depends on the customs of Holland, according to which parents can regulate the order of succession, not only to their own property, but also to that of their children; and if the children have made no contrary testamentary provisions, they are taken to have acquiesced in the dispositions of their parents. From this it follows that we must consider the present case as if Frans Adriaans had left his father one-half of his estate by testament, which he was allowed to do. The brothers and sisters of the said Frans Adriaans are not entitled to deduct any legitimate or Trebellianic portion, since the father must be taken to have succeeded to half of the property aforementioned, not so much by reason of the stipulation of the said Annetge Heyndriks, as by the disposition of Frans Adriaans himself.

(2) The said agreement does not conflict with this Opinion, since Adriaan Frans did not only leave the succession to his children unrevoked in the ante-nuptial contract, but even expressly reserved the same.

## OPINION No. 17.

HOLL. CONS. V. 130.

[GROTIUS II. 12, 8; VAN DER KESSEL, THES. 241.]

Ante-nuptial contract—Regulation of succession to the children.

ACCORDING to the customary law of Holland, parents can regulate the succession not only to themselves, but also to their children.

I have seen a certain ante-nuptial contract entered into between Adriaan Jans and Annetje Heindriks on the 15th April 1579, as well as certain agreements entered into between Adriaan Jans and the guardian of his children, after the death of Annetje Heindriks. I have been asked in connection therewith whether the said Adriaan Jans is entitled to one-half of all the property left by Frans Adriaans, his son, who had died intestate and without children at the age of twenty-eight.

I am of opinion that a decision on this point depends on the customary law of Holland, which allows parents to regulate by ante-nuptial contract the succession not only to themselves, but also to their children; and if the children make no contrary

testamentary disposition, they are considered to have acquiesced in the parental disposition. From this it follows that we must consider this matter as if Frans Adriaans had himself left one-half of his property to his father by testament, which he could have done.

The brothers and sisters of the said Frans Adriaans cannot therefore claim a deduction of the Trebellianic or legitimate portions, for the father must be considered to inherit the property, not by virtue of the disposition of Annetje Heindriks, but rather by virtue of that of Frans Adriaans. The afore-mentioned agreement does not affect the case, since the said Adriaan Frans\* did not only not renounce the succession to his children, but expressly reserved the same.†

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\* Adriaan Frans, this must be a misprint for Adriaan Jans, the father.—[TR.]

† The tenor of this Opinion is the same as that of the preceding, but it has been inserted here because the two are not exactly alike, and it has been thought advisable not to eliminate either.



## OPINION No. 18.

HOLL. CONS. III. B. 184.

[GROTIUS II. 12, 8; VAN DER KEESEL, THES. 241-246.]

Devolution—Ante-nuptial contract—When children succeed to a dowry—Interpretation.

1. Dos a patre profecta, mortua filia liberos relinquente remanet penes liberos, etiamsi pater stipulatus sit quod omni casu soluti matrimonii, dos rediret ad eum.

2. Quod juris in dote matris.

3. Argumentum a simili necessario concludit, ubi nota assimilationis reperitur in lege, aut in contractu.

I have seen a certain ante-nuptial contract entered into between Tonis Pieters Bregman and Leentge Arents Gouwen, spinster, on the 29th March 1606. Klaasje Leenderts, the mother of the bride, promised in the deed to provide 2000 guildens for the purchase of a house, or for any other purpose, as she had done to her son Jacob Gouwen, together with the marriage gifts and paternal portion; with this condition, however, that the 2000 guildens due to the spouses should devolve upon her, the said Klaasje

Leenderts, should she survive her daughter Leentge, but not otherwise.

I have been asked whether the said 2000 guildens must devolve upon the said Klaasje Leenderts, or must go to the children of Leentge Gouwen aforementioned, since the latter died, leaving as survivors her husband and the children procreated by him.

I am of opinion, that although the words of the ante-nuptial contract with reference to the devolution of the 2000 guildens to Klaasje Leenderts have a general significance, and make no distinction whether there are children or not, yet it may be well contended that it was her intention, as well as of the contracting parties at the time of the marriage, that such devolution should take place in case Leentge Gouwen died without offspring, intimating that the said Klaasje Leenderts wished to make provision that her money should not go to strangers. With this agrees the opinion of several notable juriconsults:—*Quod dos a patre profecta, mortua filia, liberos relinquente, remanet penes liberos, quam opinionem consuetudine approbatam ait Bart.(a) Imo etiamsi pater stipulatus sit quod omni casu soluti matrimonii dos rediret ad eum, locum tamen forte isti consuetudini ait Bald.,(b) quod multo magis optinebit, si simpliciter concepta sit stipulatio, ut dos ad eum redeat.(c)*

2. This opinion is contradicted by other juris-

(a) Bart. in l. dos a patre, D. 24, 3; Joh. And. in addit ad spec. in D. 24, 1, § fin. circa princ.; Bald. in Code 6, 61, 2.

(b) Bald. ad d. l. consuetudines.

(c) Ut tradit Joh. Campesius tract. de dote, quæst. 157. Cf. D. 24, 3 40, Arg. a contrario sensu, et C. 6, 20, 19.

consults, and it may be further disputed whether it can be applied to both the property given by the mother at the time of the marriage and to that obtained from the father's estate. Tonis Pieters, as representing the interests of his children, must therefore obtain accurate information whether Klaasje Leenderts, when she gave a like sum of 2000 guildens to Jacob Gouwen, her son, stipulated that the money should return to her on the death of Jacob Gouwen if he left any children.

3. If this was not stipulated, and if, on the other hand, it must be taken that the money was to remain for the benefit of the children, in case he left any, the same ought to be taken to have been stipulated with regard to the children of Leentge Gouwen, on account of the word "as" which occurs in the antenuptial contract, for by it no distinction whatever was made between the money given to Jacob and to Leentge Gouwen. Quod argumentum a simili necessario concludit, ubi nota assimilationis reperitur in lege, aut in contractu.(*d*)

ROTTERDAM,

(*Date uncertain*).

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(*d*) Bald. ad Code 9, 1, 9, et Code 4, 10, 2.

## TESTAMENTS.

Vide OPINIONS Nos. I. *supra* and XIX.—L. *infra*.

## § 1.

## WILLS AMONG THE ROMANS.

UPON examining the subject of testaments, as now known to us, we are apt, after hasty consideration, to assume that the practice of testamentary dispositions was universal and prompted by an original instinct since the earliest time. On thorough examination, however, it will be found, if careful attention be directed to the historical aspect of the matter, that such is not the case. No trace of the conception of a will is found among the early barbarians, and the best ascertained facts in the early history of law lead to the conclusion that in all indigenous societies a condition of jurisprudence in which testamentary privileges are not allowed, or rather not contemplated, has preceded the later stage of legal development, in which the mere will of the proprietor is permitted, under more or less of restriction, to override the claims of his kindred and blood.<sup>(e)</sup>

By reason of the close analogy between the Roman-Dutch law which obtained in Holland, and is still followed in the Colonies once subject to Dutch rule, and the Roman law, it has been considered advisable to give a fairly detailed account of the origin of wills among the Romans, before proceeding to consider the Roman-Dutch law and the South African case law on the subject.

The conception of a will brings with it several other conceptions, viz.—inheritance, succession. An inheritance is a form of universal succession.

In order to understand what is meant by universal succession, we must first have a definition of a *universitas juris*. A *universitas juris* is a collection of rights and duties

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(e) The history of ancient testamentary succession has been most fully and learnedly discussed by Sir Henry Maine (*Ancient Law*, cap. 6).

united by the single circumstance of their having belonged at one time to some one person.<sup>(f)</sup> It is, as it were, the legal *persona* or clothing of an individual.

*Universal succession* is a succession to the *universitas juris*. This happens when one individual is invested with the legal clothing—rights, duties and liabilities—of another. This need not necessarily occur *at death*, as will be seen from the following instances.

(1.) Under insolvency, by *bonorum venditio* the assignee succeeds to the *universitas juris* of the bankrupt.

(2.) By *adoption*, the *paterfamilias* succeeded universally to all the rights and obligations of the adoptive child.

(3.) By *bonorum addictio*—surrender to a slave.

(4.) *Ex Senatusc. Claudiano*.

The two last-mentioned examples, however, afford instances of partial rather than universal succession.

Lastly comes succession by inheritance, which was a universal succession *at death*.

“*Hæreditas est successio in universum jus quod defunctus habuit.*”

The gradual growth of the conceptions of individual rights and the development of *individual* property through the “family” from “community,” have left clearly distinctive traces on the gradual development of wills generally. Thus it is that, whilst under ancient Roman law, inheritance, as a form of universal succession, was aimed at in wills, under later Roman law and modern testamentary jurisprudence, chief importance is attached to the execution and signification of the testator’s intentions.

Modestinus defines a testament as “*voluntatis nostræ justa sententia de eo quod, quis post-mortem suam fieri vult.*”<sup>(g)</sup> Ulpian is very much to the same effect, giving as a definition “*mentis nostræ justa contestatio, in id solemniter facta, ut post-mortem nostram valeat.*”<sup>(h)</sup>

<sup>(f)</sup> Maine’s Ancient Law, p. 178.

<sup>(g)</sup> D. 28, 1, 1.

<sup>(h)</sup> Reg. 20, 1. *Et vide* the discussion by Grotius in Opinion No. 1 as to the position of the testator under the *jus nature*.

At first two kinds of testaments were in use among the Romans. The one called *calata comitiis*, because it was made in the *comitia calata*—that is, the *comitia curiata*, a legislative assembly of the patrician burghers of Rome, representing the *gentes* or houses of the patrician citizens. The object in relegating the making of wills to this assembly was, says Maine,<sup>(i)</sup> “intended to secure the *gentes* in their privilege to ultimate inheritance,” in the absence of any *sui* (direct descendant) or of the nearest agnate. The other kind of testament was called *procinctum*. This could be made just before going into battle, and did not come before the *comitia curiata*.<sup>(k)</sup>

When the power of the plebeians increased, and their rights were insisted upon, the patricians entertained many of their demands. The contention between them eventually gave rise to another form of will, to which may be traced the origin of all modern testaments. The Twelve Tables effected a compromise (sometimes called the Decemviral compromise), and enacted “*Paterfamilias uti de pecuniâ tutelâve rei suce legassit, ita jus esto.*”

This Will was effected in the same manner as a Roman *mancipium*, sale or conveyance, and was called *per aes et libram*. Gaius describes the procedure in full. In early times the vendee was the heir, and he received the testator’s instructions direct respecting the disposition of the property. This had its disadvantages, for after the sale the testator had no further control over the property or the actions of the heir, and the mancipation or sale was irrevocable. A way out of the difficulty presented itself. A third party was introduced for form’s sake, and made to represent the purchaser. The will was not at first in writing, and certain symbols and phrases were introduced to supply the place afterwards filled by documentary forms.

The proceedings were as follows:—The testator having summoned, as is done in other mancipations, five witnesses,

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(i) Maine’s Ancient Law, p. 200.

(k) Gaius, ii. 101–104. Justinian, ii. 10, 1.

all Roman citizens of the age of puberty, and a holder of the scales, and having already reduced his will to writing, makes a fictitious mancipation of his estate to a certain vendee, who thereupon utters these words: *Familiam pecuniamque tuam endo mandatela tutela custodelaque mea esse aio eaque, quo tu jure testamentum facere possis secundum legem publicam, hoc aere* (and, as some add), *æneaque libra esto mihi emptæ.* ("Thy family and thy money into my charge, ward, and custody I receive, and in order to validate thy will conformably to Roman law with this ingot"—(further) "with this scale and bronze unto me it is purchased." He (the vendee) then strikes the scale with the ingot and delivers the latter to the testator, as by way of purchase-money. Thereupon the testator holding the tablets of his will says as follows: *Hæc ita ut in his tabulis cerisque scripta sunt ita do, ita lego, ita testor itaque vos Quirites testimonium mihi perhibetote.* ("This estate, as in these tablets and in this wax is written, I so grant, so devise, so dispose, and do you, Quirites, so give me your attestation.") These words are called the *nuncupatio*, for nuncupation signifies public declaration, and by these general words the specific written dispositions of the testator are published and confirmed.<sup>(l)</sup>

The vendee was called the *emptor familiæ*, and the holder of the balance *libripens*. Both were considered witnesses, and none of the other five witnesses were to be in the power either of the testator or of the *familiæ emptor*. The whole fictitious sale was based on the ancient *mancipium*, which was a *contract* of conveyance or sale. This is the link which associates *wills and contracts*. At first, the *nuncupatio and fictitious sale* was an unconditional transfer of the *hæreditas*, but later more attention was paid to the written tablets referred to; the sale became a matter of form, and the real testament was that which the testator wrote.

The kinds of wills above mentioned belong to the Civil Law. At an epoch which cannot be settled with accuracy,

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(l) Gaius, 2, 104.

the prætors began to take cognisance of testaments, and allowed the solemnities in connection therewith to be performed in closer conformity with the spirit than the letter of the law. By the *jus honorarium*, the fictitious sale was dispensed with, and the testator merely recited his will in the presence of seven witnesses. No emblematic ceremony was gone through, and the witnesses, two of whom represented the *familiæ emptor* and the *libripens*, merely sealed the will on the outside with their seals.

In 439 A.D. the final stage was reached. The Imperial Constitutions of Valentinian III. in the East, and Theodosius II., his colleague, in the West, enacted that the execution of wills should take place in the presence of seven witnesses, present at one and the same time, and should be signed and sealed by the witnesses then and there. This new kind of will was known as the *testamentum tripartitum*, on account of its triple origin, since the formality of seven witnesses, present at the same time, was derived from the Civil Law, that of the sealing of the will from the Prætorian Law, and that of the signature from the Imperial Constitutions. It seems, however, that the *testamentum tripartitum* never entirely supplanted the *testamentum per æs et libram* in the West.<sup>(m)</sup>

The witnesses must be present of their own accord, and specially summoned,<sup>(n)</sup> and the testator must sign the part of the will shown to the witnesses. If he cannot write, an eighth person must sign the will for him in the presence of the witnesses. If the will is in the handwriting of the testator, his signature is not absolutely necessary.<sup>(o)</sup> The whole transaction must be uninterrupted, and unmixed with any other business—*Est autem uno contextu nullum actum alienum testamento intermiscere.*<sup>(p)</sup>

The *private nuncupative* or *oral* will was another form of will which existed at the time of Justinian. If a man

(m) Sandar's Justinian, note ad 2, 10, 3.

(n) D. 28, 125. D. 28, 1, 20, 8.

(o) C. 6, 23, 21, Pr.

(p) D. 28, 1, 21, 3.



did not wish to commit his will to writing, he could declare his wishes as to the succession of his estate before seven witnesses.(q)

Testators were also allowed to declare their last will in the presence of a magistrate, or to have a memorandum thereof filed on the court records. This was known as a *public nuncupative will*.(r)

The formalities above mentioned were dispensed with in regard to soldiers whilst their names were inscribed on the list of the army (*in numeris*). Their testaments were valid though made without any legal formality or the requisite number of witnesses. Nevertheless such wills had to be proved by witnesses to avoid impositions, as decreed by the Emperor Trajan.(s) The will held good for one year after discharge from the army, but not if he was dismissed *ignominia causa*.(t)

The same privilege was allowed to seamen in the service of the state.(u)

Blind persons had to make their wills in the presence of a notary (*tabularius*) and seven witnesses.(v)

## § 2.

After the introductory remarks above made, the Roman-Dutch testamentary jurisprudence claims our chief attention.

Grotius defines a last will or testament as "a declaration as to what a person desires should become of his property after his decease." (*Uyterste wille is een oorkonde van 't gunt yemand wil dat van 't zijn na zijn dood zal geschieden*).<sup>(x)</sup> Ordinarily a will contains various provisions, *e.g.*, regarding the guardianship of the children of the testator, the funeral,

(q) C. 6, 23, 21, 2.

(r) C. 6, 23, 19.

(s) Instit. 2, 11, 1, 2, 3.

(t) D. 29, 1, 38, 1.

(u) D. 37, 13, 1, 1 (Pr.).

(v) C. 6, 22, 8.

(x) Grotius, Introd. 2, 14, 4, and 2, 14, 15.

the administration of the estate, and general stipulations as to the devolution of the property. The two main provisions, though not absolutely essential, refer to the institution of the heir and the bequest of legacies.

#### CAPACITY TO TESTATE.

Every person, male or female, can make a last will, unless declared incapable by law.

Incapacitated persons are—

(1.) Persons who have not attained the age of puberty, which for males is fixed at fourteen, and for females at twelve years. If special dispensation has been obtained to make a will at an earlier age, its validity cannot be impugned.<sup>(y)</sup>

(2.) Persons who by reason of mental debility are incapable of managing their own affairs, such as lunatics and idiots. If they have clearly lucid intervals, they can make a will.<sup>(z)</sup> The same restriction holds with regard to persons who are so drunk that they are incapable of reasoning. The mere allegation by the notary in the heading of the testament to the effect that the testator was in a “sane and sober” mind will not validate such a testament.<sup>(a)</sup> A father cannot, by placing his minor child under curatorship, on the ground of imbecility, deprive him after majority of the administration of his affairs and the power of making a will, and if a will is made by such imbecile during a lucid period, it will be valid.<sup>(b)</sup> The court will not grant an order upon petition allowing an insane person who has a lucid period to make his will, for the same tribunal may be called upon later to adjudicate upon the validity of the will thus executed. The best method is to execute such will before a local judicial officer.<sup>(c)</sup>

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<sup>(y)</sup> Regtsg. Obs., 3, 14, and 3, 41.

<sup>(z)</sup> Grotius, 2, 15, 2. Voet, 28, 1, 34 and 35.

<sup>(a)</sup> Schorer ad Grot., 2, 15, 4 (Note cxi.). Voet, 28, 1, 35.

<sup>(b)</sup> Van der Spuys v. Maasdorp, executor of Domus and Aploon, 2 Menz. 442.

<sup>(c)</sup> *In re Kemp*, 2 Menz. 457. In connection with this subject consult also *Bekker v. Meiring*, 2 Menz. 458.

(3.) Prodigals may not make a will whilst the decree of court placing them under curatorship remains of force. If made in a just and equitable manner, it is valid according to the 30th Novel of LEO.(*d*) The will will be effectual if the estate is to be distributed among the heirs, and leave has been obtained from the sovereign or the court.(*e*)

(4.) Persons who are both deaf and dumb; but deaf persons who can speak and dumb persons who can write are excluded. Dumb persons who cannot write, but can otherwise express themselves intelligibly, are allowed to make a will, if permission from the proper authorities has been obtained.(*f*)

(5.) Persons supported in some asylum or charitable institution, which has a right to succeed to the property left by the deceased, notwithstanding his disposition to the contrary.(*g*)

(6.) Persons who, out of hatred for any religion, have made their wills to the prejudice of those lawful successors who profess it.(*h*)

(7.) When two spouses have made a mutual will whereby any benefit has been left to the survivor, and which directs how the property of the testators is to devolve after the survivor's death, the survivor cannot, after having adiated and enjoyed the benefits conferred by the mutual will, execute another will which disposes of his or her property in a manner contrary to the terms of the mutual will.(*i*)

(*d*) Grotius, 2, 15, 5. Schorer ad Grot. d. l. (Note cxii.). Van der Keessel, Thes. 281. Sande, 1, 4, 1, 3.

(*e*) Voet, 28, 1, 34. Regtsg. Obs., 3, obs. 41, and 2, obs. 37.

(*f*) Grotius, 2, 15, 6. Regtsg. Obs., 2, obs. 38.

(*g*) Van der Linden, p. 57, 1, 9, 3. Groot Placaat Boek, 6 pt. p. 491, and pt. 9, p. 217.

(*h*) Van der Keessel, Thes. 277-279. Van der Linden, 1, 9, 3. Versameling van Gewijsden, pt. 1, cas. 17.

(*i*) Meyer and Kok, Trustees of Lutgens v. Neethling, Exor. of Lutgens, 1 Menz. 504. Britz v. Britz's Executors, 2 Menz. 453, and Buc. 1868, p. 312. Hofmeyr, Neethling's Curator v. De Wet, Neethling's Exor., Buc. 1868, p. 317. Oosthuyzen v. Oosthuyzen, Buc. 1868, p. 51. Mostert v. S. A. Association, Buc. 1868, p. 286, and 1873, p. 31, L. R. (W. S.) P. C. p. 41. Grotius, 2, 15, 9. Authorities *in nota*.

The mutual will is looked upon and read as the separate will of each spouse, and the dispositions are to be treated as applicable to his or her half share of the joint estate. (This matter will be fully discussed when the revocation of wills is considered, pp. 195, 196, 214, 215 *infra*.)

(8.) The feudatory may make no testamentary disposition regarding the succession to his fief unless he has obtained a special dispensation from the lord of the fief or of the sovereign. Such dispensation is construed restrictively, and will not be interpreted to include a substitution or *fidei-commissum*.(k)

### § 3.

#### CAPACITY TO SUCCEED.

All persons may take under a last will, unless prohibited by law, whether they are minors or majors, natives or foreigners, born or not yet born. If a mistake was made in the name of the intended heir or legatee, but his or her identity can be satisfactorily proved, the bequest will hold good. Corporations and partnerships can acquire property under a last will.(l)

If a mistake is made as to the name of the intended heir or legatee, extrinsic evidence will only be admitted when the language used is free from ambiguity. When, from the circumstances or facts proved, it is found to apply equally well to two or more persons or things, each corresponding to the words of the will, extrinsic evidence of intention—as, for example, statements made by the testator, or instructions given for the drawing up of his will—may be accepted to show which of the persons or things was intended.(m) If a testator devise to John, the son of his brother William, and William's only son is named Samuel, the claim of Samuel is

(k) Opinion of Grotius, No. 29, III. (b.) 309. Grotius, *Introd.* 2, 15, 8, and 2, 42, 2.

(l) Grotius, 2, 16, 1 and 2.

(m) Per Smith, J. *In re Herold—Ex parte Rademeyer*, 1 J. 159. *Doe d. Hiscocks v. Hiscocks* (5 M. and W. 363). Wigram on Wills.

unquestionable, notwithstanding the misnomer.<sup>(n)</sup> But if a testatrix bequeathed a legacy to her grandniece, Louisa Charlotta Roux, and it appeared that she left surviving two grandnieces, one named Charlotta Johanna Ambrosia Roux and the other Charlotta Louisa Adriana Roux, extrinsic evidence of the intention of the testatrix cannot be led, under the circumstances, to prove that Charlotta Johanna Ambrosia Roux was meant, and she will not be entitled to the legacy.<sup>(o)</sup>

Those specially prohibited by law from taking under a last will are:—

(1.) Guardians and administrators of the property of minors, who cannot receive any benefit from such minors by last will. This prohibition extends to the children of guardians or administrators; likewise the godparents and concubines of minors are excluded from any succession.<sup>(p)</sup> At first this prohibition merely referred to immovable property and encumbrances on immovable property. The Placaat of the 4th October 1540, which imposed this incapacity, has received a slightly extended interpretation, and was subsequently made to embrace honorary guardians as well, and to refer to movables as well as to immovables.<sup>(q)</sup> The Placaat, according to some writers, is not extended to the wives of guardians. With all respect, however, it is here submitted that the argument against such extension seems somewhat illogical. Grotius, it is true, refers merely to administering guardians and immovable property, thus restricting the application of the Placaat, and in Opinion No. 24 (Holl. Cons. 3 (b.) 188) he says that since the provisions of

(n) Burge on Colonial and Foreign Laws, vol. iv. pp. 536, 537.

(o) *Ex parte Rademeyer*—*In re Herold*, 1 J. 159. See also Stephen's Digest of the Laws of Evidence, Article 91, and the case referred to by him, and *De Smidt v. Burton*, 1 Menz. 222.

(p) Placaat, October 4, 1540. Grotius, 2, 16, 4, and Opinion 24 (Holl. Cons. 3 (b.) 188). Van der Keessel, Thes. 285, 286. Sande, 2, 9, 19, and 20. Cons. van Holl. Regts., 1 Cons. 10, 144. Groenewegen, C. 5, 37, 17, and C. 5, 27, 2.

(q) Van der Keessel, Thes. 285, 286. Van Leeuwen, Room. Holl. R. 3, 3, 12. Schorer ad. Grotium, 2, 16, 4.

the Placaat are antagonistic to guardians and their children but not to their wives, the latter do not by interpretation fall under the prohibition. Van der Keessel, in his *Theses Selectæ*, 285–286, sanctions an extensive interpretation as regards movable property and supervisory or honorary guardians, but quotes Grotius in support of the view that the Placaat cannot be extended to the wives of guardians. If the provisions of the enactment were extended to movables and honorary guardians, in order to guard against fraud, surely *a fortiori* it should apply to the wives of guardians. Voet (28, 5, 8 and 9) restricts the application of the law to immovables *et ejusdem generis*, but extends it to wives. Schorer (ad Grot. 2, 16, 4) is in favour of the extension to movables, and evidently approves of the inclusion of wives of guardians. This view certainly appears to be correct, both logically and on the grounds of expediency. Van Leeuwen (R. D. Law, 3, 12) extends the terms of the Placaat to the wives of guardians, curators, and tutors, and to movable property of considerable value.

(2.) Any one, whether a minor or major, who has contracted a marriage with a minor without consent of the parents or guardians of the minor, cannot receive any benefit by last will from such minor, nor can they benefit each other by donation, ante-nuptial contract, or otherwise, even although the necessary consent has been obtained after marriage. Such a clandestine marriage will not bring about a community of property so as to benefit the offending parties.(*r*)

(3.) A man or woman entering into a second marriage with a person who has a child or children by a previous marriage, cannot by testament, donation, or in any other way, be benefited to a greater extent than the smallest amount left to such child or any of such children,(*s*) and whatever has

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(*r*) Mostert *v.* The Master [see Opinion No. 3 (Holl. Cons. 3 (b.) 183)], 3 Roscoe, p. 59. Grotius, *Introd.* 1, 8, 3; 2, 11, 8; 2, 12, 7; 2, 16, 5; 3, 2, 10 and 26. *Regtsgel. Obs.* pt. 2, obs. 39. *Placaat*, Oct. 4, 1540; *Placaat*, Feb. 25, 1751. *Lybrecht's Notaris Ambt.* Pt. 2. *Byelaw C.*

(*s*) *Lex hac edictali*, 5 C. 9, 6. Grotius, 2, 16, 7. Van Leeuwen (R. H. R.), 3, 3, 17.

been given in excess of that amount will go to the benefit of the children of the previous marriage.(t) This law has been repealed at the Cape by Act 26 of 1873. *Vide* Annotation to Opinion No. 8 (Holl. Cons. 3 (b.) 182).

(4.) The notary before whom a will is passed, and the attesting witnesses, cannot take any benefit under the will.(u)

(5.) According to the law of Holland, adulterous and incestuous children (*Overwonne Bastaarden*) could not inherit anything from their parents or grandparents, either *ex lege* or *ex testamento*, except that they may take what has been left them for their maintenance. Likewise persons living in adultery or incest could not take any benefit under the last will of the other guilty party. Other natural children (*Speelkinderen*) could inherit, like strangers, from their parents; but if there were other legitimate children, the illegitimate offspring could only inherit one-twelfth of the estate at most.(v) Legitimated children could succeed in the same way as legitimate children.(x)

(6.) No prohibited religious sects or institutions could inherit any property devised to them by last will. (See Note to Opinion No. 19 (3 b. 310 Holl. Cons.) with reference to this matter.)

(7.) Bequests *ad pias causas* were not effectual if executed in a manner not in conformity with the formalities required by law.(y)

(8.) On the same grounds that tutors, administrators, and guardians are prohibited from receiving any benefit under the will of their wards, clerical persons are excluded from taking any bequest if it be proved that undue influence was

(t) Novell, 22, c. 27. Grotius d. l. Van Leeuwen d. l. Groen. de Leg. Ab. ad C. 5, 9, 6. Sande, 1, 2, 3, 4, *cum seqq.*

(u) Zurck, Codex Batavus, *sub voce* Notarissen. Bynkershoek, Burg. Rechtzaken, Pt. 2. Act 22 of 1876 (Cape Colony), § 3.

(v) Grotius, 2, 16, 6. Van Leeuwen (R. H. R.), 3, 3, 10 and 11. Van der Keessel, Thes. 287. Schorer ad Grot., 2, 16, 6.

(x) Regtsgel. Obs. 4, Supplm. to pt. 1, obs. 36.

(y) Opinion No. 21 and Opinion No. 23 (Holl. Cons. 3 (b.) 163, and 3 (b.) 39).

exerted by such person to persuade the testator to make the bequest.(z)

### § 4.

#### DIFFERENT KINDS OF WILLS.

Under the Roman-Dutch law, wills were either *oral* or *in writing*.

(a.) *Oral Wills (testamenta nuncupativa)* were executed—

(1.) Before seven witnesses present at the same time, according to Roman law. This method was very seldom resorted to.(a)

(2.) Before a notary and two witnesses—the notary, as an accredited public person, supplying the place of five witnesses. This will was usually reduced to writing by the notary in order that he might remember more accurately the intentions of the testator. After having reduced it to writing, he read the will over to the testator in the presence of the witnesses, and upon the testator ratifying the writing, it was signed by the testator, notary, and witnesses, and entered in the notary's protocol. The signature of the testator and witnesses is, however, not a *sine qua non*.(b)

(3.) Before the Registrar and two members of the court.(c)

(b.) *Written Wills.*

I. *Open*.—(1.) Before a notary and two witnesses. This kind of will corresponds to a nuncupative testament declared before a notary and witnesses, and by the notary reduced to writing.(d)

(2.) Before the court authorities.(d)

(z) *Executors of Cerfonteyn v. O'Haire*, Buc. 1873, p. 47.

(a) *Van der Linden* 1, 9, 1. *Van der Keessel*, Thes. 293. *Grotius*, 2, 17, 10 and 11.

(b) *Van Leeuwen*, R. H. R. 3, 2, 3 and 4. *Grotius*, 2, 17, 10, and *Opinions of Grotius*, Nos. 21 and 22 (*Holl. Cons.* 3 (b.) 163, and 1, 231).

(c) *Grotius*, 2, 17, 14. *Van Leeuwen*, R. H. R. 3, 2, 6. *Van der Linden*, 1, 9, 1.

(d) *Grotius*, 2, 17, 17 and 18. *Van Leeuwen*, 3, 2, 5.



II. *Closed*.—(1.) This will was written by the testator or some one on his behalf, and was signed by him. It was then presented to a notary, who sealed and endorsed the will on the outside, and made the usual minute thereof in the presence of two witnesses—called an *Akte van superscriptie*. The will was kept closed until the death of the testator, when it was opened by the notary in the presence of the attesting witnesses and an *Akte van opening* made thereof.(e)

(2.) Closed wills could also be made before the court authorities.

Husband and wife can make a mutual will, in which case the will is considered as the separate testament of each of the spouses, and the dispositions will be taken to refer to his or her property. Such a will can be revoked by one of the spouses during the lifetime of the other without his or her knowledge or consent, and upon the predecease of one of the spouses the survivor can revoke the dispositions referring to his or her property, provided he or she has not adiated or received any benefit under the will.

#### SPECIAL AND PRIVILEGED WILLS.

(1.) Testaments made *jure militari* were valid although wanting in the formalities required in the case of ordinary wills.(f) (See § 1, *supra*.)

(2.) Wills made verbally before two witnesses during a time of plague or pestilence.(g)

(3.) Wills made by a father or mother disposing of their property among their children or grandchildren, if written by themselves (holograph) or signed by them, did not require to be witnessed in order to be effectual as far as the children were concerned. Such wills could also be declared orally before witnesses.

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(e) Van der Linden, 1, 9, 1. For the contents of the *Akte van opening*, see Translator's note to Van der Linden, p. 55 (Juta).

(f) Grotius, *Introd.* 2, 17, 29, and 31.

(g) *Regtsgel.* Obs. 1, obs. 40. Van Leeuwen, *R. H. R.* 3, 2, 15.

Ord. 15 of 1845 (Cape), § 3, requires that every will which formerly required to be witnessed by seven or some other number of competent witnesses shall be executed in the presence of two or more competent witnesses. On the ground that this Order only referred to wills "which formerly required to be witnessed by seven or some other number of competent witnesses," and that holograph wills never required any "number of witnesses," the Supreme Court in 1863 held, in the case of *Executors of Eaton v. Eaton* (Buc. 1873, p. 173), that a holograph will of a parent disposing of his property among his children is a privileged testament, and is therefore not subject to the provisions of Ordinance No. 15, 1845. This case was followed in the matter of *De Wet's Estate* (Buc. 1873, 119), and in 1887 in *Steer's Executor v. The Master* (5 J. 313). In that case Steer and his wife made a joint will, duly signed by both, but not duly attested by witnesses, whereby each of the spouses bequeathed all his or her property to the other, and directed that upon the death of the survivor the whole of his or her estate should be distributed among the children of the marriage. The will was throughout in the handwriting of Steer. Thereupon it was decided that the will was valid and effectual as a will of Steer, in respect of the distribution of the property among the children and the appointment of an executor to manage and administer his estate. The court did not, however, decide that the wife was entitled to what was left her under the will.

At the Cape of Good Hope wills can be executed—

(1.) Notarially before a notary public and two witnesses, who must be present at one and the same time.

(2.) *Under-hand*, before two or more witnesses.

(3.) *Closed*, by the testator alone, who signs it, and, having sealed it, hands it over to a notary.

(4.) As privileged testaments.

These different methods will be more fully discussed in treating of the attestation of wills generally (§ 6, *infra*).

## § 5.

## VALIDITY AND INVALIDITY OF WILLS.

Wills are valid if made in conformity with the requirements of the law, which are as follows:—

- (1.) The testator must be capable of making a valid will.
- (2.) The heirs or legatees must be capable to adiate or take under the will.
- (3.) The outward formalities must be complied with. It must be executed in the manner prescribed for notarial, under-hand, or closed wills.

Wills are invalid—

- (1.) If made by one who is by law incompetent to testate (§ 2, *supra*).
- (2.) If all the formalities required by law have not been observed in their execution (§ 6, *infra*).
- (3.) If no direct heir is instituted. This is, however, not essential to the validity of testaments now (§ 10, *infra*). [*Batt v. Batt*, 2 M. 430.]
- (4.) If a previous testament contains a derogative clause (*clausula derogativa*) to the effect that no subsequent wills made by the testator shall be considered valid, a subsequent will made notwithstanding such clause will be void *ab initio*, unless the clause is specifically revoked in the subsequent testament (§ 9, p. 205, *infra*). This clause has practically dropped into disuse.
- (5.) A valid testament will subsequently become invalidated if revoked by the testator (§ 7, *infra*).
- (6.) If adiation is wanting, or if the heirs cannot take under the testament, it will become invalidated (§ 8, *infra*).

## § 6.

## ATTESTATION OF WILLS.

All wills, except those that are privileged, must be duly executed before witnesses. The different methods of execut-

ing wills, both under the Roman-Dutch law and at the Cape of Good Hope, have been mentioned in § 4, *supra*.

#### QUALIFICATION OF WITNESSES.

The attesting witnesses had to be men of good understanding and reputation.<sup>(h)</sup>

The law considered incompetent—

- (1.) Females.
- (2.) Males under the age of fourteen years.
- (3.) Prodigals and persons who have been declared infamous or have an infamous sentence against them.
- (4.) Lunatics, insane, dumb and deaf persons.
- (5.) The heirs and legatees under the will.
- (6.) Those under the power of the instituted heir *et vice versa*. Domestic servants were regarded as those under power. Brothers or father and son may, however, witness the will of another person.
- (7.) The son or father of the notary who executed the will was also disqualified.
- (8.) Guardians and executors appointed under the will could not witness the same.
- (9.) Relations within the fifth degree of consanguinity. Thus the will of a testator attested by his brother is void. But this disqualification is only in connection with notarial wills, and the relations of a testator are not debarred from witnessing the execution of an under-hand will.<sup>(i)</sup>

These rules were strictly applied. Thus hermaphrodites were disqualified, because they were not males *stricto sensu*. Likewise if a witness who appeared to be over fourteen years of age was found, after having witnessed the will, to be even but a day under age, the will is invalid.<sup>(k)</sup>

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(h) Van Leeuwen, R. H. R. 3, 2, 8.

(i) Van Reenen *v.* The Board of Executors, Buc. 1876, p. 44. Le Sueur *v.* Le Sueur, Buc. 1876, p. 153.

(k) With reference to this matter see Van Leeuwen, R. H. R. 3, 2, 7, 8, 9. Grotius, 2, 17. Groenewegen de Leg. Abr. ad C. 4, 20, 18, et Instit. 2, 10,

One incompetent witness was sufficient to render the whole testament invalid; but then such witness must be one of the minimum number required by law. If there are more witnesses than are actually necessary, the will is not invalid if the number of competent witnesses correspond to the number required by law, and the rest will be considered as surplusage.<sup>(l)</sup>

According to Colonial law, any person who is competent to give evidence in a court of law in the Colony is qualified to attest and witness the execution of a will. Any attesting witness, to whom, or to whose wife or husband, any beneficial bequest or appointment has been made under the will which he or she has attested, forfeits such bequest or appointment, and persons who have attested a will cannot be appointed executor or guardian under the will.<sup>(m)</sup>

#### ATTENDANCE AND SIGNATURE OF WITNESSES.

The witnesses to a will must be specially summoned, and must be present at one and the same time at the execution thereof, otherwise it will be set aside as invalid.<sup>(n)</sup> The rule is construed strictly; and therefore, if the will is executed in one room, and the witnesses are in another, with the door leading from the one room into the other ajar, the presence required by law will be considered wanting, and the testamentary instrument void.<sup>(o)</sup>

Under the Roman-Dutch law, nuncupative or oral wills required merely the presence of witnesses to the number of seven, or of a notary and two witnesses. It was not abso-

6, et 2, 10, 11. Wassenaar, *Practijk van Testamenten*, § 17, 18, 19, 20. Kersteman, *Oeffenschool der Notarissen*, p. 242. Lybreghts, *Notaris. Ambt.*, Pt. cap. 19, § 10, 11, 12, 13.

(l) *Arg. ex. Eaton v. Eaton*, Buc. 1875, p. 173.

(m) Act 3 of 1873 (Cape Colony), §§ 2, 3, 4.

(n) *De Bruyn v. De Bruyn*, Buc. 1874, 8. *Laubscher v. Basson's Executor*, Buc. 1868, p. 251. *McDonald v. Hart, Executor of McDonald*, S. 3, 37. *Van Leeuwen, Censura Forensis*, 3, 2, 9, 10. Ord. 15 of 1845 (Cape).

(o) *Lauson v. Pritchard & Lauson*, 1 R. 93.

lutely necessary that the testamentary declaration should be in writing, although it was usual to draw up a written instrument containing a record of the testator's intentions, in order that they may not be forgotten.(p)

A *notarially written will* was considered a nuncupative testamentary declaration in writing. The testator by word of mouth dictated to the notary his last will and intention respecting the devolution of his property. This was reduced to writing for the sake of remembrance by the notary, who then *read over the written will to the testator* and witnesses, and asked the former, in the presence of the latter, whether he has understood the nature thereof, and whether that which is taken down is his last will and wish. If acknowledged to be correct, it was usually signed by the testator, witnesses, and notary. All this was only adopted for safety, for the actual subscription of the will by the testator and witnesses was not actually necessary, and did not constitute a portion of the will.(q)

The *written will*, under Roman-Dutch law, must not be confused with what is known among us in South Africa as a *notarial will*. The written will was the *closed testament*, and was so called because it was produced in writing before witnesses, the testator making a legally expressed declaration, by which he affirms that his last will is contained in this document. It is *subscribed* as such by the testator and witnesses, the signature on the part of the witnesses being specially required.(r)

An *under-hand testament*, among us, is executed without the intervention of a notary, and must be subscribed by the testator and two witnesses present at one and the same time.

There is, therefore, a distinct difference between a notarial and an under-hand will as regards attestation. In the former,

(p) See Opinion No. 1, where Grotius discusses the attestation of wills *jure naturæ et gentium*.

(q) Van Leeuwen, R. H. R. 3, 2, 3 and 4. Van der Keessel, Thes. 296. Voet, 28, 1, 23. Grotius, Opinion No. 48. Krynauw v. De Marillac (O. F. S. Feb. 1892).

(r) Van Leeuwen, Censura Forensis, 3, 2, 7 and 8.

the signature of the witnesses is not absolutely required,<sup>(s)</sup> whilst in the latter it is an essential formality.<sup>(t)</sup> Moreover, in the former the law requires that the notarially written instrument should be read over to the testator and declared by him to be his last will in the presence of the two witnesses. If this formality is omitted, the will will be imperfectly executed, and consequently invalid.<sup>(u)</sup> And thus it was decided in the case of *Meiring v. Executors of Meiring*.<sup>(v)</sup> This rule has been repealed by Act No. 3 of 1878 (passed six months after the above decision), which enacts that no notarial will shall be considered invalid merely because it was not read over to the testator in the presence of the subscribing witnesses. The use of the words "subscribing witnesses" in the Act is somewhat significant. It must be assumed that at the time of the passing of the Act the legislators were of opinion that notarial testamentary instruments had to be subscribed by the witnesses present. *Proctor's Case*, wherein it was decided that the signatures of the witnesses were not an essential formality, was not decided till nine years afterwards.

The question therefore arises—must the will be read over by the notary to the testator when the witnesses do not sign their names? Having regard to the intention of the Legislature, to the fact that it has been customary for witnesses almost always to append their signatures, and to the fact that it was generally accepted at the time of the passing of the Act that the witnesses alluded to must be subscribing witnesses, it may safely be contended that the maxim *expressio unius exclusio alterius est*, will not be applied in this case and in the interpretation of the Act; so that the "reading" will be dispensed with in every case.

The manner in which wills have to be attested and signed at the Cape of Good Hope is regulated by Ordinance No. 15

(s) *In re Proctor*, 5, J. 159.

(t) Ordinance 15 of 1845 (Colonial).

(u) Voet, 28, 1, 25. Van Leeuwen, R. H. R. 3, 2, 3 and 4. Sande, Decis. Fris., 4, 1, 9. Holl. Cons. 3 (b.) 328.

(v) 3 R. p. 6.

of 1845. This law has been adopted in the Orange Free State by Ordinance 2 of 1856 of that Republic, and its enactments have been followed in the Transvaal in practice. In 1888 by *Volksraadbesluit* all wills drawn up in terms of the Ordinance of 1845 have been declared validly executed.

The 3rd section of the Ordinance reads as follows:—"No will or other testamentary writing made or executed upon or after the first day of January 1844, which will or other testamentary writing, if made before the said first day of January 1844, would, in order to be valid, have required to be witnessed by seven or some other number of competent witnesses, shall be valid unless it shall or shall have been executed in the manner hereinafter mentioned—that is to say, it shall or shall have been signed at the foot or end thereof by the testator, or by some other person in his presence and by his direction, and such signature shall or shall have been made or acknowledged by the testator in the presence of two or more competent witnesses present at the same time, and such witnesses shall or shall have attested and subscribed the will in the presence of the person executing the same; and where the instrument shall or shall have been written on more leaves than one, the party executing the same, and also the witnesses, shall sign or shall have signed their names upon at least one side of every leaf upon which the instrument shall or shall have been written."

This Act has been held to apply only to underhand and not to notarial wills.(x)

The witnesses must be present at one and the same time,(y) and must be *competent*,(z) and must *sign* the will upon *at least one side of every leaf*, if the will has been written on more leaves than one.

It is very doubtful whether by *signing* is meant that the

(x) *In re Proctor*, 5 J. 159.

(y) *De Bruyn v. De Bruyn*, 1874, Buc. p. 8. *Laubscher v. Basson's Executor*, Buc. 1868, p. 251. *McDonald v. Hart*, S. 3, 37.

(z) *Van Reenen v. Board of Executors*, Buc. 1876, p. 44. *Le Sueur v. Le Sueur*, Buc. 1876, 153; but see Act No. 22 of 1876, § 2, 3, 4.



testator and witnesses must write their names in full (Christian names or initials of Christian names and surname), or whether they can sign their initials merely on the side of every leaf. In the case of *Van Vuuren v. Van Vuuren*,<sup>(a)</sup> a mutual will was written upon one sheet containing two leaves (four pages); the testator and one of the witnesses signed their initials on the first leaf, the other witness signed his name; all signed their names on the second leaf. The court by a majority held the will invalid, and refused to consider the subscription of the initials as *signing*.

It must, however, be pointed out that the judgment of the court was not unanimous, and that it was inconsistent with two subsequent cases of *Troost v. Ross, Executrix of Hohenstein*,<sup>(b)</sup> and *Re Le Roux*.<sup>(c)</sup> In the former case the testator had signed by affixing his *mark*, whilst the two attesting witnesses signed their names in full, and the court held the will to be validly and duly executed. In the latter case, the testator and one of the witnesses had signed in full, but the other witness had merely affixed his mark. The will was upheld, and letters of administration ordered to be issued in terms thereof. Where a will is otherwise good, the court will always incline to uphold its validity, and will take as favourable and equitable a view as possible of the matter. (*Weise's Trustees v. Weise's Executor*, not reported, C. L. J. vol. v. p. 243, and *Board of Executors and Grewer v. Morgan and Others*, G. W. Reps. by Collinson, vol. vi. p. 26.) It is, therefore, extremely likely that if the matter of signing by initials only be again brought before the court, the judgment in *Van Vuuren v. Van Vuuren* will be upset. (Vide *In re Ebben's Will*, 4 J. 495.)

The testator and witnesses must sign upon at least one side of every leaf of a will. Therefore, if a will is written upon a sheet of paper containing two leaves, and is attested

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(a) S. 2, 116.

(b) 4 S. 211.

(c) 3 J. 56.

only at the end of the document, it will be set aside as invalid.(d) This decision has been upheld and followed in the Orange Free State.(e) Likewise the attestation of a will written on the second and third pages of a sheet of paper is invalid if the witnesses only signed on the third page, the will not having been attested on each leaf (*Re Walker's Estate*, 9 Juta, 311). The required signatures must appear on the will, and it makes no difference if the signatures have been omitted through mistake or inadvertence; the will will be considered invalid. (*Re Estate Mentz*, not reported, July 13, 1887 (Sup. Court), C. L. J. iv. 232.) If the testator's name appears in the will on the first page in his own handwriting, but he has not signed the leaf again, but only the attesting witnesses have appended their names, the signature required by the Ordinance will be considered to have been complied with, and the will will be held to have been duly executed.(f)

As has been before stated, the signature of a testator and witnesses is not indispensably necessary to the validity of a written nuncupative or notarial will (*Horak's Heirs v. Widow of Horak*),(g) *Proctor's Case*,(h) and *Wilhelmina v. Robertson*).(i) In the last case, Robertson on his deathbed sent for a notary and showed him a paper writing, which he declared to be his last will, in the presence of two witnesses. The will was not signed by the witnesses. The court upheld the paper writing as the valid declaration of the testator's will. In *Proctor's Case* the will was executed by a notary, and attested by him as having been executed and signed in the presence of two witnesses, but the will was only signed by one witness. The court upheld the validity of the will.

From the operation of Ordinance 15 of 1845 are also

(d) *Walker v. Executors of Walker*, Buc. 1874, p. 144.

(e) *In re Cornelia Smit* (O. F. S.), November 1884 (C. L. J. 1, 116).

(f) *In re Ebdens Will*, 4 J. 495.

(g) 2 Menz. 424.

(h) 5 Juta, 159.

(i) 2 Menz. 438.

excluded privileged testaments, such as holograph wills disposing of the testator's property amongst his children or grandchildren.(k)

If a written instrument is drawn up as an act or deed of donation, and is not properly witnessed, and it is found that such document is not merely a deed of donation, but virtually a testamentary writing, the deed will be void, since it lacks the formalities required of a testament.(l)

## § 7.

### REVOCAION OF WILLS.

A testator always retained the power to change, wholly or in part, the intentions which he has expressed in a previous will concerning the devolution of his property. He cannot introduce any clause or provision such as the *clausula derogativa* into his will, in order to preclude himself absolutely from making a subsequent will.(m) *Ambulatoria est voluntas defuncti usque ad vitæ supremum exitum.*(n)

A previous will can be revoked—

(a.) *Expressly.*

(1.) By a subsequent testament which expressly revokes such will.(o)

(2.) By an instrument attested by the same number of witnesses, or executed in the same manner as is required in the execution of a will, whereby the testator declares that he wishes to revoke his will and that its provisions shall be of no effect, or that he wishes his property to descend by intestate succession.(p)

The mere signification of a desire to revoke is not suffi-

(k) § 4, *supra*. Eaton's Executors v. Eaton, Buc. 1873, p. 173.

(l) *In re De Wet's Estate*, Buc. 1873, p. 119. *Steer's Executor v. The Master*, 5 J. 313. *In re Van Wijk*, 5 J. 1.

(m) Grotius, Introduction to the Laws of Holland, 2, 24, 8.

(n) Digest, 34, 4, 4.

(o) Grotius, *Introduct.* 2, 24, 9.

(p) Grotius, *Introduct.* 2, 24, 16. Voet, 23, 3, 1.

cient. The desire has to be expressed in the form required by law.

A will cannot be invalidated by the submission of parol evidence to the effect that the testator declared himself to be intestate or that he wished his will revoked.(*q*)

Neither a will nor a codicil is revoked by the mere declaration of a testator, a few days before death, to a notary, expressly summoned for the purpose, that he wished such will or codicil revoked. This is not sufficient for a *de presenti revocation*.(*r*)

If the subsequent will is invalid, the revocation contained therein is of no effect, and the previous testamentary dispositions will remain of full force.

(3.) By outward acts confined to the revocation of that will, described by the commentators on the Civil Law as *deletio*, *inductio*, *inscriptio*, and *superscriptio*, i.e. destruction, annihilation, interlineation, and erasure. No exact definition of any one term can, however, be given, for the one in some degree always includes the other. These alterations in a will, or the total or partial cancellation by tearing up, burning, or breaking, or otherwise destroying the same, or by breaking or opening the seals of a closed will, must be done either by the testator himself or by some one with his authority and sanction.(*s*)

If a will is lost and cannot be produced, the presumption is that it was destroyed by the testator with the intention of revoking it.(*t*)

If a will is executed in duplicate, and the testator destroys the copy in his possession, the will is considered to have been revoked by virtue of such destruction.(*u*)

Voet (28, 4, 1 and 2) is of opinion that revocation under

(*q*) Ludwig *v.* Ludwig's Executors, 2 Menz. 471.

(*r*) Horak's Heirs *v.* The Widow Horak, 2 Menz. 424.

(*s*) Van Leeuwen, *Censura Forensis*, Pt. 3, 11, 14. Voet, 28, 3, 1 and 2. Digest, 28, 4, 1. Burge on Colonial and Foreign Laws, "Revocation of Testaments."

(*t*) Nelson *v.* Currey and Others, 4 J. 355.

(*u*) *Ibid.* See Voet, 28, 4, 1. Lauterbach ad Pand., 28, 4, § 38.

such circumstances can only be inferred, if it could be shown that the cancellation was made by the testator with the intention that he should die intestate, or if it could be shown that the testator's intention was that the deletion was made for the purpose of restoring a prior will.

If the testator is only in possession of a copy, whilst the original minute is enregistered or is filed in the notary's protocol, the destruction of the *grosse* or copy by the testator does not revoke the testament as long as the registered or filed minute remains intact, unless it be proved that this cancellation and destruction was done with the view of dying intestate. This is the opinion of Voet and Van der Keessel.<sup>(v)</sup> The weak point in this contention is the want of finality, since under such circumstances proof *aliunde* of the testator's intention can always be adduced. Schorer adopts a wider view,<sup>(x)</sup> and maintains that the destruction of the *grosse* is sufficient proof of the intention of the testator to effect a revocation.

Grotius in Opinion No. 47 holds that a notarial will cannot be revoked by merely destroying the copy.

A good deal will depend upon the circumstances of each case, for the obliteration or cancellation of a will must, as regards its revocation, depend upon the intention. If clear proof can be gathered from the circumstances that the intention of the testator was to revoke, the court will no doubt give effect to such intention. On the other hand, if the circumstances indicate an opposite intention, or convey an impression that the act was not done by the testator, or was not done deliberately—for instance, where it appears that the altered or obliterated copy was in possession of a third party—the court will not consider the cancellation sufficient for revocation of the will.

If the original minute in the notary's protocol has been destroyed, either by fraud or mistake, or has been un-

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(v) Voet, 28, 3, 1 *et seq.* Van der Keessel, Thes. Sel., 330.

(x) Schorer ad Grot., 2, 24, 15.

accountably lost, but the testator has preserved the copy in his possession intact, such copy will not *per se* be entitled to probate. The court will, however, upon the presumption that the testator did not wish to revoke his will, call upon all interested to show cause why the copy shall not be admitted and acted upon as the testator's last will.(y)

(b.) By *Implication*.

(4.) A prior will is impliedly revoked by a subsequent one, if such subsequent will contains dispositions contrary to those in the prior one. The prior will is revoked by the subsequent will only in so far as there is any directly inconsistent provision in the latter, if the former will has not been expressly revoked by the latter.

In Tenant's *Notary's Manual*, c. 3, § 24, it is stated that the prior will is revoked by the subsequent will, "although the last will contains no express revocation of the former will, for two different testaments cannot subsist together." If the word *different* is meant to stand for "inconsistent," no fault can be otherwise found with the text. If not, it is directly opposed to the best authorities on Roman-Dutch law, who maintain that, *contrary to the testamentary jurisprudence of Rome*, there is nothing to prevent two or more testaments, when no express revocation of one of them has been made, from being valid at the same time.(z)

The subsequent testament must be validly executed, otherwise it does not operate as a revocation.(a)

If a subsequent testament revokes a prior one, and it becomes invalidated after execution, through non-adiation, revocation, or otherwise, the previous will does not come into force again tacitly.(b)

(y) *In re Beresford—Ex parte Graham*, 2 J. 303.

(z) Van Leeuwen, *Cens. Forens.*, Pt. 1, 3, 11, 9. Groenewegen ad *Instit.* 2, 17, 3. Voet, 28, 3, 8. Holl. Cons. 2, 24, and 5, 42, and Grotius, *Opinion No. 46* (this work).

(a) Voet, 28, 3, 5. Vinnius ad *Inst.* 2, 17. Lauterbach ad *Pandectas*, 28, 3 and 4, n. 23.

(b) Voet, 28, 3, 5.

If two wills were made on the same day, containing inconsistent provisions, and it is impossible to say which was prior in point of time, they are both void. If both wills contain the same hereditary institution, and contain no inconsistent bequest, both will be valid.(c)

If the one appears to be really a codicil, although erroneously styled a testament, the testament will be considered as the last will, and the other will be treated as a subsequent codicil.(d)

Contrary to the English law, a mutual will by husband and wife is not revoked upon a second marriage.(e)

When a testament is revoked, every disposition in such testament must be considered as revoked also.(f) When only certain provisions of a prior will are revoked by a codicil or subsequent will, the rest of the prior will remains valid and unrevoked, and the dispositions are not to be interfered with except to give effect to the codicil or subsequent will.(g)

When husband and wife have made a mutual will disposing of the property of the joint estate, the dispositions of each spouse are treated as applicable to his or her half of the joint property. Each of the spouses can, during the lifetime of the other, with or without his or her consent, or with or without communication with him or her, revoke his or her own part of the will. After the death of the co-testator the survivor can revoke the will as far as it affected his or her property; but if the survivor has adiated under the mutual will or has received any benefits thereunder, the terms of the mutual will cannot be departed from, and cannot be revoked by a subsequent disposition by the survivor.(h)

(c) Voet, 28, 3, 9.

(d) Grotius, Opinion No. 47 (Holl. Cons. 3 (b.) 157).

(e) Ludwig v. Ludwig's Executors, 2 Menz. 471.

(f) Grotius, Opinion No. 46 (Holl. Cons. 5, 134).

(g) Van der Keessel, Thes. 329. Burge on Col. and For. Laws, p. 320 (Juta's Abridgment).

(h) South African Association v. Mostert, Buc. 1873, p. 31. Brits v. Brits' Executors, Buc. 1868, 312. Hofmeyr, Neethling's Curator v. De Wet, Buc. 1868, p. 317. Oosthuyzen v. Oosthuyzen, Buc. 1868, 51.

This matter will be more fully discussed under § 10, when treating of the interests of the surviving spouse under a mutual will.

If the survivor is appointed heir together with the children of the marriage, he or she can dispose by last will of the moiety of the joint estate, and a child's share under any terms or conditions that he or she may desire; and if such will by the survivor referred to the whole joint estate, it will not be deemed wholly invalid, but will be construed to refer only to his or her share of the property.<sup>(i)</sup>

## § 8.

### ADIATION AND REPUDIATION UNDER A WILL.

In addition to all the other requirements of a valid will, *adiation* by the instituted heirs was insisted upon as a last act in order that the will may be effective.

The heir has to accept the benefits conferred by the will (*adiate*), or had to renounce the inheritance (*repudiate*).

*Adiation* (*adiare hereditatem*) is considered to have taken place whenever the heir in any way entered on the inheritance, either by acting as heir or by mere intention—*Aut pro herede gerendo vel etiam nuda voluntate*. The intention could be inferred from other circumstances besides those given above, the existence, and not the actual expression of intention, being the chief point.<sup>(k)</sup>

The heir is at liberty either to *adiate* or *repudiate* the inheritance at pleasure, but he must do so within a certain time. It was not compulsory for him to declare his intention immediately upon the decease of the testator. According to Roman-Dutch law, the heir could obtain a *deed of deliberation*, which generally lasted for a year, and could be applied for at any time before *adiation* within thirty years of the death of the testator. The

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<sup>(i)</sup> Smith and Others v. Executors of Sayers, F. 66.

<sup>(k)</sup> Justinian, Instit. 2, 19, 17. Sanders ad d. l.



creditors could object in court, and had a *locus standi in judicio*.(l)

Repudiation must precede adiation; for when once an estate or inheritance has been accepted by the heir, he cannot afterwards repudiate it, and adiation cannot take place after repudiation.(m)

Partial adiation and partial repudiation is not allowed.(m)

Adiation consists not only in an expression of intention, but even in implied intention, to be inferred from such acts—*actes hereditaires*—as indicate that the heir was satisfied with the terms of the will, and wished to accept the benefits thereunder, and that he wished to act as heir. An heir is considered to adiate an inheritance when he treats the property of the estate as his own, when he sells or encumbers any portion thereof, when he cultivates the ground or lets any property, or when in any other way he declares, either by act or word, his intention to enter on the inheritance. Such direct or implied intention can, of course, only occur when the person knows that he has been appointed heir.(n)

When the heir administers the estate merely out of kindness, or for the honour of the deceased, or for the benefit of others, but with no intention of adiation, he will not be taken to have accepted the benefits and burdens under the will.(o)

Adiation must be made simply, and not conditionally from or to a certain day.(p)

The following are considered *actes hereditaires* :—

(1.) When the heir takes possession of the estate without a *deed of deliberation*, unless he does so merely through kindness.

(2.) If he sells, alienates, or mortgages the property, unless he acts merely as *negotiorum gestor*.

(l) Grotius, *Introd.* 2, 21, 3 and 4. Van der Linden, i. 9, 10.

(m) Grotius, *Introd.* 2, 21, 3.

(n) Grotius, *Introd.* 2, 21, 5. Justinian, *Instit.* 2, 19, 7.

(o) Grotius, *Introd.* 2, 21, 5.

(p) Grotius, *Introd.* 2, 21, 6.

(3.) If he carries out the terms of the will, by paying legacies, &c.

(4.) If he collects the money outstanding and pays the debts of the estate.

(5.) If he treats the inheritance as his own, and disposes of his rights by sale or cession.

Acts which are absolutely necessary for the benefit of the estate or the honour of the testator do not constitute adiation,<sup>(q)</sup> but it is best to enter a formal protest before proceeding to carry out such acts.<sup>(r)</sup>

In order to presume adiation, there must be some unequivocal act done by the heir clearly indicating his intention to accept the inheritance. The mere fact that the heir took out letters of administration in terms of the will is not conclusive proof. Thus where a surviving spouse had taken out letters of administration in terms of a mutual will, and had collected some rents, but had refused to accept any benefits under the will or to proceed with the administration of the estate, it was held that no adiation had taken place.<sup>(s)</sup>

In *Watson v. Burchill* <sup>(t)</sup> it appeared that a husband, who was married in *community of property*, made a will disposing of the *whole joint* estate. His wife was nominated as one of the executors. After his death she took out letters of administration and filed an account, but she did not distribute the estate, nor did she otherwise accept any benefits under the will. Subsequently she discovered her rights with regard to the joint estate, and she claimed a moiety of the estate by virtue of the community, as well as the benefits conferred on her by the will. Under these circumstances it was held that she had not adiated the inheritance, and she could therefore claim her one-half share of the joint estate, but that she could not at the same time claim the benefits under the will. The same principle had been previously laid down

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<sup>(q)</sup> See Opinion No. 35 of Grotius, *re Negotium Hereditatis*.

<sup>(r)</sup> Grotius, *Introd.* 2, 21, 5 and 6. Lybreght's *Notaris. Ambt.*, 2, 5, p. 25. Voet, 29, 2, 4 *et seq.*

<sup>(s)</sup> *Silver v. Silver's Executors*, 5 J. 29.

<sup>(t)</sup> 9 J. 2.

in the case of the *South African Association v. Mostert*,<sup>(u)</sup> and had been followed in *Van Rooyen v. Gorman*.<sup>(v)</sup>

One person cannot adiate or repudiate an inheritance for another except in the case of those under curatorship or guardianship.

The consequences of adiation were that the heir or co-heirs were clothed with the whole legal *persona* of the deceased, possessed his property, and became liable for his debts and obligations.<sup>(x)</sup>

Liability for the debts of the deceased could, however, be avoided by applying for *letters for benefit of inventory* from the Government. It was usual to apply for such letters after a *deed of deliberation* had been obtained. Application could be made at any time within thirty years. Creditors and interested parties who pressed for payment could oppose.<sup>(y)</sup> Van der Linden (1, 9, 10) describes with great detail the procedure in relation to this matter as it obtained in his day.

An heir who had been instituted to the universal succession of the estate could not adiate in part and repudiate in part. If an heir has only been instituted in part, he is not bound to accept the rest of the inheritance, for the *jus accrescendi* between co-heirs no longer strictly applies,<sup>(z)</sup> and the right of accretion is not now ruled by the subtleties of the Roman law, but depends upon the apparent intention of the testator.<sup>(a)</sup>

When several heirs are instituted, each becomes liable for the debts of the deceased in proportion to his share of the inheritance, except in the case of indivisible debts, such as prædial servitudes, when each heir will be liable *in solidum*.<sup>(b)</sup> The heir's share is reckoned according to the

(u) Buch. 1873, p. 31, and 1869, p. 231.

(v) 6 J. 55.

(x) Van Leeuwen (R. H. R.), 3, 10, 3. C. 6, 30, 22.

(y) Voet, 28, 8, 12. Schorer ad Grot., 2, 21, 8 and 9. Van der Linden, 1, 9, 10.

(z) Van der Keessel, Thes. 322.

(a) Schorer ad Grot., 2, 21, 6. Grotius, 2, 23, 5.

(b) Grotius, 2, 21, 7. Schorer ad Grot., 2, 21, 7. Voet, 10, 2, 26.

amount for which he is heir, and does not include legacies or præ-legacies.(c) In the event of insolvency of one of the co-heirs, the liabilities of the others will not be increased.(d)

When the inheritance has been repudiated by the instituted heirs, it descends to the nearest heirs *ab intestato*, and the testament will be invalidated, unless it was further confirmed by a *clause codicillaire*, when the bequests and other directions will continue effectual.(e)

At the Cape of Good Hope, Ordinance 104 of 1833 makes provision for the filing of an inventory with the Master of the High Court in both testate and intestate estates (sects. 14 and 16). The heirs are therefore personally freed from liability for the debts of the deceased.(f)

## § 9.

### CODICILS AND CLAUSES IN WILLS.

Last wills are either *perfecta* or *imperfecta*.

A perfect last will is a testament validly executed containing the institution of an heir.

An imperfect last will is a codicil; it does not contain the institution of an heir, and could be executed without formalities.(g)

Under Roman law a codicil—*codicillus* (*codex*)—was an informal will which came into use after the establishment of the *fidei-commissaria hereditas*. No codicils were in vogue before the time of Augustus. It was left to Lucius Lentulus, who also introduced *fidei-commissa*, to call them into being.(h)

In Roman law a great distinction was observed between testaments and codicils, both as regards their intrinsic nature and the external formality required in their execution.

(c) Voet, 29, 20. Schorer ad Grot. d. 1. et ad 2, 26, 4.

(d) See (b) *supra*. Pothier on Obligations, 1, 2, 4. Art. 2, § 2.

(e) Van Leeuwen, R. H. R. 3, 10, 10.

(f) See Fisher v. Liquidators of the Union Bank, 8 Juta, 46.

(g) See "Reservatory Clause," p. 204 *infra*.

(h) Justinian, 2, 25, pr.

(1.) In testaments it was absolutely necessary, in order that the testament may be valid, that an heir to the inheritance should be instituted. This was not required in codicils.*(i)*

(2.) Only one valid testament could exist at a time, whilst a testator could make two or more codicils.*(k)*

(3.) Codicils required no formalities in their execution.*(l)*

(4.) Disherison could not take place by codicil.*(m)*

(5.) No codicil was void because it made no provision for the legitimate portion.

(6.) No one could be appointed heir by codicil, but the heir instituted under the will could be asked by codicil to give up the inheritance to another.*(n)*

The cardinal difference between a codicil and testament had reference to the institution of the heir.

Under the Roman-Dutch law these differences had almost entirely disappeared. Van Leeuwen,*(o)* and the authorities quoted by him, hold that every distinction between testaments and codicils has been altogether abolished by usage; and Grotius, in Opinion No. 1, states that codicils appear to be of very little practical utility, for the formalities required for their execution are the same as in the case of wills.

Van der Keessel,*(p)* however, states that such is not the case, and that three differences between them still exist.

(1.) As regards the number of witnesses, if executed according to Roman law, when five witnesses are required to attest the execution of a codicil.*(q)*

(2.) The institution of the heir generally takes place by will, and not by codicil.

(3.) Codicils confirmed by testament under the reservatory clause could be made in a private instrument, and required

*(i)* Digest de Hered. Instit. 1. 1.

*(k)* Justinian, Instit. 2, 25, 3.

*(l)* Justinian, Instit. 2, 25, 3.

*(m)* Justinian, Instit. 2, 25, 2.

*(n)* Gaius, 2, 273.

*(o)* Censura Forensis, Pt. 1, 3, 2, 2.

*(p)* Theses Selectæ, 289.

*(q)* Voet, 29, 7, 1.

no formalities, and no institution of an heir could be made by such private instrument.

The Roman-Dutch law required seven male witnesses to a testament, if made according to the formalities of the Roman law. A codicil required five witnesses, either male or female.<sup>(r)</sup> If the requisite number of witnesses for a last will has been altered by statute, the number of attesting witnesses to a codicil will be altered also. Thus where it has been enacted that two witnesses are sufficient for the execution of an under-hand testament, a like number will be required to attest a codicil.<sup>(s)</sup>

A codicil can be executed without witnesses by virtue of the *clausule reservatoir* which operates as a confirmation of codicils.<sup>(t)</sup>

If the instrument is void as a will, but was executed with the formalities required for a codicil, it will take effect as such.<sup>(u)</sup>

If the instrument is void as a will because certain prescribed formalities were not complied with, it will not become valid by reason of a codicil properly executed referring thereto. The will must remain invalid, but the codicil will be effective.<sup>(v)</sup> If the codicil was executed informally by virtue of a reservatory clause in an invalidly drawn up will, the codicil will not validate the will,<sup>(x)</sup> and the codicil should likewise be invalid, since it was executed by virtue of a reservatory clause which occurred in an invalid testament, void in law and considered *pro non scripto*. This point has, however, not been definitely decided.<sup>(x)</sup>

<sup>(r)</sup> Voet, 29, 7, 1. *Dwyer v. O'Flinn's Executor*, 3 S. 16. Schorer ad Grot., 2, 25, 2.

<sup>(s)</sup> *Dwyer v. O'Flinn's Executor*, 3 S. 16.

<sup>(t)</sup> *In re Sir John Wyldde's Will*, Buc. 1873, p. 113. *Pullen v. Gilfillan* (S. A. R.), 1893.

<sup>(u)</sup> *McDonald and Another v. Hart and Another, Executors of McDonald*, 3 S. 37. *Dwyer v. O'Flinn's Executor*, 3 S. 16.

<sup>(v)</sup> *Van Reenen v. The Board of Executors*, Buc. 1876, 44.

<sup>(x)</sup> *Re Labuschagne*, Sup. Court, April 12, 1888. *Van Reenen v. Board of Executors*, Buc. 1876, p. 44.

A codicil can exist independently of a will,<sup>(y)</sup> and if a will and codicil are made on the same day, they will both be considered valid unless their provisions are inconsistent.<sup>(z)</sup>

Those who are incapable of making a will are also incapable of making a codicil. Therefore a surviving spouse, who has accepted benefits under a mutual will, cannot by codicil revoke or alter the terms of such mutual will.<sup>(a)</sup>

#### CLAUSES IN WILLS.

The clauses sometimes used in wills are five in number:—

- (1.) *Clausula codicillaris.*
- (2.) *Clausula reservatoria.*
- (3.) *Clausula derogativa.*
- (4.) *Clausula cassatoria.*
- (5.) *Clausula generalis.*

The *Clausula codicillaris* is generally employed by the testator to express his wish that, if his testament cannot be valid as a testament, it may be considered valid as a codicil, or otherwise as may be most consistent with law.<sup>(b)</sup>

By virtue of this clause the formalities wanting to render the instrument a valid, solemn, and perfect testament are supplied, and the deed operates as a codicil, provided such formalities were observed as are requisite for the validity of codicils.

If a will which contains the codicillary clause becomes subsequently invalidated by reason of non-adiation or repudiation, it will take effect as a codicil.

It is not, however, absolutely necessary that the codicillary clause should be inserted in a will in order to let the invalid will take effect as a codicil.<sup>(c)</sup> The intention of the testator may be gathered from the wording and general tenor of the

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(y) Voet, 27, 3, 5. McDonald v. Hart, 3 S. 37.

(z) Grotius, Opinion No. 30 (Holl. Cons. 3 (b.) 152).

(a) Lutgen's Trustees v. Lutgen's Executor, 1 Menz. 504.

(b) Grotius, Introd. 2, 24, 7.

(c) Schorer ad Grot., 2, 24, 7.

will; and if the court finds that such intention has been to let the will be otherwise effective as a codicil, it will be carried out. This is especially the case if no heirs were instituted under the will.(d)

The codicillary clause is closely connected with the *fidei-commissaria hereditas* in its operations. In fact, *codicilli* and *fidei-commissa* were both introduced by the same person, Lucius Lentullus.(e) If the will is declared invalid as a will, but valid as a codicil, the bequests, trusts, and prælegacies are preserved, and the heir *ab intestato* must hand over the bequeathed property to the fidei-commissary heirs and legatees; and in like manner he must restore the inheritance to the heir nominated in the will by virtue of the universal *fidei-commissum*. He retains only his right to the deduction of the legitimate and Trebellianic portions.(f)

The *Reservatory clause* is generally introduced by the testator into his will with the object of retaining the liberty at all times to make any alteration in his will under-hand and without formality. The usual form is as follows:—“Finally, I reserve to myself the right to make all such alterations in, and additions to, this my last will as I may think proper, either by separate writing or at the foot thereof, under-hand and without solemnity, desiring that all such alterations and additions so made shall be equally valid as if they had been inserted herein.”

The effect of the reservatory clause is that the testator can make a subsequent codicil without any formality.(g) Such codicil cannot contain the institution of an heir, but if in the will the testator specially reserved the right to nominate an heir later, he could do so by virtue of the reservatory clause.(h) In order to be valid, such private writing must be signed by the testator.(h)

(d) Dwyer v. O'Flinn's Executor, 3 S. 16.

(e) Justinian, 2, 25, pr.

(f) Van der Keessel, Thes. 307.

(g) Van der Keessel, Thes. 337.

(h) Schorer ad Grot., 2, 25, 9.



A reservatory clause is of equal force, whether it is contained in a notarial or in a non-notarial and under-hand will.(i)

If a codicil is properly executed by virtue of a reservatory clause in an invalid testament, the codicil cannot validate the testament. (See *Codicils*, and footnote (x), *supra*.)

The *Clausula derogativa* is to the effect that the testator does not wish any wills subsequently made by him to be valid. This clause has lost much of its force, for a testator could not legally deprive himself of the liberty to make fresh testamentary dispositions—*Ambulatoria est voluntas defuncti usque ad vitæ supremum exitum*.(k) He could, therefore, revoke this clause by either of the clauses below mentioned; and further, if there is no suspicion of fraud a subsequent inconsistent testament will revoke the prior will although it contains the derogative clause.(l) The use of this clause has therefore practically disappeared. Its only service is that it will more readily attract attention to the execution of the subsequent will, and is more likely to induce investigation to ascertain the absence of fraud.

The *Clausula cassatoria* is introduced into a subsequent will specially to revoke a prior one. If such prior will contains a protecting derogatory clause, the clause is cancelled and the prior will revoked.(m)

By the *Clausula generalis* the testator generally revokes all prior testaments and testamentary writings, declaring that he wishes the present instrument to be considered as his last will and testament. This clause also cancels a derogatory clause in a prior will.(m).

(i) *Re Sir John Wylde's Will*, Buc. 1873, 113.

(k) Digest, 34, 4, 4, and Grotius, *Introd.* 2, 24, 8, and *Holl. Cons.* 3 (b.), 185 (*Opinion No. 15*).

(l) Van der Keessel, *Thes.* 328.

(m) Van der Keessel, *Thes.* 328. Bynkershoek, *Q. Jus Priv.* 3, chaps. 6 and 7, and 2, 16, 6. Schorer *ad Grot.*, 2, 24, 8.

## § 10.

## INSTITUTION OF HEIRS.

The institution of an heir to succeed to the property of the deceased was the foundation of a testament (see § 1). Modern conceptions as regards succession and the evolution of individual rights from the ancient communal system have, however, greatly altered the effects of such institution, which was formerly absolutely essential to the validity of a will, but have now ceased to be so.(n)

The institution of the heir is either direct or *fidei commissary*.(o)

It could be made conditionally or simply.

The condition must not have happened.(p) It must not be *contra leges aut contra bonos mores*.(q) It must be possible to execute, for impossible conditions do not render the institution void, but are regarded *pro non scriptis*.(r) And lastly, it must not cause confusion in the will.(s)

A condition in the negative, that the heir shall *not* do a certain thing, may also be imposed, in which case he will have to give security for the due compliance with the condition.(t)

Children had to be instituted heirs, and if pretermitted, the will was voidable. At the Cape of Good Hope this is no longer the case. Children cannot claim their legitimate portions (Act 23 of 1874, § 2), and testators may disinherit their children without assigning any reasons (§ 3 of same Act).

If two or more heirs are instituted, but one is unable to

(n) Van der Keessel, Thes. 290. Voet, 28, 1, 1; 28, 5, 1; 29, 7, 1. Batt v. Widow Batt, 2 M. 430; and discussed but not decided in Anderson v. Thwaites, 2 S. 187. Per Connor, J., in Oosthuyzen v. Oosthuyzen, Buc. 1868, pp. 62-65.

(o) Grotius, 2, 14, 11 and 12.

(p) Digest, 35, 1, 10, 1; 35, 1, 68; 31, 1, 45, 2.

(q) Digest, 28, 7, 14.

(r) Digest, 28, 7, 1. Voet, 28, 7, 16. Digest, 35, 1, 3. Grotius, 2, 18, 20. Van der Keessel, Thes. 310.

(s) Digest, 28, 7, 16.

(t) Digest, 35, 1, 7 pr.

take his inheritance, or dies before the testator, or repudiates his share, that portion accrues to the other heirs by virtue of the *jus accrescendi*. Much, however, depends upon the intention of the testator, as gathered from the wording of the will. Where a husband and wife by mutual will bequeathed certain immovable property to their two sons, "in the first place for both of them, and secondly the eldest son of our grandchildren shall always have the same rights thereto," and one of the sons died after the death of the testators, the legacy having vested; it was decided that there was no *jus accrescendi* in favour of the surviving son, and that the heirs of the deceased son represented him in the acquisition of the rights to one-half of the property.(u) Likewise, if the children and grandchildren of a deceased son are instituted heirs, and one of the grandchildren does not adiate, his share will accrue to the other grandchildren, and not to all the heirs.(v)

In order to avoid accretion, the property or bequest must have vested.(x)

*Obligations of Heir.*—The heir is bound either to adiate or repudiate the inheritance (§ 8), and he must carry out the wishes of the testator.(y) He must distribute the estate, pay out the legacies, and transfer the ownership of specially bequeathed corporeal property to the legatees.(z)

The heir can be appointed up to a certain time or from a certain time.(a)

The testator can dispose not only of his own property, but also of that of his heir.(b)

When legacies have been left which are subject to a burden, and the testator has not directed by whom the burdens should be borne, the heir must release the property

(u) De Jager v. Scheepers, Buc. 1875, p. 86.

(v) Tenant's Notary's Manual, p. 73 (C. 3, § 8).

(x) De Jager v. Scheepers, Buc. 1876, p. 86. See also for discussion Rahl v. De Jager, 1 J. 38, and Grotius, Opinions Nos. 37 and 39.

(y) Grotius, Opinion No. 42.

(z) Grotius, Opinions Nos. 25, 36, and Introd. 2, 18, 21.

(a) Van der Keessel, Thes. 311.

(b) Grotius, Opinion No. 42.

if the burden is redeemable—such as a mortgage bond; but if the burden is irredeemable, such as emphyteutic rent, servitudes, it must be borne by the legatee (*Rathfelder v. Rathfelder*).(c)

The heir had to pay the debts of the deceased, but he was entitled to an “act of deliberation” and “benefit of inventory,” which, in operation, removed his liability in excess of the inheritance received by him (see § 8). Ordinance 104 of the Colonial Statute Law wrought several important changes in this matter, but it did not alter the liability of the heirs to pay the debts of the deceased up to the amount actually received by them.\*

This matter has been fully discussed in the two cases of *Fisher v. Liquidators of the Union Bank*(d) and *Watson's Executors v. Watson's Heirs*.(e) In the former, the plaintiff became heir to one-half of the estate of his parents. Among the assets were certain Union Bank shares, which the executor, without the knowledge or consent of the plaintiff, transferred into his (plaintiff's) name. The Bank having been placed under liquidation, plaintiff was put upon the list as a contributory for the full amount due on the shares as “calls;” but the court held that the plaintiff, as heir, was not liable for payment of “calls” in excess of the amount of the inheritance which he had actually received.

The other case differed somewhat from this, in that the executors had paid the heirs their proportionate shares due under the will, but had not distributed among the heirs the Union Bank shares in the estate. Upon liquidation, a call was made on these shares, but no money was left with the executors wherewith to meet the fresh liability. The court, under these circumstances, held that the executors could recover from the heirs a *pro rata* share of the amount paid out to each, in order that the calls might be paid.

(c) Buc. 1874, p. 9.

\* See also judgment of Connor, J., in *Oosthuyzen v. Oosthuyzen*, Buc. 1868, pp. 61–63, concerning the relative positions of executors and heirs.

(d) 8 Juta, 46.

(e) 8 Juta, 283.

It frequently happens that the heirs, through ignorance, mistake, or negligence, by express words or tacitly acquiesce in the distribution or management and administration of the estate contrary to the terms of the will, and the question arises whether they are estopped from claiming a different distribution or administration to that in which they have acquiesced. A great deal will necessarily depend upon the particular facts of each separate case, and no definite rule can be laid down to govern all cases. If the acquiescence was deliberate, with full knowledge and for a consideration, estoppel will certainly intervene. On the other hand, if the acquiescence is the effect of mistake, fraud, or fear, equitable relief will be afforded by the court. Cases lying between the two extremes must be decided according to the facts of each particular case. A study of the following cases will show the attitude adopted by the courts:—

De Smidt *v.* Burton, Master of the Supreme Court.(*f*)

Heirs of Horak *v.* Widow of Horak.(*g*)

Reis *v.* Executors of Galloway.(*h*)

Oosthuyzen Wessels *v.* Executors of Rensburg.(*i*)

Brand *v.* Neethling's Executor.(*k*)

Van Reenen *v.* Neethling's Executor.(*l*)

Roche Blanche *v.* Widow of Pas.(*m*)

Cleeuwek *v.* Berg and Another.(*n*)

South African Association *v.* Mostert.(*o*)

Watson *v.* Burchill.(*p*)

See also Opinion No. 54 (2), Holl. Cons. 3 (b.) 159.

*Collation* (see Opinions Nos. 53 and 54).—In computing the amount to which each heir is entitled, all monies received by the heirs as gifts for their advancement or

(*f*) 1 Menz. 222.

(*h*) 1 Menz. 186.

(*k*) 2 Menz. 489.

(*m*) 2 Menz. 475.

(*o*) Buc. 1869, p. 231. Buc. 1873, p. 27 and 31, and L. J. R. (N.S.), (P.C.), p. 41.

(*g*) 2 Menz. 424.

(*i*) 2 Menz. 447.

(*l*) 2 Menz. 492.

(*n*) 2 Menz. 418.

(*p*) 9 J. 2.

education must be brought into collation, unless the testator has specially declared otherwise.(q)

Collation does not entirely depend on the right of the heir to a legitimate portion, for it will be required although the child has lost his right to claim his legitim.(r) The fact that the parent did not prove the debt in the estate of the insolvent child,(s) or that he did not sue him within the period of prescription, is not sufficient proof of intention that collation of the debt should not take place.(t) In like manner the executors of a parent's estate can set off against the inheritance of a child the debt due by him to his parent's estate.(u)

In matters of *compensation*, where one heir has to receive the money value or property of equal value to that inherited by another heir, the valuation must be *arbitrio boni viri*.(v) Collation is further treated on pp. 391–395.

*Children as Heirs.*—The legal significance of the word “*children*” used in a will varies according to the nature of the institution and the apparent intention of the testator. By the word “*child*,” and every word of that species, is meant *prima facie* a legitimate child.(x)

Another rule is that grandchildren and further descendants are comprehended under the word “*children*,” if they are the testator's own children and grandchildren; but not if they are the children of another person, and thus not his descendants.(y)

If a burden is imposed upon the children, further descen-

(q) Voet, 37, 6, 1. Van Leeuwen, Cens. Forens., 3, 13. Grotius, Opinions Nos. 26, 53, and 54.

(r) Jooste v. Jooste's Executor, 8 J. 288.

(s) De Villiers, Tutrix of Wehr v. S. A. Association, 2 S. 297.

(t) Van Heerden v. Marais, Buc. 1876, p. 92. Jooste v. Jooste's Executor, 8 J. 288.

(u) Hiddingh's Executors v. Hiddingh's Trustee, 4 J. 200.

(v) Grotius, Opinions Nos. 26 and 28.

(x) Dig. 1, 5, 6. Voet ad Pandectas, 36, 1, 13.

(y) Voet, 36, 1, 22. Van Leeuwen, R. H. R. 3, 6, 7. Van den Berg, Advijsboek, 1 Cons. 196, and 3 Cons. 126, 136, 157.

dants are not comprehended. Thus, in the charge of fideicommissary inheritance among the children, grandchildren are not included, and will take the inheritance unencumbered.(z)

Hard and fast rules for the interpretation of the word "children" cannot be laid down to govern every case. If the intention of the testator was that the word should include natural as well as legitimate children, or should not include children born after the execution of the will, or that all or some of the grandchildren should be excluded or included under the condition, legal effect will be given thereto. The intention of the testator may be gathered from express words in the will, or inferred from the circumstances. Hence the signification that has to be given to the word is a question of fact, and cannot be governed by definite rules.

The following Colonial cases treat of this matter:—

Spengler *v.* Executor of Higgs (1 R. 221).

*In re* Insolvent Estate of Beck.(a)

Cruse *v.* Executors of Pretorius.(b)

Du Preez *v.* Du Preez.(c)

Pretorius *v.* Executors of Pretorius.(d)

Bresler *v.* Executors of Kotze.(e)

*In re* Brink (Aug. 1892).(f)

*Education.*—If the surviving parent is entitled under a mutual will to the *usufruct* of the property, subject to the burden of educating the children until they become of age, and such parent allows the monies in excess of the educational expenses to accumulate in the hands of the Orphan Chamber, either through mistake or otherwise, he or she is not debarred from subsequently claiming the amount thus accumulated as surplus.(g)

(z) Sande, 4, 5, def. 9, 10, 11. Van Leeuwen, R. H. R. 3, 8, 11.

(a) 1 Menz. 332. (b) Buc. 1879, 124.

(c) 1 J. 259. (d) 2 J. 293. (e) 2 M. 466.

(f) 9 J. (Aug. 1892), Cape L. J. 9, 242.

(g) De Smidt *v.* Burton, 1 M. 222.

If the surviving parent is burdened as in the preceding case, and he or she spends more money on the education of the children than is derived from the annual interest of the property, the excess expenditure thus incurred cannot be deducted or recovered from the *corpus* of the estate coming to the children.<sup>(h)</sup>

When the children have to be educated and maintained till they have reached an approved state, the surviving parent cannot confine this period to eighteen years.<sup>(i)</sup>

*Valuation.*—It is frequently stipulated in the mutual will of parents that the children shall be educated during minority, and that upon marriage, majority, or other approved state, their paternal or maternal proportions shall be paid out to them.

When this valuation is to take place has been laid down *in re Wium.*<sup>(k)</sup>

In that case the spouses had executed a mutual will which contained the following clause:—"Provided the survivor shall be bound and obliged to maintain the children already or still to be procreated during the wedlock, honestly and in the Christian religion, until their majority or marriage, or other approved state, when to each of them shall be paid over, for or in place of father's or mother's portion, such a sum of money as the survivor shall conscientiously, and according to the condition of the estate, find to belong to them." The wife predeceased her husband, and the husband became insolvent. The children proved on the estate for their share of the maternal inheritance, calculated according to the value of the estate at the time of their mother's death. Some of the children had attained majority before the decease of the mother; the others after her death, but before the father's insolvency. The question arose whether the maternal portions had to be calculated according to the value of the estate at the death of the mother, at the date of the majority

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<sup>(h)</sup> Prince qq. Dieleman *v.* Berrange *alias* Anderson, 1 Menz. 435.

<sup>(i)</sup> Opinion No. 54, § 5, Holl. Cons. 3 (b.) 159.

<sup>(k)</sup> 2 Menz. 453.



of the children, or at the date of sequestration. It was held by the court that the shares of the heirs major at the death of the mother must be calculated according to the value of the estate at that date, and the shares of the heirs minor at the death of the mother had to be calculated according to the value of the estate at the dates when they attained majority.

Under such a will the children will be entitled to an amount somewhat in excess to their legitimates.(l)

If a child receives money from his father and binds himself to repay such amount, failing which it was to be deducted from his share of the inheritance, and he predeceases his father the testator, a child of such son, grandchild of the testator, is bound by such acknowledgment, and the amount will be set off against the inheritance to which he is entitled under the testator's will, as representing his deceased parent.(m)

When the mutual will provides that the children shall be paid their portions "upon marrying, attaining majority, or other approved condition," it was argued that the words "approved condition" included emancipation, and that where a child had been farming on his own account for several years and was nearly of age, his inheritance could be paid out to him as having attained an approved state, and so the court held.(n)

*Tacit Hypothec.*—Where the children have been instituted heirs under a mutual will, the surviving spouse to remain in possession of the estate until they attain majority, they will have a tacit hypothec upon the estate of their surviving parent for the payment of the amounts due to them from the estate of their deceased parent. The broad principle is that the fidei-commissary and the legatee are entitled to a tacit hypothec on the estate of the deceased testator for the payment of the *fidci-commissum* or legacy. In case of

(l) Oosthuyzen and Others v. Moeke, 1 R. 330.

(m) Richert's Heirs v. Stoll and Richert, 1 Menz. 556.

(n) *Ex parte* Streicher, 3 J. 58.

a mutual will, by which the surviving testator has been appointed fiduciary, the tacit hypothec of the fidei-commissary affects only the share of the first dying testator.(o)

THE POSITION OF THE SURVIVOR UNDER A  
MUTUAL WILL.

Mutual wills, like community of property, were an innovation of the Dutch jurists. They were not actually prohibited by the Roman law, but in Holland their use became very common. At the time of Grotius, any two persons, not necessarily relations or spouses, could make a mutual will, and in the *Hollandsche Consultatien* (2, 275) a case is mentioned where three persons have made their will on one and the same paper.(p)

The only mutual will in use now is that executed by husband and wife conjointly. Such a mutual will is considered the separate will of each spouse, and the dispositions of each are treated as applicable to his or her half of the joint property.(q)

The mutual will is a contract between the spouses;(r) but since the power of testamentary disposition could not be rescinded or taken away, each of the spouses retained the right to revoke or alter the mutual will, as far as his dispositions were concerned, during the lifetime of the other, with or without the other's knowledge or consent. The contract was, to a certain extent, confirmed by death, and the survivor could not revoke or alter the terms of the mutual will if he or she adiated or accepted any benefits

(o) Voet, 20, 21, and 23. *In re Wium*, 2 Menz. 453. *Gnade in re*, 2 Menz. 450. *Minors Hiddingh v. De Ronbaix*, 3 R. 11. *Van Rooyen v. McColl*, 3 J. 284. *Oosthuyzen v. Moffat*, 5 J. 319. *Jennings v. Van Wijk*, 7 J. 228. *Booyen v. Colonial Orphan Chamber*, F. 48 and 51.

(p) Grotius, 2, 17, 24. *Gail*, 2, obs. 117, n. 1 and 2. *Peckuis de Testamentis Conjugorum*, 1, 43. *Van der Linden, Institutes*. See also judgment of *Denyssen, J.*, in *S. A. Association v. Mostert*, Buc. 1869, p. 231.

(q) *S. A. Association v. Mostert*, Buc. 1869, 231, and L. J. (N.S.) P. C. p. 41.

(r) *Neethling v. Neethling*, quoted by *Fitzpatrick, J.*, in above case.

under the will;(s) in other words, if he or she accepted the *consideration* after the demise of the other spouse. Thus the Privy Council decided in the case of the *S. A. Association v. Mostert*,(t) that the power of the surviving spouse to revoke the mutual will, as regards one-half of the joint property, is taken away upon the concurrence of two conditions:—

(1.) The will must dispose of the joint property.

(2.) The survivor must have accepted some benefit under the joint will.

The first condition is often referred to as *the massing of the joint estate*. See *Barry v. Kunhardt's Executor* (2 J. 98), and *Brand v. Brand* (4 J. 320).

#### THE SURVIVOR AS USUFRUCTUARY OR FIDUCIARY HEIR.

The interest of the surviving spouse under a mutual will is generally that of a usufructuary or fiduciary heir. The difference between the two positions is chiefly confined to the *time of the vesting of the dominium* in the legatees or fidei-commissaries; and this again regulates the power and duties of the survivor, and the remedies of the fidei-commissaries and legatees with respect to the joint property left under the mutual will.

If the surviving testator under a joint will is a *bare*

(s) *S. A. Association v. Mostert*, L. J. (N.S.) P.C. p. 41.

(t) The decisive authority of the Privy Council has set this matter at rest. Earlier cases had come before the courts, but in none of these was a definite decision of the courts obtained in respect of the questions ultimately conclusively answered by the Privy Council. The first case was that of *Britz v. Britz* (Buc. 1868, 312). The judgment in this case was to the effect that a mutual will, dealing *re singulari*, was not revocable by the survivor. This view to a certain extent corresponds with the judgment of the court in *Oosthuyzen v. Oosthuyzen* (Buc. 1868, p. 51), where there was a tendency to hold that a mutual will was irrevocable after the death of one of the spouses, without taking the acceptance of benefits or adiation into consideration at all. In the case of *Hofmeyr, Neethling's Curator v. De Wet, Neethling's Executor* (Buc. 1868, 312), the judgment was almost to the same effect as in the decision of the Privy Council.

*usufructuary*, the *dominium* at once rests in the legatees upon the decease of the first-dying spouse.(u) If the survivor is a *fiduciary*, the *dominium* vests in him,(v) and the fidei-commissaries have a contingent claim.(w) *Is etiam heres dicitur, qui sub onere fidei-commissa est heres* (Opinion No. 55).

The wording of wills whereby the whole or part of the joint property is left to legatees or fidei-commissary heirs after the death of the testator frequently involves the bequest in a great deal of ambiguity, and this has led to a vast amount of litigation and numerous decisions, which, if not apparently inconsistent, are certainly most difficult to analyse in order to obtain a definite series of rules for future guidance.

The presumption, in case of ambiguity, is always in favour of a *fidei-commissum*, and the burdened heir will be considered a *fiduciary* in preference to a *usufructuary*. The mere use of the words "for life" in a bequest does not always confer a bare usufruct, but sometimes ownership, depending upon the construction placed upon the will.(x) This is certainly the case where the interests of creditors are concerned.(y)

Thus in the case of *In re Zipp*,(z) the survivor and the children were appointed heirs of the predeceasing in all the testator's property, to be possessed by them as their full and free property, with the condition that the survivor remained bound to support the children till marriage or majority, "at which time each shall be paid out such portions as the survivor shall think fit, the survivor to remain in full and undisturbed possession, in order to be the better enabled by means of the usufruct to educate and support the minors." Further, after the survivor's death two farms were bequeathed

(u) *Upton v. Upton*, Buc. 1879, 289. *In re Zipp*, 1878. *Lucas v. Hoole*, Buc. 1879, p. 132. *Rahl v. De Jager*, 3 J. 38.

(v) Opinion No. 55, Holl. Cons. 3 (b.) 339.

(w) *Hiddingh v. De Roubaix*, 3 R. 11. *Van Rooyen v. McColl*, 3 J. 284. *Oosthuyzen v. Moffat*, 5 J. 319.

(x) *Voet*, 7, 1, 9, 10, 13. *Grotius*, 2, 20, 14. *Sande*, *Decis. Fris.*, 5, 1, 2.

(y) *Hiddingh v. De Roubaix*, *supra*.

(z) Decided in the Supreme Court in December 1878.

to the children, to be entered upon and possessed by them as their free and own property. At the death of the predeceator (the husband) three children were left, and the survivor adiated. One of the children died subsequently, and the survivor was appointed executrix. She then applied to the court for an order to appoint appraisers to value the farms, and to allow her to transfer them to the surviving children, and to raise a mortgage on them to the extent of one-third of their value (*i.e.*, the share of the deceased child), this amount to be paid into the estate of the deceased child. It was argued for the surviving children that the mother was a fiduciary, and that therefore the *dominium* vested in the fidei-commissaries only after her death, when the *jus accrescendi* would operate in their favour; but the court held that the estate vested upon the death of the predeceator, and that the mother was entitled to her share in the estate of her deceased child as heir *ab intestato*, she being merely a usufructuary.

The case of *Upton v. Upton* (a) was decided on the same grounds seven years previously (1871). There, by mutual will, it was provided that the survivor should be the sole heir together with the children, "*one-half of the estate and a child's portion to appertain and belong to the survivor, and the residue to the children, share and share alike in equal portions, —and at the demise of the survivor the said joint estate shall be divided equally among the children.*" Under these circumstances it was argued that the survivor had acquired an *absolute right* to one-half and a child's portion of the estate, and a usufructuary's right over the remainder. It was, however, decided that the whole estate should go to the children on the death of the survivor, the survivor being a usufructuary and fiduciary heir.

In the case of *Lucas v. Hoole*, (b) the wording of the will was almost identical with that of the mutual will in the preceding case, and it was then decided that the children were fidei-commissary heirs in respect of one-half and a

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(a) Buc. 1879, 289, and Roscoe, 2, 42.

(b) Buc. 1879, 132.

child's portion of the estate, and that the survivor was a usufructuary heir as regards the remainder. In giving judgment, De Villiers, C.J., is reported to have said, "The will is not free from obscurity, for, after declaring that one-half of the joint estate and a child's portion should belong to the survivor and the residue to the children, the will directs that the survivor shall enjoy the usufruct of the joint estate during his or her life, and that on his or her death the joint estate shall be equally divided among the children. Following the ordinary rule, however, that all the parts of a will are to be construed so as to form a consistent whole, the apparent inconsistency of the will may be reconciled by holding that as to one-half and a child's portion of the joint estate, the testators intended that the survivor should be a fiduciary heir, and as to the residue, that the survivor should be merely a usufructuary. If this view be correct, it would follow that after the death of the survivor the children became entitled to the whole of the joint estate of the testator and his wife, providing, of course, that the following conditions occurred, viz., that the will disposed of the joint property and that the survivor had adiated under the will."

In *Rahl v. De Jager*,<sup>(c)</sup> the children of the marriage were appointed sole and universal heirs, and the testators desired that after the death of the survivor the value of the property was to be divided in equal shares among all the heirs. Here it was decided that the survivor was a mere usufructuary, and not a fiduciary heir.

This decision was followed in *Nortje v. Nortje*.<sup>(d)</sup> The mutual will stipulated that the survivor should remain in possession till his or her death, when the property was to be publicly sold, and the proceeds divided amongst the children or their lawful heirs. The testator died in 1868, when a daughter of the marriage was married to N. In 1881 a decree of divorce was obtained by the daughter against her husband on the ground of adultery, but the forfeiture of

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(c) 1 J. 33.

(d) 6 J. 9.

benefits was not decreed. In 1886 the survivor, who had adiated, died. Under these circumstances it was decided that the survivor was a mere usufructuary, that the *dominium* vested in the children in 1868 and not in 1886, and that therefore the daughter could only claim one-half of the inheritance as against her husband, the parties having been married in community of property.

This case clearly illustrates the importance as to the time of the vesting of ownership.

In *Klopper v. Smit*,<sup>(e)</sup> husband and wife, married in community of property, bequeathed all their property *that should be left at the death of the survivor of them* to certain heirs. The survivor was not appointed one of the heirs. The court held that if the survivor adiated under the will, he was a mere life usufructuary and the property vested in the heirs; but he could repudiate the will, in which case he would be entitled to claim one-half of the joint estate.

The case of *Hiddingh v. De Roubaix*<sup>(f)</sup> illustrates a converse position. There the *survivor and children* were appointed heirs of the first dying, on condition that the survivor should be allowed to keep the whole of the joint estate under his or her control and to remain in possession of the *usufruct*, but at the death of the survivor the joint estate was to be equally divided among the children. And it was held that the children were fidei-commissary heirs, in whom the estate vested upon the death of the survivor, and that they therefore had a contingent claim only in case of insolvency.

The *survivor and children* were appointed heirs in this case. Compare with this provision the terms of the will in *Lucas v. Hoole* on the one hand, and *Rahl v. De Jager* on the other.

When the interpretation of the will merely affects the heirs, no grave difficulties arise. It is, however, different when the rights of third parties, such as vendees and creditors, conflict with claims of the heirs under the will.

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(e) Decided in Sup. Court, March 2, 1892, 9 Juta, p. 167. (f) 3 R. 11.

It is undisputed law that the property of the testator must be realised to meet his debts as a first charge before heirs and legatees can be paid, and if they have been paid under mistake, their bequests will have to be abated, or they will have to make a refund in proportion to the amount received.

What is, however, the position of affairs when the usufructuary or fiduciary heir has alienated or encumbered in favour of a third party the property bequeathed under a will to the legatees or heirs?

The legal remedies afforded to legatees and fidei-commissaries in order to obtain possession or satisfaction of their claims under a will are three in number:—

(1.) A personal right against the heir for payment or compliance with the terms of the bequest.

(2.) A *jus in rem* against the property itself.

(3.) A right of tacit hypothec against the estate of the testator, but not of the heir, after all debts have been paid, for payment of the value of the legacy or *fidei-commissum*.

The second remedy under the Roman Dutch-law included the *rei vindicatio*, and, in the case of minors, *restitutio in integrum*.

If the heir alienated or encumbered the property which had to be handed over as a legacy or *fidei-commissum*, the legatee or fidei-commissary could reclaim the property from the alienee, or could demand that the burden be declared void; and the fidei-commissary will not be barred by any length of time which may have intervened between the alienation or encumbrance and the happening of the event which vested the title in him. (g)

If the fiduciary and the vendee were both ignorant that the property was subject to a *fidei-commissum*, and the ignorance could be attributed to no fault on their part, but

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(g) Voet, 36, 1, 64; Sande de Prohib. Alien., 3, 8, 51 and 57. Sande, Decis. Fris., 4, 5, 16. Gail, 2 Obs. 137, 5, 6, 7. Burge, Col. and For. Laws, pt. 2—*Fidei-commissa*.



solely to the conduct of the testator, it has been considered that the property must remain with the purchaser, and the fiduciary must pay the purchase-money to the fidei-commissary.(h)

If the fiduciary or usufructuary encumbers the property registered in his name in favour of an innocent and *bona fide* mortgagee for valuable consideration without notice of the terms of the will, the hypothec or other burden will not be void, and the fidei-commissaries cannot recover more than one-half the proceeds if the property be sold in execution of a judgment obtained by the mortgagee. In case of insolvency of the fiduciary, the fidei-commissaries will be allowed to prove preferently for one-half of the *present* value of their contingent claim and concurrently for the rest. They are allowed this preference by virtue of the tacit hypothec which they have upon the estate of the testator, but not upon the estate of the fiduciary. Therefore the tacit hypothec does not extend over the whole of the insolvent fiduciary's estate, but only over such property as can be proved to have come into his hands from the estate of the predeceasor. *Hiddingh v. De Roubaix*; (i) *Van Rooyen v. McColl*; (k) *Oosthuyzen v. Moffat*; (l) *Haupt v. Van der Hever*.(m)

If such property is alienated by the fiduciary to a transferee who knows of the *fidei-commissum*, the transfer may be set aside (*Lange v. Scheepers*). (n).

If the alienation is made to a *bona fide* transferee for value who is ignorant of the prohibition, the fidei-commissaries or legatees have no *real* right to the alienated property, and cannot recover it by *vindication* if they were cognisant of what was being done, and did not protest against the interference with their rights (*Lange v. Liesching*). (o) From

(h) Voet, 36, 1, 64. Sande de Prohib. Alien., 3, 7, 10. Burge, *Fidei-commissa*.

(i) 3 R. p. 11.

(k) 3 J. 284.

(l) 5 J. 319.

(m) 6 J. 49.

(n) Referred to in *Lange v. Liesching*, F. 55, decided in August 1878.

(o) Foord, 55.

the judgment of De Villiers, C.J., in this case it seems that it would probably make no difference whether the fidei-commissaries or legatees did or did not know of the interference. This is certainly contrary to the doctrine of the Roman-Dutch law, which allows the vindicatory action, but circumstances at the Cape of Good Hope have altered the position of legatees and indirect heirs, owing to the wider powers conferred on executors, the passing of Act No. 5 of 1861, § 9, and the facility afforded to legatees and heirs to have their titles registered in the Deeds Registry.

Moreover, it must not be forgotten that *all fidei-commissa had to be registered in Holland,(p) whilst at the Cape this was not necessary,(q)* although, if fidei-commissaries were to register their titles in the Deeds Registry there, and alienation were then to take place contrary to the terms of the *fidei-commissum*, *the legal remedies will be exactly the same as those allowed under the Roman-Dutch law.*

If the property was not registered in the names of the testators at the time of the death of the predeceator, no right *in rem* passes to the legatees or indirect heirs. (*Booyesen v. Colonial Orphan Chamber*).(r)

The surviving spouse must draw up an inventory of the estate after the death of the predeceator. If such inventory is not forthcoming, the executors of the survivor will have to prove that any property claimed by them *qua* executors of the separate estate of the survivor was acquired after the death of the predeceator, and on failure of such proof the whole estate of the survivor must be presumed to have formed part of the original joint estate (*Smith v. Sayers*).(s)

When the usufruct of the property is left under a will, but no heir is instituted or no person nominated to whom the ownership is to go, the nominal legatee or usufructuary will be considered as vested with the *dominium* (*Castleman v. Stride's Executor*).(t)

(p) Placaat of 1624. Voet, 36, 1, 12.

(q) *In re Lutgens*, 2 Menz. 315.

(r) Foord, 48.

(s) Foord, 66.

(t) 4 J. 28.

A mutual will by two spouses is valid as the will of the surviving spouse, notwithstanding his or her second marriage (*Ludwig v. Ludwig's Executors*).<sup>(u)</sup> Subsequent marriage, under English law, on the other hand, revokes a previous testamentary disposition.

When the child predeceases the surviving spouse under a will by which the survivor and child are appointed the sole and universal heirs, the former being burdened with a *fidei-commissum* of her share in favour of the latter, it was held that the child could by last will appoint her surviving parent as her heir, and that thereupon the survivor became entitled to the free possession of the joint estate, although such an occurrence was not contemplated at the execution of the mutual will.

When an heir is burdened with a *fidei-commissum* to restore to a certain person the residue of the estate which may be left at his death, he is considered burdened with a *fidei-commissum residui*, and he cannot alienate during his lifetime more than three-fourths of the estate. If by mutual will the survivor was burdened with a *fidei-commissum residui*, he could dispose during life of the whole, and was not bound to preserve one-fourth for the *residuary legatee*.<sup>(v)</sup>

The usufructuary can be restrained by interdict from alienating the property to which the legatee is entitled (*Oosthuyzen v. Oosthuyzen*).<sup>(x)</sup>

The claim of the *fidei-commissary* was contingent, the *dominium* only vested in him upon the death of the fiduciary, and if he died before the fiduciary, his share accrued to his co-heirs. In the case of a usufructuary, the *dominium* vests in the legatee, who can dispose of his *spes successionis* during the life of the usufructuary heir, or can let it devolve upon his heirs, should he predecease the usufructuary (*Rahl v. De Jager*).<sup>(y)</sup> and Opinions of Grotius Nos. 37 and 39).<sup>(z)</sup>

<sup>(u)</sup> 2 Menz. 471.

<sup>(v)</sup> *Brown v. Rickard*, 2 J. 314. Grotius, 2, 20, 13. Holl. Cons. 5, 25, 3. Schorer ad Grotius, 2, 20, 13.

<sup>(x)</sup> Buc. 1868, 51.

<sup>(y)</sup> 1 J. 38.

<sup>(z)</sup> Op. No. 37, Holl. Cons. 3 (b.) 161, and Op. No. 39, Holl. Cons. 3 (b.) 154.

When *Boedelhouderschap* is continued by the survivor under the terms of a mutual will, a *fidei-commissum*, either simple or residuary, is not created in favour of the heirs, and therefore they have no right to a tacit hypothec or to a vindicatory action (*Cloete v. Cloete's Trustees*).<sup>(a)</sup>

## § 11.

### THE LEGITIMATE PORTION.

By Act 23 of 1874, § 2, of the Cape Legislature it was provided that no legitimate portion shall be claimable of right by any one out of the estate of any person who should die after the Act came into operation.

As a rule, the appointment of heirs and the bequests of legacies were left to the free will of the testator, but there was one exception: no one could disinherit his or her children without lawful cause. The children had to be instituted to a part of the inheritance, the value whereof had to amount to one-third of the value of the estate to which they would have been entitled *ab intestato*, or to one-half if there were more than four children. This part was called the *legitimate* portion. Descendants of the children represented them, and could thus claim the legitimate.

Parents were entitled to a legitimate portion out of the estate of their children if they would have been heirs *ab intestato*.

Brothers and sisters could only claim it if an infamous person had been appointed heir.

In order to calculate the legitimate, the whole estate had to be appraised or sold, and the children had to collate all benefits.<sup>(b)</sup>

The legitimate has to be left free and unencumbered.<sup>(c)</sup>

(a) 5 J. 59.

(b) Grotius, 2, 18, 8-11. Van Leeuwen, R. H. R. 3, 5. Tenant's Notary's Manual contains a detailed account of this matter, chap. 3, § 9.

(c) Sandenbergh *v.* Zibee's Executors, 2 Menz. 449.

but this does not prevent the parent from imposing certain provisions or restrictions, if these appear for the benefit of the children.(d)

Children can only be disinherited by their parents upon certain grounds and for good cause; and if passed over, they are entitled to claim their legitimate and Trebellianic portions.(e)

The children have a preferent claim for the amount of their legitimate;(f) but if they were born in concubinage, they are not entitled to demand a legitimate portion.(g)

By Ordinance No. 11 of 1880, the legitimate, Trebellian, and Falcidian portions were abolished in the Orange Free State, and no reasons need be assigned by parents for exheredation.

## § 12.

### FALDICIAN AND TREBELLIAN PORTIONS.

These have been repealed by Act 26 of 1873, § 1 (the law of Inheritance Amendment Act of the Cape Colony), and by Ordinance 11 of 1880, in the Orange Free State.

Act 26 of 1873, § 1, provides that in no case shall any heir of "any one dying after the taking effect of this Act be entitled to deduct out of the estate of the person so dying any portion under the laws known respectively as the Falcidian and the Trebellianic Laws, which, but for such laws respectively, such heir would not be entitled to claim or deduct."

The *Lex Falcidia* was a *plebiscitum* passed in the year 714, A.U.C. This law enacts that no testator can dispose of more than three-fourths of his estate in legacies; one-fourth had

(d) *Blignant's Trustee v. Cellier's Executor*, Buc. 1868, p. 206. See also judgment of Watemeyer, J., in *Van Schoor's Trustees v. Muller's Executors*, 3 S. 131 and 137.

(e) *Swanepoel v. Stroh—Re Estate of Gouws* (O. F. S.), August 9, 1880. *Barret and De Kock v. Meyer's Executors* (Natal), July 9, 1885.

(f) *Clarence v. Reid*, 3 S. 122.

(g) *Bronn v. Fritz Bronn's Executor*, 3 S. 313.

to be left free to the heir.(*h*) This fourth was known as the *quarta Falcidia*, *portio legibus debita*, *portio legitima*, or briefly as *quarta* or *Falcidia*. The *Lex Falcidia* was preceded by the *Lex Furia testamentaria* and the *Lex Voconia*,(*h*) whilst its principles were extended by the *Senatusconsultum Pegasianum* (*i*) to *fidei-commissa*, and further extended to donations *mortis causa* by a rescript of Antoninus and Severus,(*k*) to *fidei-commissa* imposed on heirs *ab intestato* by a rescript of Antoninus Pius,(*l*) and to donations *inter conjuges* by C. 6, 50, 12.

If less than one-fourth was left to the heir, he was entitled to the *actio ad supplementum legitimæ*; if the lawful heir was disinherited, he was entitled to the *querela de inofficioso*.

The Trebellian fourth was allowed to be deducted by the heir in the case of *fidei-commissa*.

Before the *Senatusconsultum Trebellianum* (62 A.D.), the heir remained heir, and as such liable for all the obligations of the deceased, although he may have handed over the whole estate to *fidei-commissaries*.

This *Senatusconsultum*, passed during the reign of Nero, in the consulships of Trebellius Maximus and Annæus Seneca, enacted that upon the handing over of the estate under a *fidei-commissum*, all actions which could have been brought by or against the heir could be instituted by or against the *fidei-commissary*.

In 73 A.D. the *Senatusconsultum Pegasianum* was passed, during the reign of Vespasian, in the consulships of Pegasus and Pusio, whereby the instituted heir was allowed to retain one-fourth part of all *fidei-commissa*.

These *Senatusconsulta* were amalgamated by Justinian under the name of *Senatusconsultum Trebellianum*.(*m*)

Both the legitimate and Trebellianic portions could be

(*h*) Gaius, 2, 224–227. Justinian, 2, 22, pr.

(*i*) Justinian, Instit. 2, 23, 5.

(*k*) Code, 6, 50, 5.

(*l*) Digest, 35, 2, 18.

(*m*) Gaius, 2, 253–258. Justinian, 2, 23, 4, 5, 6, 7. Digest, 31, 1, 2, and 36, 1, 1, 16, 21, and 36, 1, 30, 3.

deducted by the children, but they could not be both claimed by ascendants (Grotius, Opinions Nos. 25 and 28).<sup>(n)</sup>

The following Roman-Dutch law authorities may be consulted on this subject:—

Grotius, Introd. 2, 20, 6–10; 2, 21, 7–9; 2, 23, 20.

Van Leeuwen, Room. Holl. Recht., 3, 11.

Huber, Hedendaagsche Rechtsgel., 2, 19, 84, 85, 86, 96, 97, and 2, 23.

Wassenaar, Pract. Not. Testam., § 147, 148.

Lybrecht's Notaris. Ambt., i. 23, and i. 26.

Voet, Pandects, 35, 2, and 36, 1.

Van der Linden, 1, 9, 9, p. 72.

See also Domat's Civil Law, tit. "Falcidian Portion," and Tenant's *Notary's Manual*, 3, 13, and 18.

### § 13.

#### FIDEI-COMMISSA.

The nature of *fidei-commissa* or "trusts" have already been considered in treating of usufructuary and fiduciary heirs (§ 10), and of the Falcidian and Trebellianic portions (§ 12, *supra*).

*Fidei-commissa* at first were trusts pure and simple, so called because they were entrusted to the good faith—*fidei commitebant*—of those requested to execute them.<sup>(o)</sup> The following definition of a *fidei-commissum* is given by Ulpian:<sup>(p)</sup>—*Quod non civilibus verbis, sed precativè relinquitur; nec ex rigore juris civilis proficiscitur, sed ea voluntate datur relinquentis.*

These trusts were always something outside and foreign to the nature of the testamentary jurisprudence of Rome. At their commencement no legal remedies existed for their execution. Everything was left to the good faith of the fiduciary. Later, under the Emperor Augustus, the Consuls

<sup>(n)</sup> Holl. Cons. 3 (b.) 162, and 3 (b.) 193.

<sup>(o)</sup> Gaius, 2, 274, 275, 278, 285. Justinian, 2, 23, 1.

<sup>(p)</sup> Regula, 25, 1.

were instructed to interfere, but the proceeding was always considered *extra ordinem*.(g)

Subsequently the *prætor fidei-commissarius* was specially appointed to deal with "trusts" of this nature.

Trusts were of two kinds—*universal* or *particular*: *fidei-commissariæ hereditates* or *fidei-commissa singularum rerum*.

The following Roman-Dutch law authorities may be consulted on this subject:—

Grotius, 2, 20.

Van Leeuwen, Roman-Dutch Law, 3, 8, 1-5, and *Censura Forensis*, 3, 7.

Voet, 36, 1.

Sande de Prohib. Alien., 3, 5, 1, and *Decis. Fris.*, 4, 5, 18.

Huber, *Heedendaagsche Rechtsgel.*, 2, 19.

Van der Linden, 1, 9, 8.

Lybreght's *Notaris. Ambt.*, 1, 25, 1-3.

Wassenaar, *Over Testamenten*, § 145, 146.

Gail, lib. 2, obs. 136.

Burge on Colonial and Foreign Laws, under *Fidei-commissum*.

Hollandsche Consultatien:—

Part I. Cons. 12, 24, 60, 63, 68, 71, 76, 78, 79, 93, 98, 100, 107, 115, 158, 165.

Part II. 19, 81, 124, 181, 220, 296, 298, 300.

Part III. (a.) 46, 24, 105, 111, 143, 151.

Part III. (b.) 29, 111, 115, 151, 152, 188, 194, 198, 309, 318, 338, 339, 137, 124, 116.

Part IV. 18, 48, 84, 94, 109, 113, 168, 175, 388, 280, 262, 405, 142, 146.

Part V. 14, 15, 59, 109, 112, 129, 137, 158, 174, 180, 207, 214, 215, 226, 227, 253.

Part VI. 12, 47, 122, 129, 131, 132, 138, 176, 183, 185, 188, 209, 102, 182, 27.

Grotius states in his Opinions that the imposition of a *fidei-commissum* must be interpreted strictly and not extensively,(r)

(g) Gaius, 2, 278. Justinian, 2, 23, 1.

(r) Opinion No. 24 (Holl. Cons. 3 (b.) 188), and Opinion No. 32 (Holl. Cons. 3 (b.) 189).



and *in dubio* the inheritance will be presumed to be unencumbered.(s)

The fiduciary can be compelled to give proper security for the restitution of the *fidei-commissum*.(t) The manner of imposing a trust is not connected with any formalities, and if a clerical error has crept in, the trust will not necessarily be void.(u)

In case a person *bona fide* believes that a trust has been imposed in his favour, but cannot obtain conclusive evidence, he may refer the matter to the oath of the instituted heir.(v)

Trusts may be imposed either on the instituted heir or the *fidei-commissaries*, but in places where the legitimate portion is still in force, the children, if burdened with a trust, can claim their legitimate unencumbered.(x)

If the *fidei-commissary* dies before the fiduciary, the latter is entitled to the property in full ownership.(y) If the heir was not a fiduciary but a usufructuary, and the legatee predeceases him, the property does not pass to him, but goes to the lawful heirs of the legatee.(z)

There cannot be a *fidei-commissum* otherwise than in favour of some one, and if no *fidei-commissary* is nominated, full and not qualified ownership will vest in the heir.(a)

In like manner the *dominium* will vest upon failure of *fidei-commissaries*.(b)

The burden of *fidei-commissum* is construed strictly, as above stated, and in case of doubt the court will presume that no encumbrance was intended.(c)

Where a testatrix appointed her son as her sole and

(s) Opinion No. 27 (Holl. Cons. 3 (b.) 194).

(t) Opinion No. 29 (Holl. Cons. 3 (b.) 309).

(u) Opinion No. 30 (Holl. Cons. 3 (b.) 152).

(v) Opinion No. 31 (Holl. Cons. 3 (b.) 198).

(x) Sandenbergh *v.* Zibee's Executors, 2 Menz. 449.

(y) Van Dijk *v.* Executors of Van Dijk, 7 J. 194.

(z) Per De Villiers, C.J., in Van Dijk *v.* Van Dijk's Executors, *supra*.

(a) Castleman *v.* Stride's Executors, 4 J. 28. Drew *v.* Drew's Executor Buch. 1876, 203.

(b) Heyn *v.* Tonkin—De Geest's Case, 4 J. 95.

(c) Cruse *v.* Executors of Pretorius, Buch. 1879, 124.

universal heir, and on his death his lawful descendants by representation, the son will succeed *unburthened* with a *fidei-commissum*, and upon his death his descendants will take his place (*Lint v. Zipp*).<sup>(d)</sup> See also the cases of *Oliver v. Oliver and Cloete*,<sup>(e)</sup> and *Du Plessis v. Smallberger*,<sup>(f)</sup> and *Nel v. Nel's Executors*,<sup>(g)</sup> as illustrations of the restrictive interpretation placed upon *fidei-commissary* institutions.

If a prohibition of alienation is imposed, so that the legatees shall not be at liberty to sell the bequest to any but their co-legatees, and the co-legatees are unwilling to purchase, a legatee may sell his share to a stranger.<sup>(h)</sup>

If a *fidei-commissum* has been imposed upon condition that the fiduciary heir shall have the usufruct for life, the trust will vest upon the death of the heir, and not upon the death of his or her surviving spouse.<sup>(i)</sup>

The will speaks from the testator's death, as a rule;<sup>(k)</sup> but this doctrine does not apply where the will contains a clearly contrary expression of intention on the part of the testator. Thus in *Ex parte Ratcliffe—Re Mutery's Will*,<sup>(l)</sup> Mutery instituted Batten as her sole heir, upon condition "that, in case of the decease of Batten, whatever property shall remain, shall then be divided into equal shares among his and the testator's relatives, provided he died unmarried. Mutery predeceased Batten, leaving no relatives, and subsequently Batten died unmarried. Under these circumstances it was held:—(1) that a division *per capita* among the relatives was intended; (2) that the death of Batten was the date for ascertaining his relatives, and that it was therefore also

(d) Buch. 1876, 181.

(e) 3 S. 367.

(f) 3 S. 383.

(g) 8 J. 189.

(h) *Ex parte Steyn* (Sup. Court, Sept. 3, 1892).

(i) *Behr v. Morrison's Executor*, 7 J. 94.

(k) *Bresler v. Kotze's Executors*, 2 Menz. 444. *In re Henning*, 7 J. 53.

(l) 5 J. 39. Due regard must be paid to the intention of the testator in the construction of wills, and technical rules are subsidiary. *De Jager et Uxor v. Muller's Executor*, Buch. 1870, p. 52.

the date for ascertaining the relatives of Mutery; (3) that Batten's heirs *ab intestato* at his death were entitled to the whole inheritance, there being a failure of relatives of Mutery.

The rights and remedies of a fidei-commissary legatee have been fully discussed under § 10, *Survivor's Interest (supra)*.

## § 14.

### LEGACIES.

*Legatum est donatio quædam a defuncto relicta.*(*m*)

It has also been defined as "delibatio hereditatis, qua testator ex eo, quod universum heredis foret, alicui quid collatum vellit; adeoque id, quod mavult se habere, quam eum cui leget, magisque eum cui legat, quam heredem suum."<sup>(*n*)</sup>

Grotius (*o*) says that "a legacy or bequest is a declaration of intention, whereby something is left to a person by last will, but not as heir."

It will be sufficient for the purposes of this note to give the authorities that may be consulted with advantage on the subject, instead of embodying the law as there laid down in a special chapter. We can then pass on to consider the points referred to in the Opinions of Grotius and the South African decisions in connection therewith.

The principal authorities bearing upon this subject are:—

Justinian, Institutes, 2, 20.

Digest, 30, 31, and 32.

Voet ad Pandectas, 30, 31, 32.

Grotius, Introd. 2, 14, 13; 2, 18, 20; 2, 22, 23 and 24; 3, 39, 14, with Schorer and Van der Keessel.

Van Leeuwen (R. H. R.), 3, 9, and Censura Forensis, 3, 8.

(*m*) Justinian, Instit. 2, 20, 1. Digest, 31, 36.

(*n*) See Voet, 30-32-1, 1.

(*o*) Introd. 2, 14, 13.

Pothier on Legacies.

Domat's Civil Law—"Legacies."

Huber, Hedendaagsche Rechtsgel., 2, 26, and 27.

Lybreght's Notaris Ambt., 1, 21.

Van der Linden, 1, 9, 9.

Holl. Cons. tit. "Legaat."

In his Opinions Grotius lays down that a legacy given from a mistaken motive or with a wrong reason (*falsa causa*) is not vitiated, but remains of force if the testator's intention is void of ambiguity.(p)

As a rule, legacies had to be made in the same manner as codicils—before five witnesses—but there were certain exceptions. A person under the *bona fide* belief that a legacy has been left him may put the heir on his oath to deny any knowledge of such bequest.(q)

If mortgage bonds were made over to legatees in payment of their legacies, they were transferred into the names of the legatees without payment of transfer dues.(r)

A legacy of life-usufruct expired upon the death of the usufructuary heir. It lapsed if no adiation took place. The *dominium* vested in the legatee upon the death of the testator, and he could dispose thereof during the lifetime of the usufructuary heir.(s)

The legacies are presumed to have been left free and unencumbered, and *in dubio* the heir must bear all burdens in connection therewith.(t) If the subject-matter of the legacy is encumbered with redeemable burdens, the heir must redeem them; but if irredeemable, they must be borne by the legatee.(u)

A legacy of clothes includes all personal effects, such as

(p) Opinion No. 15 (Holl. Cons. 3 (b.) 185).

(q) Opinion No. 31 (Holl. Cons. 3 (b.) 198).

(r) Opinion No. 41 (Holl. Cons. 3 (b.) 153).

(s) Opinion No. 36 (Holl. Cons. 3 (b.) 191); No. 37 (Holl. Cons. 3 (b.) 161); No. 39 (Holl. Cons. 3 (b.) 154).

(t) Opinion No. 28 (Holl. Cons. 3 (b.) 193).

(u) Opinion No. 38 (Holl. Cons. 3 (b.) 190).

trinkets, ornaments, &c., whether in use or merely destined for use :(*v*)—

The testator can dispose of the property of the heir, and if the latter adiates, he must carry out the instructions contained in the will.(*x*)

The legatee has three legal remedies for the payment of the legacy :(*y*)—

(1.) A personal action against the heir or other person charged with the payment of the legacy, or against the executor. The increase and damages may also be claimed.

(2.) A vindicatory action.

(3.) A hypothecary action, founded on the tacit hypothec given to legatees on the testator's estate, but not on that of the heir.(*z*)

The decisions relative to the rights of legatees will be found under § 10, pp. 220–223, *supra*, where the position of the usufructuary heir is discussed.

The interest vests at the date of death of the testator, and therefore, if a testator leaves a legacy to the *children* of X., only those children will be entitled to the legacy who were alive at the date of the demise of the testator, and those born subsequently will be excluded.(*a*)

Any condition may be imposed, provided it is neither *contra leges* nor *contra bonos mores*.(*b*)

If a legacy is left subject to the happening of a certain event or contingency, the legatee cannot claim the bequest before the event has occurred. Thus, where by will an annual legacy has been bequeathed to a person for his trouble in acting as arbitrator in case of disagreement among the beneficiaries under the will, it was held that

(*v*) Opinion No. 40 (Holl. Cons. 3 (b.) 195).

(*x*) Opinion No. 42 (Holl. Cons. 5, 131).

(*y*) Van der Linden, 1, 9, 9.

(*z*) Hiddingh *v.* De Roubaix, 3 R. 11. Oosthuyzen *v.* Moffat, 5 J. 319. Haupt *v.* Van den Hever, 6 J. 49.

(*a*) Bresler *v.* Kotze's Executors, 2 Menz. 444. *In re* Schlemmer, Sup. Court, Aug. 6, 1885, and *In re* Henning, *ex parte* Strydom, 7 J. 53.

(*b*) See Pohl *v.* Auret and Van Heerden (5 E. D. C. 43), where conditional legacies are discussed.

he was not entitled to claim or receive such annual payment until such events had occurred as would give rise to the opportunity for him to perform the duty of arbitrator.(e)

If a legacy is left upon condition that the legatee is only to enjoy the interest during his lifetime, after which the trustees under the will are to pay the money to his heirs, but in case of insolvency the legacy is to vest in the trustees for the heirs, although the interest is to be paid to the legatee during his lifetime as aliment; the legatee cannot claim the usufruct, but the payment must be made to the trustees of his insolvent estate for the benefit of his creditors.(d)

The legatees under a will can only acquire rights subject to prior rights, and the testator retains free power of alienating or encumbering the property during his lifetime.(e)

The rights of a legatee to a bequest pass to his trustees upon insolvency, and they will be subject to the same conditions and restrictions as the legatee.(f)

If the estate is insufficient to pay all the legacies, an abatement *pro rata* must be made from all.(g)

No bequest can be given by implication unless it is a necessary implication. Where a bequest of the usufruct of an inheritance was left to a son, with remainder over after the death of such son *and his wife*, the son is entitled to the bequest during his lifetime, and upon his death his executors can claim the usufruct during the lifetime of his wife. If the son died intestate, his wife will be entitled to one-half, and his children to the other half of the usufruct. If he died testate, the property must be distributed in terms of the will.(h)

(e) The Consistory of the Dutch Reformed Church v. The Master and the South African Association, 8 J. 181.

(d) Hiddingh's Trustee v. Colonial Orphan Chamber and Hiddingh, 2 J. 273.

(e) Kriel v. Kriel, 1 J. 49.

(f) Jonker's Trustees v. Jonker's Executor, 1 R. 334.

(g) Mulder v. Mulder's Executors, 4 J. 39. Christie v. Gilbert's Executors and Others, 5 J. 199. Watson's Executors v. Watson's Heirs, 8 J. 283.

(h) Morrison v. Morrison's Executors, Buc. 1879, 24.

## § 15.

## CONSTRUCTION AND INTERPRETATION OF WILLS.

The rules for the construction and interpretation of wills are few in number and easy of application, except in very complex cases. The principle, as far as applicable, is the same as that which governs the interpretation of contracts and statutes.

Words in general use, void of ambiguity, receive an interpretation according to their usual meaning, unless it appears that they were used in a special sense by the testator.

Non aliter a significatione verborum recedi oportet, quum cum manifestum est, aliud sensisse testatorem.(i)

Et cum in verbis nulla ambiguitas est, non debet admitti voluntatis quæstio.(k)

Full effect is to be given to the apparent intention of the testator.(l)

Such intention can be gathered from the wording of the will and the circumstances of the case.(m)

The testament is to be construed liberally in order to ascertain that intention.(n)

The testator's intention is to be gathered from the whole will, provided it is not unlawful or inconsistent with the rules of law.(o)

The will must not be construed *per parcella*, but in its entirety.(p)

The testator's intention is the first and great object of inquiry, and to this object all technical rules are, to a certain extent, made subservient.(o)

If there is an ambiguity in a will, and the testator has assigned a motive for the bequest, that motive may be

(i) Digest, 32, 1, 69.

(k) Digest, 32, 3, 25, § 1.

(l) Grotius, Opinion No. 42 (Holl. Cons. 5, 131).

(m) *Bresler v. Kotze's Executors*, 2 M. 466.

(n) Digest, 32, 1, 69, § 1; 35, 1, 19, § 1; 50, 17, 12, 96. Bronchorst de Reg. Jur. ad l. 96.

(o) *De Jager et Uxor v. Muller's Executor*, Buc. 1870, 52.

(p) Voet, 34, 5, 1.

taken into consideration for the purpose of explaining the ambiguity.(*q*)

Ex scriptura, quæ ad faciendum testamentum parabatur nihil peti potest.(*r*) Instructions given for the execution of a will may, however, be admitted as extrinsic evidence. If there is a latent ambiguity in the will, applicable equally well to two or more persons or things, extrinsic evidence may be admitted.(*s*)

Verba testamenti ex precedentibus et sequentibus declarantur, et specialiter quando precedentia sunt generalia et sequentia determinata, tunc sequentia determinant precedentia.(*t*).

Ex verbis precedentibus dispositio immediate subsequens debet intelligi.(*u*)

Wills and bequests must be favourably construed.(*v*)

Thus, in the case of *Cruse v. Pretorius' Executors* (Buch. 1879, 124), the testator had one daughter by his first marriage, and three sons and three daughters as issue by his second marriage. In a mutual will with the second spouse, the testator instituted as heirs his daughter by his former marriage by name, together with his spouse and children of the second marriage, and a further proviso was inserted imposing a *fidei-commissum* on the portions "of the appearer's daughters." Held that the proviso did not apply to the daughter of the first marriage.(*x*)

All unfavourable conditions imposed under the terms of a will are to receive a restrictive interpretation.

Cum in testamento ambigè aut etiam perperam scriptum est; benignè interpretari et secundum id quod credibile est cogitatum, credendum est. Commodissimum est, id accipi, quo res, de qua agitur, magis valeat, quam pereat.(*y*)

(*q*) Digest, 31, 3, 41; 34, 1, 4, and Pothier on Test., 7, 5.

(*r*) Opinion of Grotius, No. 23, Holl. Cons. 3 (b.) 39.

(*s*) Per Smith, J., in *Ex parte Rademeyer*, 1 J. 167.

(*t*) Opinion of Grotius, No. 27, § 1 (Holl. Cons. 3 (b.) 194).

(*u*) Opinion of Grotius, No. 27, § 2 (Holl. Cons. 3 (b.) 194).

(*v*) Opinion of Grotius, No. 30 (Holl. Cons. 3 (b.) 152).

(*x*) Opinion of Grotius, No. 32 (Holl. Cons. 3 (b.) 189).

(*y*) Digest, 34, 5, 12 and 24.



An absurd interpretation must always be avoided in the construction of testaments.(z)

The presumption always is that the testator's intention was that which is to be gathered from the usual meaning of words of the will.(a)

No bequest can be given by implication unless it be a necessary implication.(b).

As regards the interpretation of words in a will, Menzies, J. (c), says, "It is a clear and well-established rule for the construction and interpretation of wills, that where words used in a will are in themselves clear, and, when taken in the sense which they have in common acceptation, themselves raise no ambiguity, and where no doubt as to the sense in which the testator intended to use these words is raised by any other expressions in the will itself, *the words* must be construed according to their construction in common parlance where they are words of common parlance, and according to their established technical construction where they had a fixed and certain technical meaning given to them in law or practice, notwithstanding any averment or suggestion, however strong it may be, proposed to be proved by evidence extrinsic of the will, that the testator when making it intended to use them in a different sense than would be given to them." (d)

Therefore, where a testator in a mutual will with his spouse, to whom he was married *in community of property*, made certain stipulations as to the devolution of HIS PROPERTY, it was held that reference was made to his half share under the community, and not to the whole of the joint estate.(e)

Likewise, in the case of *Johnson v. Roux' Executors*.(f)

(z) Opinion of Grotius, No. 36 (Holl. Cons. 3 (b.) 191).

(a) Opinion of Grotius, No. 48 (Holl. Cons. 3 (b.) 192).

(b) *Morrison v. Morrison's Executors*, Buc. 1879, 24.

(c) *Caffin et Uxor v. Heurtley's Executors*, 1 Menz. 181, 182.

(d) The learned judge then quoted Van der Linden, *Instit.* 1, 9, 9. Voet, 34, 5, 1, 34, 5, 4; Domat, ii. 3, 1, 6, notes 3, 15, 16.

(e) *Caffin et Uxor v. Heurtley's Executors*, 1 Menz. 178.

(f) Buc. 1874, p. 34.

the testators set aside a certain sum of money, the interest of which was to be paid to certain persons, and upon the death of these persons, the capital amount was to devolve upon *their children*, it was decided that the reversion was in favour of the children of the testators, and not of the legatees.

Of course, the intention of the testator, as gathered from the reading of the will, must prevail, especially if, without any difficulty, he could have added to or otherwise altered the wording of the will, in order to convey a different intention, had he so wished.(g)

If a testator firstly bequeathed certain legacies, and then instituted some persons as his sole and universal heirs of all the residue and remainder of his estate with entail of *fidei-commissum*, the heirs are not entitled to claim the deduction of the Falcidian portion from the aforesaid legacies, as *universal heirs of the whole estate*, but only from the residue of such estate.(h)

A will is to be favourably construed as regards its legality. Thus *in dubio* the required number of witnesses will be presumed to have been present at the execution of a will,(i) or the necessary heirs will be taken to have been instituted.(k) *Semper enim laborandum est, tum in testamentis, tum in testibus, tum in instrumentis, ut pugnancia potius concilientur quam ut actus erroris arguatur* (Bronchorst de Reg. Jur. ad l. 188).

The rule as to the *admission of parole evidence* to interpret the testator's intention is not without difficulty in its application.

Generally, evidence will not be allowed to be led in explanation of the meaning of a will, when such will is void of ambiguity.(l)

(g) *Drew v. Executors of Drew*, Buc. 1876, 205. *In re Henning, ex parte Strydom*, 7 J. 55. *Bresler v. Kotze's Executors*, 2 Menz. 444.

(h) *Dantu v. Hart's Executors*, Buc. 1868, 168.

(i) *Macdonald v. Hart*, 3 S. 37.

(k) *Oosthuyzen v. Moeke*, 1 R. 330.

(l) *Caffin et Uxor v. Heurtley's Executors*, 1 Menz. 178 and 181. *De Smidt v. Burton*, 1 Menz. 222. *Johnson v. Roux' Executors*, Buc. 1874, 34. *Lint v. Zipp*, Buc. 1876, p. 181.

Cases, however, frequently arise in which doubtful passages can be elucidated by reference to the evidence of witnesses acquainted with the circumstances of the case, although such ambiguous passages could also be construed consistently with the general tenor of the instrument. It is at this stage that the difficulty arises with regard to the exclusion or admission of parole evidence. The courts have, as a rule, disallowed the admission of such evidence on the grounds of expediency and to prevent fraud. "In this case," says De Villiers, C.J., in *Lint, Curator of Doman v. Zipp*,<sup>(m)</sup> "parole evidence cannot be admitted. There is no such ambiguity in the will or in the codicil as to justify the court in receiving it. This is more a question of construction. It may be true that there is a difficulty in construing the different clauses of the will, but this is not a reason for the admission of extrinsic evidence. The principles of law which regulate the construction of wills are against such a procedure. The doctrine, if extended to its full length, might lead to the introduction of evidence in cases where there was no real difficulty."

In the case of *Collings v. Executors of Hartogh*,<sup>(n)</sup> (of which a full report has not been published), the court allowed evidence to prove the intention of the testator when he bequeathed to the plaintiff "all my household furniture of whatever nature and description, glass and crockery, silver and plate, and all other movable property which at this moment is or may be found in the said house and premises in Sir Lowry Street aforesaid at my decease." It appeared that several pianos and other valuable articles were kept on the premises for the purpose of being sold. The court held, after hearing the evidence, that the words "all other movable property in the said house and premises," were sufficiently wide to include the pianos, &c., although under ordinary circumstances, without reference to extrinsic evidence, the words would have been construed to embrace

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(m) Buc. 1876, 182.

(n) 1 Ros. 29.

property *ejusdem generis* as the articles mentioned, *i.e.*, strictly "household furniture."

If the testator makes a mistake in the name of the legatee or heir, or otherwise, evidence may be led to prove who was intended to be nominated by the testator, but the latent ambiguity must apply generally to more than one person equally. If this is not strictly the case, extrinsic evidence must be excluded.

Thus where a testatrix bequeathed a legacy to her grandniece, Louisa Charlotta Roux, and it appeared that she left surviving two grandnieces, one named Charlotta Johanna Ambrosia, and the other Charlotta Louisa Adriana Roux, extrinsic evidence to show that Charlotta Johanna Ambrosia was intended was refused and declared inadmissible, on the ground that the latent ambiguity did not refer equally to the two grandnieces.<sup>(o)</sup>

If the language of the document, though plain in itself, applies equally well to more objects than one, evidence may be given both of the circumstances of the case and of statements made by any party to the document as to his intentions in reference to the matter to which the document relates.<sup>(p)</sup> Or, as it was laid down in *Hiscocks v. Hiscocks*:<sup>(q)</sup>—"Where there is a latent ambiguity with reference to any person or thing intended by the testator, that is to say, where the description used by the testator is indifferently applicable to more than one person or thing, evidence is admissible to show to which person or thing the description is intended to apply. If one devises to his nephew William Smith, and has no nephew answering to the description in all respects, evidence must be admitted to show which nephew the testator meant by a description not strictly applying to any nephew. The ambiguity there

<sup>(o)</sup> *Ex parte Rademeyer, in re Herold*, 1 J. 159. This case has been referred to under § 3, p. 176, *supra*.

<sup>(p)</sup> Stephens, Digest of the Law of Evidence, Art. 91 (8). *Stringer v. Gardiner*, 27 Beav. 35; 4 De G. and J. 468.

<sup>(q)</sup> 5 M. and W.

arises from an extrinsic fact or circumstance, and the admission of evidence to explain the ambiguity is necessary to give effect to the will; and it is only in such a case that extrinsic evidence can be received." "The only case," says Smith, J.,<sup>(r)</sup> in which extrinsic evidence is admissible is when the language is free from ambiguity, but from the circumstances or facts proved it is found to apply equally well to more than one person or thing, each corresponding to the words of the will, and then extrinsic evidence of intention—as, for example, statements made by the testator or instructions given for his will—may be given in evidence to show which of the persons or things was intended by the testator."

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(r) *Ex parte Rademeyer, supra.*

## OPINION No. 19.

HOLL. CONS. III. B. 310

[GROTIUS II. 16, 3.]

Incapabilities of ecclesiastics removed—Alimentation.

1. THE laws which declared ecclesiastics incapable of inheriting have ceased and been abolished, and a priest cannot be prohibited from succeeding to an inheritance to which he is entitled.

2. Alimentation must be made to priests in compensation for the usufruct to which they were entitled in conventual property.

A. joined the Brothers of the convent at Goude named "Der Collatis Broeders," before the commencement of the "Disturbances," with the consent of his parents. He remained here among the Brothers, until Henry, Pater and Procurator, was cruelly murdered by order of the Count of Lummi, then within the city of Goude, and until the soldiers, who had entered the convent in great rage, grossly ill-treated the Brothers, and among others the said A. A. had formerly a good memory and intellect, but by the treatment received these were impaired, and he left the convent for a time, until better order was restored in the Republic. He then returned to the

convent and was accepted. The convent was then provided by the States-General, upon the request of the Heeren of Goude, with an income for the support of the orphan poor of the city.

From this arises the question whether the said A. ought not to receive aliment and support out of the income of the said convent, in the same way that other monastics were supported by ordinance of the States-General?

Secondly, whether A. and other priests who had inherited property after the Revolution, or their heirs upon their death, ought not to be allowed to claim such property?

(1) I am of opinion that since the laws which rendered priests incapable to succeed to inheritances have been abolished amongst us and have ceased, A. ought not to be prevented from succeeding to the inheritance which devolved upon him. (2) Moreover, the general resolution with regard to the alimentation of priests, in compensation for the usufruct to which they were entitled out of the conventual property, ought also to tend to the benefit of the said A.

'S GRAVEN-HAGE,  
20th October 1614.

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The laws referred to by Grotius are evidently the Placaat of 20th March 1524 and 15th October 1531. The date of this Opinion is 20th October 1614. Subsequently, on the 4th May 1655, the Placaat of the States-General was passed

against instituting Catholic priests and pious foundations as heirs.

Although Grotius distinctly states that the laws imposing these disabilities were no longer in force, Van Leeuwen expressly refers to them, and Van der Keessel and Van der Linden refer to them as still of force in their time.(a)

At the Cape, disabilities on the ground of religion were abolished by the Ordinance of Sir Lowry Cole, Ord. 68 of 1830, and by Act No. 11 of 1868; whilst Act 23 of 1874 secured freedom of testamentary disposition.

In the Transvaal, although certain civil disabilities are still in force, yet freedom of religion and of the right to property have been allowed by the Legislature.(b)

Ordinance 4 of 1880 removes all disabilities on account of the Roman Catholic faith in the Orange Free State.

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(a) Van Leeuwen, R. H. R. iii. 3, § 13, 14. Van der Keessel, Thes. Sel., 284. Van der Linden, i. 9, 4.

(b) *Vide* Raad Besluit of 1st June 1870 and of 11th Sept. 1876. Pretoria Convention, 1881, and London Convention, 1884.



## OPINION No. 20.

HOLL. CONS. V. 127.

[GROTIUS II. 16, 7.]

Second marriage—Benefits—Child's portion.

WHEN there are children of a previous marriage, the parent cannot dispose of more than a child's portion to his second spouse.

I have seen a certain ante-nuptial contract between Jakob Boudewyns Wisse and Petronella van Baerland, spinster, bearing date the 24th December 1614, and also a certain testament made by the said Wisse and Petronella on the 16th January 1616.

After having considered the questions advanced, I am of opinion, since the husband of the young lady Petronella had predeceased her, leaving a daughter by his first wife, that she (Petronella) is entitled to take the property brought by her into the estate at the time of the marriage, and also one-half of the property acquired during marriage, and also to have the free ownership of the household effects, furniture, and silver, excluding the clothes belonging to the deceased, as well as two hundred Flemish pounds first mentioned, and one-half of a certain house

standing on the market as usufructuary, all in terms of the said ante-nuptial contract. Moreover, she has the right for one year after her husband's death to manage, for the joint profit and loss of the above-mentioned daughter and herself, the land situated in Kloetingen. It must be well understood that the above-mentioned one-half of the household effects, furniture, and silver, the two hundred Flemish pounds, the usufruct of one-half of the house, together with the right of management, do not exceed in value the inheritance of the daughter. As regards the second sum of two hundred Flemish pounds acknowledged to be due in the ante-nuptial contract to Petronella, which her husband would have enjoyed in terms of the contract as coming from her, she cannot claim this amount, since she abandoned her right in the said testament, assuming that the said Wisse died from the illness there mentioned.

I am further of opinion that the afore-mentioned usufruct of one-half of the house could not be taken away from the said Petronella without consent of the guardians of the said orphan and a decree of the Orphan-Masters, and that she is entitled to retain or vindicate the said usufruct without taking into consideration the alienation of the house, unless she be advised to accept fitting compensation in settlement for the said usufruct.

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The *lex hac edictale* is treated of under Opinion No. 8, *supra* (Holl. Cons. 3 (b.) 182).

## OPINION No. 21.

HOLL. CONS. III. B. 163.

[GROTIUS II. 17, 18, 13, 17 & 18.]

How many witnesses required to a testament—Wills for pious purposes are not exempted—Witnesses must be expressly summoned—Bequests *ad pias causas* no exception.

1. SEVEN male witnesses are required according to the Civil Law for all testaments without exception, whether they are for the benefit of the poor or not.

2. This remains unaltered with us except in one point, viz., that a notary, being a public person, fills the place of five witnesses.

3. Quod liberè possit relinqui collegiis, et locis piis, reddit locos pios capaces sed non tollit requisitas solemnitates.

4. Ex testamento facto coram quatuor testibus, quorum quarta erat mulier, ne pia quidem legata debentur in Francia, etsi aliud observetur in terris ecclesiæ.

5. Witnesses to a testament must be specially summoned and convoked for that purpose, and testaments *ad pias causas* are not exempted from this requirement.

6. Rogatio testium non presumitur, sed probari debet.

I have seen a certain deposition made by Huybrecht Jans van Oosten, Huygh Huyberts and Jannetgen Adams on November 11, 1612, before the Schepenen of St. Aarnour's Kerk, and have been asked whether the effect of the said deposition is that Willem Willems mentioned therein must be considered as having disposed of his goods by testament or as having died intestate, in which case one-fourth of the property coming from his grandmother will go to the treasury of Zeeland, there being no legal claimants.

(1) I am of opinion that the said deposition, when examined according to the principles of the Civil Law, is not sufficient to prove that Willem Willems had made a testament, although it was for the benefit of the poor, since, according to the Civil Law, all testaments without exception require seven male witnesses, whether they are for the benefit of the poor or not. (2) And this has not been altered by our customs, except that a notary, as a public person, fills the place of five witnesses. (3) The passage from the Code<sup>(a)</sup> is not opposed to it:—*Quæ concedit quod liberè possit relinqui collegiis et locis piis: quia vox illa, libere, locos pios reddit capaces; non autem tollit requisitas solemnitates.*<sup>(b)</sup> (4) Hence Boërius lays down in his 93rd decision, “*Quod ex testamento facto coram quatuor testibus, quorum quarta erat mulier, ne pia quidem*

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(a) C. 1, 2, 1.

(b) Ut ait Glossa *ibid.* et late Jason, affirmans hanc opinionem esse communem et in judiciis receptam.

legata debeantur in Francia, etsi aliud observetur in terris ecclesiæ.”

(5) To this may be added that it does not appear from the said deposition that the witnesses were expressly summoned and convoked, which in law is necessary in all testaments, and testaments *ad pias causas* are not exempted therefrom.(c) (6) Rogationem autem testium, tanquam solemnitatem extrinsecam, nunquam præsumi, sed probari debere communio est opinio quam tenent Bart. et alii.(d)

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(c) Quam opinionem tenet Barbatia in C. relatum, Ext. de testam. et Zabarel, Cons. 73, et Alex. Cons. 70, et Cons. 47, vol. ii., et Boër. decis. 34.

(d) Bart. ad D. 28, 1, 21, 2. Jason in l. hac consultissima C. de testam. spec. in tit. de testibus, § 1, vers. sed quid in prædict. et alii allegati, et approbati a Boërio, dicta decisione, 34.

## OPINION No. 22.

HOLL. CONS. I. 231.

[GROTIUS II. 17, 13, 17 & 18.]

Testament—Witnesses—Contract.

ACCORDING to the Civil Law, a testament requires to be signed by seven witnesses; and according to custom, it must be signed by a notary and two witnesses.

A testament void as such cannot hold good as a contract.—[Ed.]

*Dominium* of landed property only vests after proper registration and transfer.—[Ed.]

Having seen a certain document entered into between Pieter Hubrechts and Maritge Hendricks, his late wife's daughter,(*a*) on 1st June 1616, before Cornelis Jansz Blewswijck and Pieter Hendricks, *Schepenen* of Capelle, and Gijsbert, Hendricks' son, and Cornelis Aertsz, members of the same Ambacht,(*b*) and in the presence of Pieter Cornelis, late secretary of Capelle, and witnessed by the said Pieter Hubrechts and Maritge Hendricks with their respective marks, and by the signatures of the rest; and having

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(*a*) His step-daughter is evidently meant.

(*b*) There is no exact English equivalent for this word. For a full explanation see Mr. Maasdorp's note to his excellent translation of Grotius, Introduction, Gr. ii. 9, 10.

been asked whether the document is a valid testament according to law :—

I am of opinion, that the said document cannot pass as a valid testament, since there are neither seven witnesses to it, as required by law,<sup>(c)</sup> nor a notary and two witnesses, as required by custom ; and also that the person who officiated as secretary at the time of the signature of the document was not secretary.

With respect to the question whether the document will be valid *as a contract*, I am of opinion that such is not the case, since these words used therein are more in accordance with the form of a testament than of a contract. And although it may be contended that the document is valid as a contract, yet it is perfectly certain that, in as far as it relates to the ground, which Pieter Hendricks<sup>(d)</sup> wishes to pass to Maritge Hendricks, the *dominium* thereof is still vested in Pieter Hendricks, and now belongs to his blood-relations. For ground cannot be transferred to another, according to the Placaat of 1529 and the Placaat of the States, otherwise than before the court, by payment of the fortieth penny ; and, moreover, the deeds in the register must be signed by the officer and two of the members of the court, and properly stamped within sixteen days ; and it must also appear that the fortieth penny has been

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(c) By law (*rechten*) Grotius here means written (Civil) law, or, as the head-note in the *Consultatien* has it, "*beschreven Rechten*."

(d) The name Pieter Hendricks occurs throughout the body of the Opinion. This is evidently a mistake, and ought to read Pieter Hubrechts.

paid. It must be inferred that none of these things have been done in the present instance.

In case the said instruments were held to be a contract, the heirs of the said Pieter Hendricks could seek relief from its terms, if the value of the goods of Hendricks, over and above his liabilities, amounted to more than twice the cost of keeping him during his lifetime; provided that, in that case, the heirs will be bound to make reasonable compensation to the said Maritge Hendricks for keeping the above-mentioned Pieter Hendricks.(e)

ROTTERDAM,  
16th *June* 1616.

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(e) At a first glance, the concluding portion of the Opinion seems somewhat unintelligible. It would appear, however, that in the document P. H. stipulates that M. H. shall have the erf or ground on his death, provided that she supports him during his lifetime. When read in this light, the remarks are clear and intelligible.



## OPINION No. 23.

HOLL CONS. III. (b.) 39.

[GROTIUS II. 17, 28; II. 16, 3; II. 23, 2 & 5.]

Testaments—Documents to prove intention of the deceased—  
Force of incomplete testamentary writings—Bequests *ad  
pias causas*—Are heirs bound *in foro conscientie*?—What is  
a “*perfecta voluntas*”?

1. NOTHING can be demanded under a writing which was drawn up for the purpose of making a will.

2. This must also be observed in bequests *ad pias causas*.

3. By the Pontifical law two or three witnesses were required to attest bequests for charitable purposes (*piæ causæ*).

4. That which has been held to be contrary to the spirit of the law is not to be followed.

5. The claims of the children have more in their favour than bequests for charitable purposes.

6. Legacies left to churches and the poor, in writing, under the hand of the deceased, without witnesses, cannot be claimed.

7. Various opinions and restrictions of the jurists concerning the question whether the bequests in an informal testament will bind the heirs in conscience.

8. An imperfect will is not upheld either with regard to children or in favour of charitable institutions.

9. An intention cannot be said to be perfect unless the testator set out everything fully.

10. That which a judge has drawn up for the purpose of giving a decision can in no wise be taken for a judgment.

11. The opinion of Hugo Grotius on the case in question.

I have seen an entry, without any heading, in the handwriting of a certain Peter Overbeckius, made in a memorandum-book, likewise without any title. In this entry *inter cætera* occur the following words: —“Four theological students studying the Ausburg Confession,” without the addition of any other words to amplify the meaning, and without signature. At the same time I am informed that he gave no instructions to any of his relatives, either expressly or inferentially, with regard to this writing. I have been asked whether the heirs can be compelled by action to maintain four theological students studying the Augustinian Confession; and if not, whether, as good and Christian men, they are bound to do it.

(1) In the first place, I have replied that nothing exists whereby they can be rendered liable. Nor was this writing drawn up as a testament, but merely to fix the subject-matter for the execution of a testament at some future time; under which no-

thing can be claimed, and not even under a writing prepared for the execution of a testament, if the testament is not completed, as advised by the jurists Paulus, D. 28, ~~2~~, 29, and Ulpian, D. 32, 1, 11.

(2) And it was generally accepted that this should also be observed in respect of bequests *ad pias causas*.(a) And even if the testator had greatly desired to execute a testament (the contrary is, however, perfectly apparent), yet no right to claim under the writing would arise, since the formalities required by law in the execution of testaments are wanting; for, in the present case, neither the formality of the Civil Law nor of the law of Hamburg was observed, (3) nor yet that of the Pontifical law as regards bequests *ob causam piam* (namely, two or three witnesses).(b) Further, a written document in the handwriting of the deceased without witnesses may be sufficient, although even in the case of a paternal testamentary disposition among children there are certain formalities, such as the insertion of the date, which do not occur in the present case; yet it was held that this ought not to be extended to bequests *ad pias causas*; both because that ought not to be followed which is contrary to law,(c) (4) and also because the claims of the children deserve greater consideration than legacies for charitable purposes.

(5) To this may be added that such bequests are

(a) Supported by Oldradus, Cons. cxix. Thomas Grammaticus, re iudicata lxii. Nicholaus Everhardus, consilio clv. Petrus Peckius, lib. i. de testam. conjugum, cap. xviii. Julius Clarus, testamentaria, quaest. vii.

(b) As stated in C. 6, 23. Epistolis Decretalibus, C. 6, 23.

(c) D. 1, 3, 14.

C. 11 X. 3. 26

allowed a special and privileged form according to Pontifical law, and if this is not observed, the claim is void. (6) For these reasons Nicholas Everhardus in the passage quoted, and Clarus in *quæst. vii.* above referred to, clearly maintain that that which has been left to churches or to the poor in an unattested document in the handwriting of the deceased cannot be claimed, and they state that this has been followed in two courts of justice.

(7) With reference to the other question concerning the duty of a good man (*vir bonus*), it is not necessary for us to enter into a general discussion whether bequests in a testament, defective in solemnities of execution, bind an heir in conscience, concerning which there are various opinions of theologians and jurists; (*d*) for they all agree that the heir is not bound in conscience unless he is quite certain as to the intention of the deceased. (*e*)

(8) But an imperfect intention cannot be upheld even in favour of a *pia causa*. (*f*) The general opinion is that when the testator dies without having expressed his intention clearly, such a will is said to be deficient, not as regards the formalities, but as regards the intention, and it is therefore of no effect, not even in favour of a *pia causa*. Aretinus (*g*) and

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(*d*) Vasquius, de successionum creatione, § 1, num. 23, et sequentibus; et de successionum progressa, § 50, num. 30—negante Didaco Covarruvia in C. cum esset de testam.; mediam sententiam sequente Dominico à Soto de justitia et jure, lib. 4, quæst. 4, art. 3.

(*e*) This restriction is added by Lud. Zuntus, responso pro uxore, num. 42; Mantica, de conjecturis, ult. vol. lib. 11, tit. 14, num. 13 in fine, et num. 27 in fine.

(*f*) Peckius dicto loco, et Clarus dicta quæstione 7.

(*g*) Aretinus in d. l. Is qui, col. fin. versic. secundo casu, et vide (*h*).

Boërius (*h*) testify that this is the general opinion. All these authorities come to the conclusion that the general opinion is that such a testament is of no effect, both with regard to children and also in respect of charitable matters (*piæ causæ*); for, as experience daily teaches us, we see that testators, even whilst engaged in executing a testament, alter, add, and revoke many dispositions just made.

(9) With good reason, therefore, the intention must be considered imperfect unless the testator has expressed everything clearly. Given that a testator had begun to execute his testament, and that he had bequeathed something therein *ad piæ causas*, but before the testament was completed he died. Under these circumstances such a writing ought much rather to prevail than where there was no intention to make a testament, but where merely an entry had been made, which did not even contain a fully expressed thought and was undated. So that the rescript of Trajan with reference to the oral wills of soldiers might be aptly applied here, viz., that to none is it of greater interest than those to whom this privilege has been granted that a precedent of this kind should not be allowed.

(10) In the same manner, that which a judge has drawn up to formulate his decision can in no wise be taken as a decision, as Everhardus and Peckius state (*dicto loco*).

I certify that I have seen in the memorandum-

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(*h*) Boërius in decis. 93, post num. 10, et decis. 240, num. 5.

book of the late Petrus Overbeckius a certain writing where occur the words "Four theological students studying the Augsburg Confession." Since the whole writing is incomplete, I have been asked whether the heirs are bound to support four theological students studying the Augustinian Confession.

(11) I reply that the jurists may discuss whether such a writing, which is neither a testament nor supplies the place of one, but is merely so much raw material for the execution of a will at some future time, devoid of all formalities, should be held valid in a court of law. Since, however, it appears that the deceased wished out of piety to give some of his property for the encouragement of study, yet he had bequeathed nothing definite, neither did he fix the number of years or the amount of the costs (which he carefully attended to in the rest of the pious bequests); moreover, he never spoke a word to any of his relatives during his lifetime concerning this matter, and this writing was only found by his heirs after his death, and it seems that he wrote it many years before his death, nor had he altered or amended it subsequently, but had left it incomplete, I think (saving the opinion of others), that the heirs would act dutifully and conscientiously if, in this undefined matter, where nothing can be claimed from them according to law, they give liberally of their own accord out of free will, which alone is pleasing unto God, as much as duty and conscience may urge them. The case would have been quite different if they were sure of what the deceased

had bequeathed, or if he had clearly expressed his intention in writing, or if, without any testament, he had given instructions especially to his children, so that the heirs could be certain as regards the will of the deceased (I have given Mr. Matthias Overbeckius my views with regard thereto). For in the same manner that the heirs would then be bound to satisfy their conscience, I know for certain that they will give satisfaction willingly and liberally from their sense of duty, well known to me.

## OPINION No. 24.

HOLL. CONS. III. B. 188.

[GROTIUS II. 18, 4; SCHORER AD GROT. II. 17.]

*Fidei-commissum*—Interpretation—Placaat of 1540—Institution of heirs—*Jus accrescendi*—Fraud—Husband not heir *ab intestato*.

1. ALL *fidei-commissary* substitutions are strictly, and not extensively interpreted, especially those in favour of the collaterals of the testator or testatrix.

2. The Placaat of 1540 refers only to guardians and their children, but not to their wives.

3. When husband and wife are instituted heirs together, each is taken to have been instituted to one-half.

4. *Quoties scriptus heres efficitur incapax, ex toto vel ex parte, tunc pars vacans coheredi scripto defertur.*

5. All suspicion of fraud vanishes when special mention is made in the testament of relationship, affection, and kindnesses received.

6. A fraud against the law is committed when a person inherits a thing through the intervention of another which he is not otherwise allowed to acquire. This is not the case as regards husband and wife.

7. According to the law of Holland, the husband



is not his wife's heir, and in case the marriage is dissolved, each generally retain their own property.

I have seen a certain testament of Marijtje Cornelis, widow of Jan Suis, bearing date the 11th September 1585, together with the testament of Romer Klaas, dated the 18th of June 1612, confirmed by a notarial deed of the 14th March 1616, and have read the opinions of Messrs. Reynier van Amsterdam, Erick Dimmer, Adriaan van der Does, Jacob van der Does, and Jacob van Rosendaal.

(1) In reply to the questions asked, I am of opinion that the *fidei-commissary* substitution contended to have been made under the will of Marijtje Cornelis does not exist, for the same reasons as set forth in the afore-mentioned opinions, viz., that Romer Klaas was found not to have been burdened with the *fidei-commissum* in case he succeeded Marijtje Cornelis, and it is a well-known legal principle that all burdens of *fidei-commissum* must be strictly, and not extensively interpreted, especially if made in favour of the collaterals of the testator or testatrix. It must further be noted that even if the said *fidei-commissum* could have been extended to the person of Romer Klaas, it would nevertheless have terminated at his death, since he died without any children, and the said *fidei-commissum*, with the prohibition of alienation, refers only to the children of the fiduciary heirs and no further, as clearly indicated by the word "respectively."

(2) With reference to the article of the Placaat of

1540 quoted against the will of Romer, I am of opinion that the institution of Lijntge Frans, his wife, is legal and valid notwithstanding the article, since the Placaat is antagonistic to guardians and their children, but not to their wives, especially when they are related to the testator. (3) Further, since the said Lijntge was instituted together with her husband, I am of opinion that each should be entitled to one-half,<sup>(a)</sup> and she must, therefore, succeed to one-half of the inheritance of the said Romer. The remaining half, as far as it consists of movable property, such as money, furniture, debts, and quit-rents, which are not a burden on the immovable property, must go to Hendrik Herbets, and after his death to his children, since the Placaat lays down no rule concerning such property. The only question that remains then is with regard to the half of the immovable property, or the interests secured by the hypothecation of the immovable property of Romer Klaas. This would in any case go to the said Lijntge as instituted heir, and not to the heirs *ab intestato*, if the Placaat is still to be considered of force. (4) Quoties enim scriptus heres efficitur incapax ex toto, vel ex parte tunc pars vacans coheredi scripto defertur.<sup>(b)</sup> It cannot be contended with any good reason that the afore-mentioned institution of Lijntge was made *in fraudem legis*, for if the testator had wished to act fraudulently, he would not have instituted Hendrik

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(a) D. 28, 5, 9, 9.

(b) D.D. ad C. 6, 24, 1; et D. 29, 2, 25, 3.

Herberts together with the said Lijntge. (5) It must further be observed that the mention of relationship, affection, and kindnesses received in the testament removes absolutely all suspicion of fraud. (6) Moreover, a fraud against the law is committed when a person inherits a thing through the intervention of another which he is not otherwise allowed to acquire. This cannot occur between husband and wife, since, according to the law of Holland, the husband is not his wife's heir, and in case the marriage is dissolved, each generally retains his own property.

ROTTERDAM.

## OPINION No. 25.

HOLL. CONS. III. B. 162.

[GROTIUS 2, 18, 8.]

Legitimate portion in addition to Trebellianic portion, *et vice versa*—Enjoyment of fruits does not annul right to claim the Trebellianic portion—Stipulations as to distribution of the estate.

1. A SON burdened with a *fidei-commissum* is entitled to a free and unencumbered Trebellianic portion, in addition to his legitimate portion, notwithstanding the fact that the fruits of the inheritance were left to him in lieu of his Trebellianic portion.

2. A deed of division of the property made by the testator during his lifetime, to govern the distribution by his heirs, must be strictly complied with.

Having seen a certain will of Aaltge Goris, dated 3rd July last, with a deed of division made by the said Aaltge Goris and others on the same day :

(1) I am of opinion, in response to the questions submitted to me in connection therewith, that although Pieter Adriaans, son of the testatrix, was bound by the said will to restore the property which he would inherit from her to his children without

subtraction of any Trebellianic portion, receiving in lieu thereof the fruits of the property, he had, nevertheless, a right to enjoy his Trebellianic portion free and unencumbered, without taking the fruits into account. It is a rule of law generally accepted by the courts, that a son burdened with a *fideicommissum* is entitled to a free and unencumbered legitimate in addition to his Trebellianic portion, amounting together to one-half of the inheritance. The wife of the said Pieter Adriaans is entitled to half of the property which belonged to her husband during his lifetime, according to our customary law. After his death the widow is therefore entitled to the ownership of one-fourth of the property coming from the afore-mentioned Aaltge Goris, in addition to half the fruits.

(2) I am further of opinion that the deed of division above referred to, made by Aaltge Goris during her lifetime, according to which she wished her heirs to distribute the inheritance, must be strictly followed; and it is not necessary that the names of the selected guardians or the exclusion of the Schout and court should be expressed therein.

## OPINION No. 26.

HOLL. CONS. III. B. 164.

[GROTIUS II. 18, 11.]

Compensation under testament—A matter left to any one to decide must be done *arbitrio boni viri*—When collation takes place—When benefits must be collated—No presumption as to gifts.

1. WHEN in reality no disposition has taken place with regard to feudal property, but it was stipulated that it should be left to the eldest daughter, on condition that the younger should be compensated with certain allodial property, and, in case they cannot agree, the testator stated that the younger should fix the compensation, leaving the election to the eldest, if then the eldest choose the monetary compensation in place of the feuds, the feud under these circumstances will not devolve upon the younger daughter without consent of the lord of the fief.

2. *Utile per inutile non vitiatur.*

3. When the eldest must compensate the youngest for the value of the feuds, such compensation must be estimated *arbitrio boni viri*.

4. Whatever benefits have been enjoyed by children during the lifetime of their parents must

be brought into collation, unless they can prove that their parents did not wish them to be collated.

5. A simple donation was not presumed in questions of collation.

I have seen a certain will by Arend van der Velde and Geertjen Ariens, his wife,<sup>(a)</sup> dated 16th September 1587. In it appears the following passage: "The testators, Arend van de Velde and Geertjen Ariens, his wife, wish that their feudal and allodial disposable property left by them on their death shall devolve upon their two instituted heirs; they therefore desire that their youngest daughter shall not inherit the feuds, but that she shall receive in compensation from the allodial and disposable property of the testators an amount equal in value to the said feuds devolving upon her sister; and if the children cannot agree as to the price, they wish and ordain that the youngest shall fix the value and leave the election to the eldest." Having been asked whether the above stipulation is of legal force and effect, since certain feudal property belonging to the testatrix was situated in a place where free disposition was not allowed except by consent of the lord or lady of the feud, and such consent had not been obtained:

(1) I am of opinion that it is; for by the above stipulation the feudal property was not really

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(a) In the original appears the word "*conthoralen*." This is evidently a somewhat pedantic expression signifying "husband and wife," and literally *sharers of the marriage or bridal bed (con and thorus)*. (Ovid, *Metam.* 6, 431.) Cf. "*a mensa et thoro*."—[TR.]

disposed of, but, on the contrary, was left to the eldest daughter according to custom, and the testatrix merely stipulated that the youngest daughter should be compensated from the allodial property, which she undoubtedly had a right to do. This stipulation is not vitiated, because if, by the contingent election left to the eldest daughter, she should choose the money, the feud would devolve upon the youngest, which could not happen without consent of the feudal lord, for *quod utile per inutile non vitiatur* is a well-known legal maxim. (2) The above stipulation, therefore, remains of full force, and the eldest will have to compensate the youngest to the value of the feudal property, (3) such compensation to be fixed *arbitrio boni viri*.

A further question has been asked to the following effect:—In the said will it is stipulated that the two daughters of the testators shall have and retain what they received from the testators upon their marriage, and will not be compelled to collate the same upon the division of the estate, and by a subsequent codicil, dated the 17th August 1588, the said will is approved, with the exception of the addition that “we ordained and desired, and do hereby ordain and desire, that, as regards a certain sum of 1200 carolus guildens which Aaltgen van de Velde, our youngest daughter, received as a dotal or marriage gift more than our eldest daughter, Meynsje van de Velde, the said Meynsje van de Velde, our said eldest daughter, or her children representing her after her decease, shall receive and retain, prior to a division, a like



sum of 1200 gulden, but without any interest." It is stated that the said Meynsje had received certain marked benefits from her parents, especially in that the expenses of her confinement and of the education of her child were paid by them, as appears from a memorandum in the handwriting of the testators. It is now asked whether Meynsje is bound to collate the value of what she received from her parents under these circumstances.

(4) I am of opinion, assuming that the said benefits enjoyed by Menysje from her parents are not included in the ante-nuptial contract, that they were not given to her as a marriage gift, and that no clear indications exist to show that her parents intended them as a donation, she is bound to bring the value of these benefits into collation, since she is not freed from the liability by the will, and, according to accepted law, children must bring into hotch-potch what they have received from their parents,(5) unless it appeared *de simplici donatione, quæ in materia collationum non præsumitur.*(b)

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(b) In l. si donationem, C. 8, 54.

## OPINION No. 27.

HOLL. CONS. III. B. 194.

[GROTIUS II. 19, 1.]

Interpretation of testaments—Fidei-commissary and ordinary substitution—Meaning of the words “with full right.”

1. VERBA testamenti ex præcedentibus et sequentibus declarantur, et specialiter quando præcedentia sunt generalia et sequentia determinata, tunc sequentia determinant præcedentia.

2. Ex verbis præcedentibus dispositio immediatè subsequens debet intelligi.

3. Si testamentum valet, et filius adeat hereditatem, evanescit vulgaris substitutio nec vertitur in fidei commissarium, *et quare*.

4. The words “with full right,” pleno jure, denotant plenam dominii translationem sine onere.

5. Jura adeo abhorrent ab hac presumptione, ut uxor plus honorata aut dilecta intelligatur quam filius, ut verba testamenti potius interpretentur valde impropiè.

6. Affectio erga personam, maximam suppeditat conjecturam ad interpretandam ultimam voluntatem, adeo ut etiam ob eam causam verba impropiè accipiantur.

7. In dubio non presumitur subesse fidei com-

missum, præsertim in filio, cui onus in dubio non censetur impositum, etiam ultra Legitimam.

I have seen an extract from a certain will made in 1603 by Willem Cornelis, late dyke-reeve of Oostwatering, and Maria Anteunis, his wife, and a copy of a will made by Maria Anteunis on the 6th of January 1611. Antony Blonken, son of the afore-mentioned testator, survived Maria Anteunis, and at his death left no children. He had instituted his wife as his universal heir. I have been asked whether the property coming from the afore-mentioned Willem Cornelis must be considered to be subject to a *fidei-commissum*, either in whole or in part, in favour of the children of Lucas Willems, who was mentioned in the said will of 1603, or in favour of anybody else.

(1) I am of opinion that the property is not subject to *fidei-commissum* according to law, although at first sight this may appear to be the case under the circumstances that have occurred, for the words "so to use that in case of the death of the afore-mentioned Mr. Antony Blonken, their son, without leaving a legitimate child or children procreated by him," followed by the provisions for a substitution, seem to be applicable to these circumstances. My reason for holding this opinion is that the provision for substitution clearly shows that the intention was thus to dispose of the property in case the said Blonken died without children before the decease of his surviving parent. This can be gathered from

the words of the said disposition, where it is provided that, in the event understood to have been contemplated by the testators, the children of Lucas Willems, after the death of the survivor, should inherit certain articles from them, and thereafter (that is, after these articles had been deducted from the joint estate) they should share the property with the heirs of Maria Anteunis according to the customs of Holland. The words "after the death of the survivor" (*ter lester dood*) clearly show that the condition afore-mentioned must be taken to refer to the death of Antony Blonken before the decease of the survivor, *verba enim testamenti ex præcedentibus et sequentibus declarantur.*(a) *Et specialiter quando præcedentia sunt generalia et sequentia determinata tunc sequentia determinant præcedentia.*(b) It must, moreover, be noted that reference is made to the death of the survivor in the clause immediately preceding this provision in these words, "and the said Mr. Antony Blonken, our son, shall be bound not to interfere in the estate, nor in any way to cede any inheritance or right of succession after the predecease of one of the appearers, since they wished, ordained, and stipulated this provision by this their last will, and postponed such action till the death of the survivor." (2) *Ex quibus verbis præcedentibus dispositio immediatè subsequens debet intelligi.*(c)

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(a) Anch. Cons. 152, No. 243.

(b) Bald. in D. 31, 1, 32, 1, et l. si cum fundum, D. 50, 16. Jas. in l. si servus plurium, § ult. D. 30, 1. Mantica de conject. ult. vol. lib. 6, tit. 13, No. 4.

(c) D. 35, 1, 89; et dem. Alex. Cons. 47, No. 18. Mantica dicto loco, No. 3.

The same intention can also be gathered from the words previously used stating that the afore-mentioned Mr. Antony Blonken was nominated and instituted by the testators as "the only heir of all the property which shall be left on the death of the survivor, nominating and appointing him as universal heir to everything, with full right of institution." The only condition imposed was that the children of Lucas Willems should receive a certain amount of 200 pounds groats, and certain wheat crops as per deed of division in full satisfaction, as clearly shown by the preceding words, *ex natura relationis*, to which reference is made. Now, a testator is not presumed to make contradictory stipulations, and it cannot, therefore, be contended that in one and the same case the children of Lucas Willems should be satisfied with certain specified portions and should also be substituted as heirs to the whole of the property. The latter must therefore be taken to apply in case the afore-mentioned Antony Blonken died before the survivor and had never possessed the property, the former if he had inherited and adiated the same. Non dissimile est quod ait Mantica.(d) Fatendum est si testamentum valeat et filius adeat hereditatem, vulgarem substitutionem evanescere,(e) (3) et nemo sapiens dixerit, eam verti in fidei-commissariam, quoniam defecit conditio et voluntas testatoris manifeste refragatur. This is specially the case in the present instance on

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(d) Mantica, lib. 5, tit. 3, No. 13.

(e) C. 6, 26, 5.

account of the words "with full right," quæ verba "pleno jure" denotant plenam domini translationem sine onere.(f) (4) The testators left the survivor during his or her lifetime the power to use, alienate, and transfer the property, notwithstanding that they had a son born in wedlock. It is therefore incredible that the same testators would leave property to the survivor with a fuller and more extensive right during the lifetime of their son than to the son after the decease of both. Nam jura adeo abhorrent hac presumptione, (5) ut uxor plus honorata aut dilecta intelligatur quam filius, ut verba testamenti potius interpretentur valde improprie,(g) ex qua lege et aliis rationibus hoc etiam late deducit Mantica.(h) Another cogent reason calls for consideration. It is apparent from the whole tenor of the testament that the afore-mentioned Willem Cornelis wished to benefit his son, Antony Blonken, more than the children of Lucas Willems, both by reason of his mother's affection for him, and on account of his good conduct. He therefore instituted Blonken as universal heir, and the said children only *in rebus certis*. It cannot, therefore, be accepted that he wished to impose a greater burden on the said Blonken after he had obtained the inheritance than on the children of Lucas Willems, who were instituted to their portions sine onere fidei-commissi. (6) Affectio autem erga personam, maximam sub-

(f) Old. Cons. 248, No. 2; Alb. in l. raptores, No. 3, C. de Episc. et Cler. et Castr. in Cons. 28, No. 4. Rom. Cons. 75, No. 2, et 230, No. 3.

(g) C. 6, 42, 30.

(h) Mantica, lib. 6, tit. 11, No. 11, et sequentibus.

peditat conjecturam ad interpretandam ultimam voluntatem, adeo ut etiam eam ob causam verba improprie accipiantur.(*i*)

(7) It must also be observed that if the disposition in question were taken to apply in case Antony Blonken had adiated the inheritance after the death of his parents, it follows that his mother, who had no other children than the said Blonken, had willed that her son should not inherit her property in full ownership, but subject to restitution. This, however, cannot possibly be presumed. In dubio enim non presumitur subesse fidei-commissum,(*k*) præsertim in filio, cui onus in dubio non censetur impositum, etiam ultra legitimam.(*l*)

PARIS,

*February* 18, 1624.

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(*i*) Soc. sen. in D. 34, 5, 21.

(*k*) D. 36, 1, 78, 2, et ibi Dd.

(*l*) Ita expresse Mantica, lib. 11, tit. 23, No. 17.

## OPINION No. 28.

HOLL. CONS. III. B. 193.

[GROTIUS, II. 19, 9, & II. 22, 43.]

Substitution—Direct and fidei-commissary—Deduction of the legitimate portion—Mother entitled to succeed to the estate of her child *ab intestato* according to customs of Amsterdam—Legitimate portion of the parents—Trebellianic and legitimate not both deducted by ascendants—Heirs are ordinarily burdened with all legacies.

1. SUBSTITUTIO, quæ fit verbis communibus, trahi potest tam ad directam, quam ad fidei-commissariam substitutionem.

2. When the deduction of the legitimate portion is expressly prohibited, these general words are so interpreted *ut contineant directam substitutionem intra annos pupillares*.

3. In the case submitted, should the child die *intra annos pupillares*, no deduction of the legitimate can be made in respect of such child.

4. According to the customs of Amsterdam a mother succeeds to the estate of her children *ab intestato* even after a separation *a thoro*, and the mother cannot be validly excluded by a pupillary substitution in such case, but a testament containing a codicillary clause would render the substitution legal.



5. The legitimate portion of the parents is one-third, and their legitimate is increased with the legitimate of the children.

6. *Trebellianica* censetur inesse legitimæ. This was different in the case of descendants, but it was not extended to ascendants.

7. *In dubio* the heirs, and not the legatees, were taken to be burdened with all legacies.

I have seen a certain testament made by Hendrik Roeloff, merchant of Amsterdam, and his wife, on the 6th of January 1613, together with a certain codicil made by the said Hendrik Roeloff on the 31st of August of the same year.

I have been asked, first, whether the prohibition of the deduction of the legitimate portion contained in the said testament in favour of the nearest relations of the testator, in case his children died during the lifetime of their mother, was valid or not; and secondly, whether the children are to furnish the clothes, linen, woollen garments, and diamond ring left to Elias as a legacy by the said codicil, or whether the widow of the testator, to whom all his property had been left, except a few specified articles to which the children were found to have been instituted heirs, is liable for the payment of such legacy.

(1) With reference to the first point, I am of opinion that the question arises: *an substitutio facta per verbum commune, fit fidei-commissaria semper, an vero intra pupillarem ætatem sit directa, postea vero*

fidei-commissaria (which is a disputed point among jurisconsults), since the substitution in the said testament was made *verbis communibus*, quæ trahi possunt tam ad directam quam ad fidei-commissariam substitutionem, to wit, in the following words:—"All the property shall go to and devolve."

(2) Since the testator has, however, expressly prohibited the deduction of the legitimate portion, the words must be so interpreted, *ut contineant directam substitutionem intra annos pupillares.*(a) Sed Bartolus ait debemus advertere an ex presumpta voluntate defuncti apparere quid senserit. Tunc enim stamus voluntati suæ, etiam contra matrem. Quid enim si testator dixit, volo quod ad talem veniant omnia sine ulla diminutione, vel totam et integram hereditatem, vel similia verba: tunc enim hoc non potest esse, nisi per substitutionem directam: ergo de directa intellexit. (3) It follows therefore, that if the child of the testator dies *intra annos pupillares*, no deduction of the legitimate can be claimed on behalf of such child, since he has already enjoyed an inheritance from his father in excess of the said legitimate, and the substitution cannot be considered *pro gravamine elato a patre sed quasi ipse filius heredem sibi instituisset.*(b) (4) But since it was stated that according to the customs of Amsterdam a mother, even after separation *a thoro*, is entitled to succeed *ab intestato* to the estate of her child, her exclusion by means of the said

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(a) Bartolus ad C. 6, 26, 8.

(b) Instit. 2, 16, 2.

pupillary substitution is void according to law.(c) If the testament contains a codicillary clause, the substitution will be rendered legal, *juxta communem opinionem traditam a Julio Claro*,(d) (5) and the mother can then deduct her legitimate portion, which is a third of what she would have received *ab intestato*; for, according to the general opinion of the civilians, the legitimate of the parents is increased with the legitimate of the children. The remainder of the child's estate would go to his father's relatives, (6) and the mother cannot deduct the Trebellianic portion over and above the legitimate, for, according to law, *Trebellianica censetur inesse legitimæ*. A different rule was observed with regard to descendants, but this was not extended to ascendants,—an abrogation of the old law.(e)

(7) With reference to the second point, I am of opinion, in conformity with the legal principle that *in dubio* the heirs and not the legatees must be taken to be burdened with all legacies, that the afore-mentioned legacies left by codicil must be settled by the child or children of the testator; for the wife, now widow, of the testator is mentioned in the afore-mentioned testament merely as a legatee.

ROTTERDAM.

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(c) Per Anth. lit cum de app. cogn. C. justum, § si tales.

(d) Julius Clarus, § testamentum, quæst. 46.

(e) Ut late probat Jason, in C. 3, 36, 24, No. 9.

## OPINION No. 29.

HOLL. CONS. III. B. 309.

[GROTIUS II. 20, 1, 2; II. 42, 2.]

Condition in testament—Interpretation—Feudal property—*Fidei-commissum*—Feudal grant—Restitution—Security—Valuation.

1. How an inference can be drawn that a testator has placed a certain condition in his testament merely for the conservation of the legitimate succession and not to impose a *fidei-commissum*, such condition not appearing from the testament.

2. Feudal property cannot be included under *fidei-commissum*.

3. Although a testamentary disposition of feudal property can be made after permission previously obtained, such, according to feudal law, was understood to refer to a simple disposition, and not to a *fidei-commissary* substitution.

4. No grant can be extended to include a substitution, unless such were specially mentioned therein.

5. When property is valued, the valuation must be the amount that would be realised at a sale.

6. *Fidei-commissary* heirs must give security for restitution, according to D. 26, 3.

I have seen a certain testament made by Jasper Gerrits van Soelen on the 15th of December 1590, and also two feudal grants of a piece of land situated in the Ambacht of Kralingen, held as a feud from the lord of the House of Honingen, the first dated 10th of August 1541, and the other December 1598. I have also seen a certain ante-nuptial contract made between Gysbert Jasper van Soelen and Maartge Adriaans Kools, and have considered the questions submitted.

(1) I am of opinion that Gysbert van Soelen is not liable for any restitution in respect of the property which he inherited from his father, either directly or through the death of his brother, Gerrit van Soelen, unless the said Gysbert and his two sisters died childless. In such a case the said property must go to the nearest relatives of Jasper van Soelen afore-mentioned, provided that the heirs of the said Gysbert van Soelen be allowed to retain one-third of the said property as the legitimate portion of Gysbert, and moreover one-fourth of the remainder as a Trebellianic portion. The property can therefore be alienated subject to such burden and condition. The said property can, however, be considered to be subject to restitution should Gysbert van Soelen die childless, and his sisters were to die leaving children, for the testament in the clause relating to the *fidei-commissum* clearly refers to such a case where all the children of the said Jasper van Soelen die childless. It cannot be contended that the children of Gysbert and his sisters had been

tacitly substituted, *tanquam in conditione positi*, for the majority, as well as the best of the jurists hold *talem conditionem positam ad conservandam legitimam successionem, non ad introducendum fidei-commissum, si conditio non extiterit.*(a) Moreover such *conjectura voluntatis* tale tacitum *fidei-commissum* est, for if the testator had wished to substitute his grandchildren by *fidei-commissum*, he should have stated in the condition "if *any* of my children died childless" and not "if *all* my children," which words, I am instructed, he used.

(2) Under any circumstances the feuds are not included in the said *fidei-commissum*, since it must be presumed that the said (3) Jasper van Soelen was not provided with the proper dispensation. And as regards the piece of land in particular which was held as a feud from the House of Honingen, although the first substitution states that the possessor of the said feud can make a testamentary disposition thereof, yet such, according to feudal law, is understood to refer to simple disposition by institution or legacy, and not to *fidei-commissary* substitution, (4) for no general dispensations and licenses were extended to include substitution, unless such were specially mentioned therein. To this must be added that from the nature of the said feud every possessor had the right to dispose thereof, and this right would be taken away by the *fidei-commissum*.

(5) In case the said Gysbert van Soelen pre-

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(a) Quæ est sententia Gl. in D. 28, 5, 53, et plurimorum Doctorum, quos refert Julius Clarus, § testamentum, quæst. 77, 78, et 79.

deceased his wife, the debts must first be subtracted, and then the said Maartge Adriaans Kools can deduct from the joint estate, as a prior claim, her property brought in under the marriage, and further a sum of fifteen hundred guildens, if the estate be worth more than four thousand. In estimating the value of the said property, the goods inherited from Jasper van Soelen must be valued at the price they would fetch subject to the burden of the *fidei-commissum* afore-mentioned, unless the said Gysbert van Soelen left children or any of his sisters had died leaving children.

(6) The heirs of the said Gysbert van Soelen, in case he died childless, must give security, if demanded by the relatives of the said Jasper van Soelen, to the effect that, if the sisters also were to die childless, restitution of the property inherited from Jasper van Soelen will be made to the said relatives. (b)

ROTTERDAM,

August 1616.

## OPINION No. 30.

HOLL. CONS. III. B. 152.

[GROTIUS II. 20, 1 & 10, & II. 24, 11.]

Fidei-commissary clause—Error in writing—Interpretation—  
Codicils and wills.

1. THE bequest with respect to a *fidei-commissum* remains of force notwithstanding a clerical error, and although the fidei-commissary clause be inadequately worded.

2. Two dispositions, the one a will and the other a codicil, made by a testator on the same day, do not revoke each other, although in either instrument no mention is made of the other, provided only that they contain no conflicting terms.

3. Wills and other bequests must be favourably understood and interpreted *etiam impropriando verba*.

4. The word “*Bladinge*” (burden) (*a*) signifies not only usufruct, but also a restricted and qualified ownership, with prohibition of alienation and the burden of *fidei-commissum*.

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(*a*) The word “*Bladinge*” is evidently a derivative from “*beladen*” and “*belading*,” in which case the meaning of a load or burden becomes perfectly clear. Used in connection with “*eigendom*” (property), the combination will give us the exact English equivalent “burdened property.”

—[DE B.]



5. Heirs may deduct the Trebellianic portion free and unencumbered, when such deduction is not forbidden by testament.

A copy of a certain will made by Jan Aarnouts on the 12th November 1590 has been submitted to me, as well as copies of two documents, comprising the last will and testament of Adriaan Aarnouts, both in the form of closed testaments, signed and sealed before a notary and witnesses on the 14th and 20th May 1602 respectively. The one contains the will of Adriaan Aarnouts alone, and the other that of his wife together with his own. Having been asked whether the *fidei-commissary* clause inserted in the above-mentioned testament of Jan Aarnouts and in the separate will of Adriaan Aarnouts can be of full force and effect without appearing in the joint will, and what the legal consequences of such clauses are, I am of opinion:—

(1) As regards the afore-mentioned will of Jan Aarnouts, that although the *fidei-commissum* is inadequately worded, nevertheless the intention of the testator clearly appears to have been that the property left to his daughter should be subject to a *fidei-commissum*. This disposition is not nullified by a clerical error.(b)

(2) With reference to the will of Adriaan Aarnouts, there are two documents of the same date, and it may be contended that both must be void by reason of the uncertainty connected therewith. The dis-

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(b) Per l. errores et ambiguitates, C. 6, 23.

position made by himself and his wife jointly must, however, be taken to be not a will, but a codicil, for some additional legacies are merely left by it, and no provision is made for the institution of an heir. This disposition, although called a "testament," has not the effect of a will, but of a codicil, by virtue of the codicillary clause inserted. On the other hand, the dispositions made by the said Adriaan Aarnouts separately provide for the institution of an heir, and therefore have effect as a will. Hence it follows that the said documents—the one a will, the other a codicil—do not revoke and nullify each other, although no mention of one is made in the other, since it is sufficient that they contain no contrary stipulations.(c)

(3) And although there seems to be certain contradictions in the said testament of Adriaan Aarnouts, because at first Josijnken Jans is instituted heir to one-half and Jasper and Marinus Dosbergen heirs to the other half, under stipulation that they should "adiate," "use," and "preserve" the property, these words indicating that "ownership" is referred to, and afterwards it is laid down that each heir should enjoy the "*Bladinge*" *ad vitam* only, showing that mere usufruct is apparently referred to, the said testament, like every other will, must certainly be favourably understood and interpreted *etiam improprando verba*,(d) (4) and the word "*Bladinge*" must therefore be taken to mean, not a mere usufruct, but a restricted and qualified ownership, with pro-

(c) Inst. 2, 25, 1.

(d) Ut adjunct dd.

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hibition of alienation and burden of *fidei-commissum*, and under the circumstances this would be the case even if the word usufruct had been expressly used.(e)

The *fidei-commissary* clause in the testament of Jan Aarnouts, according to universal custom, has effect over all the property inherited by the daughter from her father, with the exception of her free and unburdened legitimate and Trebellianic portions.

(5) But with reference to the will of Adriaan Aarnouts, the clause inserted therein has effect over all the property left by him to his heirs, with the exception of a free and unburdened Trebellianic portion, for the subtraction of this amount is not forbidden in the testament.

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D 7.5.12

(e) D. 34, 2, 15, et D. 7, 1, 74, et D. 39, 5, 31, et D. 34, 1, 18, in quibus legibus mentione rei facta, intelligitur contineri proprietates, neque de ea quidquam imminutum per secutam usufructus aut similibus verborum prolationem.

## OPINION No. 31.

HOLL. CONS. III. B. 198.

[GROTIUS II. 20, 4, & II. 23, 2.]

Legacies to be made before five witnesses—There may be exceptions—Knowledge of legacies and *fidei-commissa* on the part of the heir.

1. ALTHOUGH, as a rule, legacies which have been made before less than five witnesses are invalid, there are nevertheless some exceptions.

2. An heir who knows that the testator wished that certain legacies or *fidei-commissa* should be left, and who has received instructions to that effect, is bound thereby; the legatee can refer the matter to the oath of the heir whether the testator did not wish such to be done, provided that he takes an oath that his request is *bona fide*.

(1) I am of opinion that although it is quite correct that, as a rule, legacies which have been made before less than five witnesses are invalid, yet there are exceptions to this rule. For a passage of the Code,<sup>(a)</sup> according to the interpretation of certain jurisconsults, lays down that when an heir had notice that the testator had wished that certain legacies or *fidei-commissa* should go to the legatee, and had

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(a) C 6, 42, 32.

been instructed to that effect by the testator, the said legacies and *fidei-commissa* are of force, and the legatees may refer the matter to the oath of the heir, whether such had not been the intention of the testator, provided that he first of all takes an oath that his request is *bona fide*.

ROTTERDAM,  
June 1616.

## OPINION No. 32.

HOLL. CONS. III. B. 189.

[GROTIUS II. 20, 11.]

Wills—Prohibition of alienation—Strictly interpreted.

1. THE words, “*The goods not to be sold, pledged, or otherwise burdened, but to be reasonably used,*” do not include the right of free testamentary disposition.

2. Omnes prohibitiones sunt stricti juris et minime extendendæ.

3. Favorabilior est dispositio, quæ fit per viam ultimæ voluntatis, quam quæ fit contractu inter vivos.

4. Maritus, qui uxori legavit usumfructum cum prohibitione vendendi, censetur legasse proprietatem.

5. This is the case, *a fortiori*, when children are instituted heirs of their parents.

6. The words, “*In every case of death, the property is to revert to the side of the testators, under prohibition of disposition or alienation by testament or codicil, &c.,*” were restricted to such dispositions whereby the property would be alienated from the blood-relations.

I have seen the copy of a certain testament bearing date the 12th June 1592, made by Jacob Jans Lijndrayer and Barbara Jans, his wife, together with a codicil made by them on the 14th December 1600, as well as a later codicil by the said Barbara alone on the 27th September 1602. I have also seen the award of certain arbitrators given in the matter of the children and grandchildren of Jan Klaas and Welmoet Jacobs, his wife, daughter of the afore-mentioned Jacob Jans and Barbara Jans, against Frederick Klaas, as guardian of the said Welmoet, bearing date the 29th March 1619, with a consent to judgment before the High Court of Holland on the 17th April of the same year.

I have been asked whether the afore-mentioned Welmoet can make a testamentary disposition of the property which she inherited from her father and mother, leaving them to her children in unequal shares, and whether she can make a disposition of some of the property, subject to restitution, for the benefit of her children or of her descendants, notwithstanding the afore-mentioned codicils.

(1) I am of opinion that she is entitled to do so, since the words which appear in the said award, and also in the afore-mentioned codicils, to the effect that neither Frederick Klaas nor Welmoet could sell, pledge, or otherwise burden the whole or part of the property, but could use the same reasonably, make no mention of disposition by last will, nor could such be taken to be included thereunder; not only because (2) omnes prohibitiones tales, sunt stricti

juris et minime extendendæ, (3) but also since dispositio est favorabilior, quæ fit per viam ultimæ voluntatis, quam quæ fit contractu inter vivos.(a)

The reference to the use of the property does not conflict with this, since the prohibition of alienation, pledge, or other burden, shows that it must be taken to allude to such use as is the outcome of ownership, and not de formali usufructu, per equæ tradit post alia (*vide* Peckius, lib. 5, c. 14), ibi ait, (4) quod maritus, qui uxori legavit usumfructum cum prohibitione vendendi, censendus sit legasse proprietatem. (5) This holds, *a fortiori*, when children have been instituted heirs to the property of their parents by them. The clause in the afore-mentioned codicil of the year 1592 shows nothing to the contrary, where it states that the property of Jacob and Barbara Jans must, in every case of death, revert to the side of the testators, under prohibition of disposition or alienation by testament, codicil, gift, or in any other manner whatsoever; (6) for the said prohibition only refers to such disposition whereby the said property would be alienated from the blood-relations of the afore-mentioned Jacob and Barbara Jans.

AMSTERDAM,

April 6, 1631.

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(a) Ut ait Peckius de testam. conj. lib. 1, cap. 29.



## OPINION No. 33.

HOLL. CONS. III. B. 151.

[GROTIUS II. 21.]

Collateral inheritance, unadicated and no knowledge—Immovable and movable property.

1. AN inheritance from a collateral branch cannot be transmitted, when not adicated, and even ascendants are then excluded. It makes no difference if the guardians of the minors had no notice of such inheritance.

2. No one ignorant of a collateral inheritance can transmit the same.

3. Immovable property is governed by the law of the place where it is situated.

4. According to the customary law of Utrecht, the surviving father or mother inherited the property of a deceased child. Movable property is governed by the law of the place of residence of the deceased.

5. *Balders sibi ipsi contrarius.*

6. Movables are governed by the law of the place where they are found. This is a well-known principle in the case of confiscation, when the property is not under the jurisdiction of the court or in the state where the owner is sentenced.

7. Obligations and other personal claims are not

placed in the same category with movables, but constitute a separate third class of property.

8. Such claims are not governed by the law of the place where the creditor resides, but where the debtor is, and where fulfilment can be demanded and executed *instanter*.

A., born at Rotterdam and having his property there, died in Spain. For a considerable time no reliable tidings reached this country as to his death. His nearest blood-relation at the time of his death was his deceased brother's son, B., who afterwards died at Utrecht. His father had predeceased A. B.'s mother, or her children by her second marriage, as her heirs, maintain that they are entitled to the property left by A. On the contrary, C. and D., children of the uncle and aunt of A., claim the property as reverting to them.

With regard to the question as to who are the rightful claimants :

(1) I am of opinion that in this case the fact whether or not B. or his guardians immediately adiated the property is of importance, for if B. had not adiated the inheritance, it follows that, after his death, the blood-relation of A. must succeed to his (A.'s) property, and not the nearest blood-relations of B. The reasons for this are *quia hæreditas veniens a latere non adita, non transmittitur* (Bald. ad C. 6, 52, 1, per textum expressum in l. quoniam D. de jure deliberandi); and *specialiter ne ad ascendentes quidem transmitti hæreditatem non aditam* (probat. Bartol.

ad C. 6, 52, 1, et ad C. 6, 57, 2, et D. 38, 17, 2, 11). And this is not altered by the allegation that the said B. or his guardians had no knowledge that the said inheritance had reverted to B. (2) Nam etiam ignorans non transmittit hæreditatem collateralium (ut tradit. Bald. in d. l. quoniam allegans legum pretia rerum, D. 35, 2).

(3) Taking for granted that the said inheritance of A. had been adiated by B., there could be no difficulty as to the immovable property, for after B.'s death this would go, not to his mother, but to the nearest relations from his father's side; nam bona immobilia sequuntur consuetudinem territorii ubi sunt sita (Bald. ad C. 1, 1, 1. Gail, lib. 2, obs. 124, num. 9).

(4) As regards the movables, it appears that B.'s mother or his half-brothers could claim the same under the customary law of Utrecht, which lays down that a child predeceasing his father or mother, they (his parents) could inherit his property,<sup>(a)</sup> and they have the opinion of many jurisconsults in their favour, who hold quod mobilia regulantur secundum consuetudinen domicilii defuncti.<sup>(b)</sup>

(5) But on behalf of C. and D. it may be contended, with equally good reason, that the opinion of these jurisconsults does not pass without contradiction, cum ipse Baldus sibi contrarius dicat,<sup>(c)</sup> bona

(a) Rubrica consuet. 23, art. 26.

(b) Gail d. obs. n. 18; Bald. in l. mercatores C. de commerciis; Neostadins) rer. jud. obs. 2.

(c) In C. pace tenend. a num. 6 de usibus feudorum.

*de Pacta temporal.*  
*, vs. schiff 19*

mobilia censeri esse de ejus territorio, ubi reperiuntur. Et hanc opinionem in practica servari ait Clarus tract. crim. qu. 78. num. 27. Afflict. et Bursat. allegati a Peregrino, qui inubbitanter ait idem observari lib. 6, de jure fis. tit. 1, num. 141, et Imbert. in enchiridio tit. bonorum differentia. And this practice is especially well known in matters of confiscation, when the movable property is situate not only under a different jurisdiction, but in a different state, than that in which the owner was sentenced. And Holland and Utrecht are *different States*.

(7) Moreover, it appears that this contention is based on still stronger grounds, particularly in respect of obligations and other personal claims, due and belonging to the said A. by persons residing in Zeeland, for, notwithstanding the opinion of some that actiones personales bonis mobilibus accenseri, (d) most lawyers hold that these constitute *tertia quidam species*.(e) And such claims are governed by the laws of the place of residence of the debtor, and not of the creditor where they are due and judgment can be obtained on them,(f) et hanc opinionem communiter teneri testatur Peregrinus.(g)

(d) C. 2, 32, 1, et in § Hæc ergo in verbo numeranda. Auth. de non alien. Bald. in l. 2. C. de sacro eccl.

(e) Imbert d. l. fulgos, in d. l. 1 C. si adv. transact. Card. Cons. 72. Socin. Cons. 7, viso test. Corn. Cons. 104, lib. 2, et Cons. 173, lib. 3, ubi dicit Bartol. ita sæpius consuluisse at apparet Cons. 51 et 234, quem multi alii secuti sunt allegati a Peckio de test. conjug. lib. 1, c. 30.

(f) Opinio Bald. et Aug. in l. ex facto D. de hæred.; Inst. Castr. cons. 319; Areth. Cons. 10; Soc. Cons. 175; Bald. Cons. 357; Salicet. in l. 1 C. de sum. tim. col. ult.; Tiraq. de retract. lin. § 36, num. 15 et seq.; Alex. Cons. 18; Alb. Brun. de stat. exclud. num. 18, art. 11, num. 134.

(g) Pereg. d. cap. num. 142.

From this it must be concluded that the contention of C. and D. is well founded, unless it can be proved that B. adiated the inheritance. Further, even if this can be proved, their contention can still be maintained with good reason, and they have the opinion of many lawyers in their favour.

## OPINION No. 34.

HOLL. CONS. III. B. 308.

[GROTIUS II. 21, 3.]

Repudiation of inheritance — *Successor singularis* — Co-heir's liabilities on a mortgage bond—Universal partnership.

1. A SON who repudiates his father's inheritance is not liable for the debts. He may retain any property given him upon his marriage, and also such property as he may be entitled to as *successor singularis* by virtue of a transfer or contract.

2. If any one accept a portion of a house as his inheritance, he must bear, as possessor, his share of the burdens to which the house is specially subjected by a mortgage bond.

3. Universal community includes a community of debts.

I have seen a certain extract from the Register of the city of Goude, and an accord of the 24th of May 1618, between Gerrit Joosten and the guardians of his children, also an ante-nuptial contract of the 23rd of April 1614, between Hendrik Andries and Maritge Gerrits, and also a deed of renunciation made by the said Hendrik Andries on the 16th of January 1615. I have been asked whether Hendrik

Andries could claim a third of the house mentioned in the accord, or six hundred guildens as an alternative, or whether he could repudiate everything without being liable for the debts of Gerrit Joosten and Annetge, his daughter begotten out of wedlock, both deceased.

(1) I am of opinion that Hendrik Andries is not personally liable for the debts of Gerrit Joosten and Annetge, since he repudiated the inheritance, and he can retain the money given to him on his marriage, as well as the third of the house belonging to his wife, or the six hundred guildens in place thereof, as *successor singularis* by virtue of the transfer and contract.

(2) It must be well understood, however, that if he accepts the third part of the house, he must in such case, bear, as possessor, a third share of the burdens which are specially imposed upon the said house by hypothec. If he repudiates the said third part and the six hundred guildens, he will not be liable for any debts of the said Gerrit Joosten and Annetge. This is not contradicted by the clause contained in the accord before mentioned, to the effect that the assets of the estate should be vested undivided in Gerrit Joosten, during his lifetime, and should be apportioned after his death; (3) for this was not a universal community of property, which brings with it a community of debts. The division after death must be taken to mean, if the children claimed their inheritance from Gerrit Joosten, which they were, however, left free to accept or refuse.

## OPINION No. 35.

HOLL. CONS. III. B. 305.

[GROTIUS IL 21, 5; VAN DER KEESSEL, THES. 323.]

*Negotium hereditatis*—Payment of debts of deceased—Implied promises—*Dolus*—Administrators—*Mandatarius*.

1. IF any one who carries on, together with two other relatives, the *negotium hereditatis* of a deceased relation, should, after some demurring, advance certain monies for the payment of the debts of the deceased, for his honour and reputation, it is presumed *in dubio* that the money was credited to the estate, and not specially to the relations.

2. From what tacit promises may be inferred.

3. Silence does not imply consent so as to bind another, if no other positive acts intervene.

4. When any one can benefit *ex dolo*.

5. *Consilium fraudulentum obligat*, and how such fraudulent advice can be proved, et No. 7.

6. *Dolus præsumitur in eo, ad quem lucrum spectat*.

8. Executors of an estate cannot, after accepting the administration, secure any property to themselves to the prejudice of the general creditors.

9. *Mandatarius, accepto mandato, alienam rem æque ac suam curare debet.*



If I understand the case well from what has been submitted, three questions seem to arise therefrom to my mind :

Firstly, whether B. must be taken to have paid the money advanced by him to the estate of the deceased, or to the two most important relatives still alive.

Secondly, whether under any circumstances he is entitled to claim any compensation for damages sustained from the two most important relatives.

Thirdly, whether the said two most important relatives could secure themselves, either by pledge or otherwise, out of the property of the estate to the prejudice of B.

(1) With regard to the first question, this depends on facts, and must be decided from the words used at the time of the payment and receipt of the money ; but since in the submitted case it was stated that B., after some demur, understood it to be for the honour and reputation of the deceased, ita ut ipse quoque cum aliis gesserit negotium hereditatis, and that the advance was for the payment of the debts of the deceased, it must be presumed *in dubio* that the said money was advanced to the estate and not to the relations in particular.(a)

(2) Coming to the second point, we have to examine by what right B. is entitled to claim compensation for damages from the two most important relations. This right must emanate aut ex consensu ipsorum duorum, aut ex eorundem dolo. B. seems

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(a) Per ea quæ tradit Bart. in D. 26, 9, 5, 1.

somewhat to base his claim against one of the two most important relations on a right *ex consensu*, since he (one of the two relations) knew that B. was not inclined to make the advance, except upon security given, not only by C., but by both of them, and that, knowing this, he did not inform B. that he would not give such security, from which B. inferred tacit consent. (3) The rule of law, *quod taciturnitas consensum non operatur, ubi de aliquo obligando tractatur, nisi alius actus positionis interveniat*,<sup>(b)</sup> is against this. This applies with greater force to the present case, since the said relative was away when the question of indemnity was discussed between B. and C. (4) What remains then is that both the two relatives might have benefited *ex dolo*, since they had tried to induce B. to make the advance upon their advice. This seems to convey some probability, bearing in mind the legal maxim, *quod consilium fraudulentem obligat*.<sup>(c)</sup> (5) The difficulty would be to prove the fraud. If B. could show that the two most important relatives had knowledge of the insolvency at the time that they advised him, this would be sufficient proof of fraud. Taking it that this cannot be fully proved, nevertheless, if it could be shown that B.'s advance had tended to their profit, it would be sufficient, taking into consideration some other conjectures, (6) *nam dolus præsumitur in eo, ad quem lucrum spectat*. (7) Further, even taking it that the fraud cannot be clearly proved by

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(b) D. 3, 3, 8, 1, et ibi DD.

(c) D. 4, 3, 8, et D. 50, 17, 47.

this or similar evidence, it still appears that it will be sufficient if B. can show from all the circumstances that he would not have made the advance to the estate but for the advice and importunity of the said two relatives.(d) B. is therefore specially advised to obtain evidence by which one, or, if possible, all of these points can be proved, so that he can base his action thereon.

(8) Regarding the third question, assuming that the two said relatives were executors of the estate, and as such *mandatarii* of the creditors, they could not, after their acceptance of the administration, secure themselves out of any property, to the prejudice of the other creditors. *Alienam enim rem æque ex suam curare debuerunt, accepto mandato.*(e)

(9) Further advice upon the case will be given on the receipt of other instructions, and upon the production of further evidence.

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(d) D. 17, 1, 4, 5.

(e) D. 17, 1, 35, et ibi DD.

## OPINION No. 36.

HOLL. CONS. III. B. 191.

[GROTIUS II. 22, 17, & II. 18, 10 (§ 6, 7, OPIN.)]

Legacy of usufruct—When it expires—Interpretation of testaments—Adiation—*Dies incertus*—*Spec successionis*.

1. ALL legacies of usufruct expire on the death of the legatee.

2. In the interpretation of testaments an *absurdus intellectus* must be avoided.

3. A legatee can have no usufruct unless the inheritance is adiated.

4. Ex legato pure relicto, etiam institutio pura censeri debet.

5. *Dies incertus* movetur de medio, et refertur non ad jus adeundi, sed ad efficaciam emolumenti.

6. Institutus post mortem usufructuarii si ante usufructuarium moriatur, potest hereditatem transmittere; et præsertim si filius post mortem usufructuarii est institutus. Et quare.

7. Filius debet purè institui.

I have seen a copy of a certain testament made by Bastiaan Wynants Cocq and Maaijke Michiels, his wife, and have been instructed that, after the

décease of the afore-mentioned Bastiaan Wynants, his son Justinus, who was mentioned in the testament, died, and likewise after him the afore-mentioned Maaijke Michiels, step-mother to the said Justinus, and that Justinus left no relations to succeed him according to local law.

(1) In response to the questions put, I am of opinion that the heirs to Maaijke Michiels cannot claim the property by virtue of the disposition or legacy, since she was found to have been left under the testament of her husband only the usufruct and interest of the property left by him, subject to certain burdens, and it is a well-known legal principle that all legacies of usufruct expire on the death of the legatee. Nor does the provision in the said testament conflict with this, which says the said Justinus, as survivor, shall inherit, in full ownership, after the death of Maaijke Michiels, the afore-mentioned property, whereof she had the usufruct, for the said Justinus cannot be taken to have been instituted only *in illum diem*, and *sub illa conditione*, if he survived Maaijke Michiels, because in the interpretation of testaments *vitari debet absurdus intellectus*. (2) *Esset autem absurdus intellectus, si nemo heres existeret, nisi post extinctionem ususfructus; cum usufructus ad legatarium pervenire non posset, nisi adita hereditate.*(a) (3) *Neque usufructus cuiquam relinqui possit in casum suæ mortis.*(b) Unde tali casu, quod posito consequenti, necessarium est ponere

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(a) C. 6, 42, 14.

(b) D. 7, 1, 51.

antecedens, (4) ex legato pure relicto, etiam institutio pura censi debet.(c)

(5) Quare dies incerta amovetur de medio et refertur non ad jus adeundi sed ad efficaciam emolumentum.(d)

(6) Unde sequitur quod institutus post mortem usufructuarii, si ante usufructuarium moriatur, potest hereditatem transmittere. Bald. dicit ita esse iudicatum.(e) Idem multis probant.(f) This is without doubt the case ubi filius post mortem usufructuarii est institutus, ne alioquin evanescat testamentum, quia filium pure institui necesse est.(g)

(7) It therefore follows that the afore-mentioned Justinus could transmit the property of his father Bastiaan Wynants, to his heirs, or, failing relations, to the Public Treasury, since he was entitled to the ownership of his father's property on his death. The heirs of the afore-mentioned Maaijke Michiels have no claim by virtue of the said legacy or usufruct, since they were not instituted together with Justinus and the legacy lapsed on her death. The usufruct was merged in the ownership in the person of the said Justinus, in conformity with the intention of the said Bastiaan Wynants, which is clearly indicated by the words "full ownership" appearing in the testament, in addition to the reasons already given.

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(c) Bald. in C. 1, 3, 24, in quæst. 14.

(d) Bald. in D. 28, 2, 28, et Ang. de Perusio ibi.

(e) Bald. in d. l. C. 1, 3, 24. Castr. in d. l. D. 28, 2, 28.

(f) Fach. lib. 4, contr. c. 18. Gail, lib. 2, obs. 143. Arius Pinellus ad l. 1. C. de rebus maternis 4, parte 3, Nos. 41, 42, and 43. Borgouinus Cavalcanus, tract. et usufr. mult. relicto, § 2, Nos. 1 and 2. Boerius, Cons. 13.

(g) C. 6, 25, 4. Bald. in C. 3, 28, 32, and 3, 28, 36.

## OPINION No. 37.

HOLL. CONS. III. B. 161.(a)

[GROTIUS II. 22, 17.]

Legacies of usufruct—When they terminate—Effects of adiation on—Cannot be disposed of by will—*Dies incerta*—*Absurdus intellectus* in the interpretation of wills.

1. ALL legacies of usufruct terminate upon the death of the legatee.

2. In the interpretation of testaments an *absurdus intellectus* is not allowed.

What would be an *absurdus intellectus* in the present case?

3. *Usufructus ad legatarium pervenire non potest, nisi adita hereditate.*

4. *Usufructus nemini relinqui potest, in casum suæ mortis.*

5. *Ex legato pure relicto, etiam institutio pura censeri debet.*

6. *Dies incerta amovetur de medio, et refertur non ad jus adeundi sed ad efficaciam emolumentum.*

7. *Institutus post mortem usufructuarii, si ante usufructuarium moriatur, potest hereditatem trans-*

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(a) In connection with this Opinion, read Opinion No. 36 (Holl. Cons 3, (b.) 191.—[ED.]

mittere ; et præcipue, si filius post mortem usufructuarii est institutus.

(8) A person entitled immediately on the death of the testator to the ownership of his property can transmit it to his nearest relatives, or, if these are wanting, to the Fisc. The heirs of the *usufructuarius* cannot lay any claim to it by virtue of the legacy of usufruct. *Et quare.*

I have seen the copy of a certain will made by Bastiaan Wynants Cock and Mayke Michiels, his wife, and have been further instructed that after the death of the said Bastiaan Wynants, his son Justinus also died. Mayke Michiels had survived her husband but had predeceased her stepson Justinus, and Justinus left no lawful heirs to succeed him. In response to the questions asked :

I am of opinion that since by the aforesaid will of her husband, Bastiaan Wynants, Mayke Michiels is given the usufruct and qualified ownership of the property left by him, together with certain burdens without direct title of institution : (1) her heirs cannot, after her death, claim this property by virtue of this disposition or legacy, for the legal principle is that all legacies of usufruct lapse with the death of the legatee.

(2) And with this does not conflict the stipulation in the testament that the property of which Mayke Michiels, the survivor, enjoyed the usufruct should on her decease go to the said Justinus in full ownership, and that the said Justinus should only be



considered as instituted heir over the said property *in illum diem* and *sub illa conditione*, if he survived the afore-mentioned Mayke Michiels; for in all interpretations of testaments (3) *vetari debet absurdus intellectus*. *Esset autem absurdus intellectus, si nemo heres existeret, nisi post extinctionem usufructus; cum usufructus ad legatarium pervenire non possit, nisi adita hereditate.*(b)

(4) *Neque usufructus relinqui possit alicui in casum suæ mortis.*(c) (5) *Unde tali casu, quia posito consequenti, necessarium est ponere antecedens, ex legato pure relicto, etiam institutio pura censeri debet.*(d) (6) *Quare dies incerta amovetur de medio et refertur non ad jus adeundi, sed ad efficaciam emolumenti.*(e) (7) *Unde sequitur quod institutus post mortem usufructuarii, si ante usufructuarium moriatur, possit hereditatem transmittere.*(f) The authorities below state that it has thus been decided, and many others are of the same opinion.(g) And it is sound law, *ubi filius post mortem usufructuarii est institutus, ne alioqui evanescat testamentum, quia filium institui pure necesse est.*(h)

(8) Hence it follows that the said Justinus was entitled to the *dominium* of his father's property

(b) C. 6, 42, 14.

(c) D. 7, 1, 51.

(d) Bald. ad C. 1, 3, 24, in 14 quæst.

(e) Bald. ad D. 28, 2, 28. Angelus de Perusio, *ib.*

(f) Bald. in d. l. C. 1, 3, 24. Castr. in d. l. filius.

(g) Fach. lib. 2, contr. C. 18. Gail, 2, obs. 143. Arius Pinellus ad l. 1, C. de bonis maternis 4, parte 3, 41, 42, 43. Borgnin. Calcanes, tract. de usuf. mult. relicto, sect. 2, Nos. 1 and 2. Boërius, Cons. 13.

(h) C. 6, 25, 4. Bald. in C. 3, 28, 32, and 3, 28, 36.

immediately after his (Bastiaan Wynant's) death, and could transmit it to his nearest relatives, or in default of these, to the Fisc. The heirs of the said Mayke Michiels have no claim to it whatever by virtue of the legacy of usufruct, for they were not instituted originally together with the afore-mentioned Justinus, and the legacy lapsed upon the death of the legatee, whereby the usufruct and the *dominium* became merged in the person of Justinus. This was the intention of Bastiaan Wynants, as appears clearly from the words "full ownership" found in the will, in addition to the various reasons given above.

## OPINION No. 38.

HOLL. CONS. III. B. 190.

[GROTIUS II. 22, 16 & 17.]

Redeemable and irredeemable burdens—Under what circumstances borne by legatee—*Donatio inter vivos*, when binding on donor—Debts—Jurisdiction over the Counts of Meurs.

1. PUBLIC as well as particular burdens which are irredeemable, such as emphyteutic rents, must be borne by the legatee, and not by the heir.

2. Redeemable rents must be borne by the heir.

3. Quo casu cessat regula, quod heres non teneatur luere rem legatam, si ipse ignoraverit obligatam esse.

4. If any one had been instituted as heir under obligation to pay the debts of the deceased, he is bound to pay the realised debts as well.

5. If anything has been given to a person as a donation *inter vivos*, the donor is not bound to free such gift unless the donation was made as a remuneration for services rendered, quo casu donator tenetur de evictione.

6. Remuneratio æquiparatur in solutum datione.

7. Those who claim interest on a hypothec given to any one as a donation *inter vivos* must first excuss the heirs of the donors.

8. The Counts of Meurs can be summoned before

no other Council than the Chamber-Council of Spiers.

With reference to the question whether the heirs of the late Lady Walburg, Countess of Nyeuwenart, Spiers, &c., are bound to free His Excellency, as possessor of the County of Meurs, from all interests which became due after the death of the said Lady Walburg, and which still fall due annually, being a hypothec on the said County :

(1) I am of opinion that this question is subject to great controversy by reason of the different opinions held by the lawyers ; but nevertheless I think greater and better reasons are to be found to show that the heirs are bound to do this than to show that they are not thus bound.

Firstly, the authorities which seem to differ on this point appear to convey the same meaning when carefully examined together, namely, that public as well as particular burdens which are not redeemable, such as emphyteutic rents, must be borne by the legatee, and not by the heir.(a) (2) But redeemable rents must be borne by the heir.(b) Ubi (*infra*) generaliter et sine distinctione dicitur, quod si quis rem obligatam creditori legaverit, necesse habet heres eam luere, nisi defunctus expresserit velle se rem lui a legatario, quod probari videtur satis manifeste.(c)

(3) Secondly, on account of the favour and affec-

(a) Quæ est sententia l. quæro D. de usufr. legato.

(b) Instit. 2, 20, 5.

(c) D. 32, 1, 29, et 32, 1, 102, 2.

tion which the Lady Walburg always showed to His Excellency, from which it must be presumed that she wished to benefit him without imposing any burden. Nam in simili cum heres non teneatur luere rem legatam, si ipse ignoraverit obligatam esse, cessat tamen hæc regula propter arctam amicitiam, aut magnum meritum legatarii.(d)

(4) Thirdly, since the said Lady Walburg used the words "under obligation that His Excellency shall pay our debts after our decease" in her testament whereby she instituted her heirs. For such disposition was unnecessary as regards the personal debts, for these, it is perfectly well known, the heir is bound to pay. It must therefore be presumed that the words have some other significance, and that they were inserted in order to remove all doubt as to the realised debts.

(5) The fact that the County of Meurs was given to His Excellency after the date of the testament, as a donation *inter vivos*, seems strongly to combat this view, for a donor is not bound to free such gift. To this it might be replied, firstly, that it appears to have been the intention of Her Grace not to revoke the legacy by such donation, in so far as His Excellency might derive a greater benefit therefrom than from the donation; and secondly, that the said donation was not only repeated, from which still more clearly appears that her meaning and intention was to be liberal, but it was done by way of

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(d) Bald. ad C. 6, 42, 6, num. 3.

remuneration for manifold and important services, as expressly mentioned in the wording of the second donation. Quo casu tradunt Doctores teneri donatorem de luitione, quia remuneratio æquiparatur in solutum datione.(*e*)

(7) On the further question whether His Excellency is entitled to contend that those who claim interest on the hypothec ought first to excuss the heirs of the said Lady Walburg, I am of opinion, from what has preceded, that His Excellency is entitled so to do,(*f*) assuming that His Excellency, as Count of Meurs, and at the same time heir of the said Lady Walburg, cannot be sued before any other Council than the Chamber-Council of Spiers.

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(*e*) Ita Jason ad D. 45, 1, 131, 1.

(*f*) Per Auth. Hoc si debitor, C. 8, 14, 14. (Nol. 112, cap. 1, de litigiosis.—[ED.])

## OPINION No. 39.

HOLL. CONS. III. B. 154.

[GROTIUS II. 22, 17.]

Legacy of usufruct—Ownership—Right of testamentary disposition—*Spes successionis*.

THE legacy of a usufruct or stipulation that the property shall remain undivided *ad vitam*, does not divest a person of the ownership of that portion accruing to him *pro diviso*. He can dispose of such portion by testament as if it were *in bonis ipsius*, notwithstanding that it was stipulated (in the will) that the property shall only be shared and divided after the death of the survivor.

I have seen a certain testament of Pieter Gerrits and his wife, Gijsbertge Hendrik, dated 7th January 1614, together with a testament of Jan Adriaans, soap-boiler, and his wife, Neeltge Pieters, dated 16th January 1611. Pieter Gerrits died, and then Neeltge Pieters, leaving as survivors the said Gijsbertge and Jan Adriaans. I have been asked whether Jan Adriaans is entitled to a child's share of the property left by Pieter Gerrits.

I am of opinion, since by the said testament of

1611 Jan Adriaans had been instituted as universal heir to his wife, and she (Neeltge) was entitled before her death to a portion of her father's (Pieter Gerrits) inheritance as instituted heir, that the right to that portion at the time of her death, as being *in bonis ipsius*, was transferred to her husband, her heir.

The fact that by the above-mentioned testament of Pieter Gerrits occupation and use of the property is given to his widow, and that there is a further stipulation that after the death of the survivor the property is to be shared and divided amongst the children, does not conflict with this contention, for such a legacy of usufruct or stipulation, that the survivor shall retain possession, does not divest Neeltge Pieters of the ownership of that portion coming to her *pro diviso*, and she can legally dispose over such property.



## OPINION No. 40.

HOLL. CONS. III. B. 195.

[GROTIUS II. 22, 24, & 25.]

Legacy of clothes, &c.

A LEGACY of clothes, trinkets, jewels, and everything else belonging to the person of the testator, entitles the legatee to claim all the personal effects, whether inherited or bought by the testator for the use or ornament of his own person, and not for anybody else, or acquired and destined by him for such use.

I have seen a certain mutual will made by Barthout Willems van Abbesteege and Claartge Aalberts, his wife, bearing date 21st March 1616, which obtained full force upon the predecease of the said Claartge. By this testament the survivor was instituted heir, and it was stipulated *inter alia* that their child or children should have the clothes, trinkets, jewels, and everything else belonging to the person of the first-dying. The testatrix had, of her own, certain clothes, trinkets, jewels, and effects, which were personally used by her, and had also inherited similar articles upon the death of her

mother and maternal aunt. I have been asked what articles should be considered as included under the legacy.

I am of opinion that the afore-mentioned children are entitled under the legacy to everything which belonged to the person of the testatrix, whether she had bought the same, provided it was ordinarily employed either for the use or adornment of her own person, and of no one else, or whether she had acquired and destined these articles for such use.(*a*) *Legato quod uxoris causa emptum paratumve esset, id videri legatum, quod non uxori cum viro, aut liberis communis usus fuisset, sed quod proprio uxoris usui destinatum.*(*b*) *Cum quo convenit.*(*c*) As regards the clothes, trinkets, and jewels, these must be considered to refer to such as were used upon her person, although such is not expressly stated; for generally when speaking of clothes, trinkets, and jewels, we allude not so much to the ownership as to the use. See authorities quoted,(*d*) *ubi dicitur, si quis dixerit vestem suam, de ea eum sensisse, quam ipse in usus suos habuit.*

ROTTERDAM,

27th June 1616.

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(*a*) Per text. D. 34, 2, 10.

(*b*) *Idemque traditur* D. 32, 1, 45.

(*c*) D. 34, 2, 28, et D. 50, 16, 203.

(*d*) *Lit. apparet* in D. 34, 2, 32, 2, et *clarius* in D. 34, 2, 25.

## OPINION No. 41.

HOLL. CONS. III. B. 153.

[GROTIUS II. 22, 35, & II. 23, 18.]

Mortgage bonds as legacies—Registration.

KUSTING BRIEVEN, or mortgage bonds, given to legatees in payment of their legacies, need not be transferred by the court, nor the fortieth penny paid thereon. A notarial deed of the transaction is sufficient.

Having seen a certain testament made by Jan Van den Berg and Christina Pieters, dated 23rd May 1616, which was confirmed by the death of the last-mentioned, and considered the questions put :

I am of opinion that Jan Van den Berg, in conformity with the said testament, is bound to pay out to Aaltge Ijsbrants, Maritgen Pols en Neeltgen Ijsbrants, or their children, as legatees, the respective amounts of two thousand four hundred guldens, or to give them mortgage bonds equal in value. Moreover, it is not necessary that the said mortgage bonds or *kusting brieven* be transferred to the legatees by the court. A notarial deed setting forth that the

legatees have been paid their legacies in full on receipt of these bonds is sufficient. And neither Jan Van den Berg nor the legatees are bound to pay the dues of the fortieth penny, for no such enactment is found in the Placaat of the States-General.

## OPINION No. 42.

HOLL. CONS. V. 131.

[GROTIUS II. 22, 35.]

Testamentary disposition of the property of the heir—The heir not to go contrary to the will of the deceased—Legitimate.

(*Cf.* Opinion No. 53.)

Testator potest disponere de re heredis

Heres non potest contravenire voluntati defuncti.

I HAVE seen an extract from the ante-nuptial contract entered into between Jan Kornelisse Kruisert and Theuntje Gerrits, subject to the approval of the parents, together with a copy of the testament of Gerrit Dirriks van der Wolff, dated 12th March 1609, and have considered the questions put.

I am of opinion that the guardians of Teuntje Jans would be entitled, by virtue of the said ante-nuptial contract, to claim the due performance of whatever may have been donated at the marriage of Mr. Dirk van der Wolff more than at the marriage of her mother, Teuntje Gerrits. The same guardians must, however, as regards Teuntje Jans, co-heiress with Gerrit van der Wolff, notwithstanding the said ante-nuptial contract, conform to the testament of the said Gerrit van der Wolff, cum heres non possit

contravenire voluntati defuncti, et testator possit disponere de re heredis. This testament of Gerrit van der Wolff stipulates that the said performance shall take place upon her marriage. Her guardians therefore have the option of accepting on behalf of the orphan either the testament with its conditions or the legitimate portion in full ownership, with all profits since the decease of the said Gerrit van der Wolff. This legitimate portion amounts to one-half of what each of the four branches of descendants would have received if there had been no testament. It must be borne in mind, however, that they can do this only in respect of the amount of the legitimate portion, per ea quæ notat Jason in auth. novissima, C. 3, 28, 6, n. 44.

## OPINION No. 43.

HOLL. CONS. III. B. 160.

[GROTIUS II. 23, 5.]

Copulative legacy—*Fiscus* and instituted heirs excluded.

1. A WIFE leaves a certain legacy to the relatives and heirs *ab intestato* of her deceased husband. On the husband's death he had left relatives on his mother's side only. The whole legacy will go to these relatives *non jure accrescendi, sed jure non decrescendi*, and the *Fiscus* is not entitled thereto, nor can the instituted heirs retain the half.

2. *Re conjunctus excludit hæredem.*

I have seen a certain testament wherein a legacy of 1500 guildens was left by the testatrix to the relatives and heirs *ab intestato* of her late husband. Assuming that the husband left relatives of his mother's side only, and none of his father's side, the question has arisen whether one-half of the 1500 guildens would go to the relatives of the mother's side of the said Christian Anthonis (the husband), and in case there are no relatives of the father's side, whether the other half would fall to the *Fiscus*, or devolve upon the instituted heirs of the testatrix.

I am of opinion that the total amount of 1500 guldens belongs to the relatives of the mother's side of the said Christian Anthonis, *idque non jure accrescendi, sed jure non decrescendi*, and the Public Treasury is not entitled thereto, for in this legacy are mentioned not *quivis heres ab intestato*, under which class the *Fiscus* would fall—*quatenus partem faceret ab intestato*, according to the Political Ordinance; but "all relatives and heirs *copulatively*." (2) And therefore the instituted heirs cannot claim the half *cum re conjunctus excludat hæredem.*(a)

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(a) C. 6, 51, 1, 11.



## OPINION No. 44.

HOLL. CONS. III. B. 186.\*

[GROTIUS II. 23, 18, & 1, 13, 1.]

Citizenship—How acquired—How lost—Domicile of wife—Heirs entitled to possession of estate—Legatee's rights against heirs.

1. CITIZENSHIP can be acquired in different ways. How it can be lost.

2. *Uxor omnino sequitur mariti conditionem* (Opinion No. 9).

3. A woman who is a citizen born of Zierikzee loses all the advantages of such citizenship upon her marriage with a stranger.

4. The Articles of the Enactments of the city of Zierikzee, which go further than the Common Law, cannot be extended to those who are merely inhabitants, but not citizens.

5. Although Zierikzee is privileged to create customs, such customs must be confined to matters of general police.

6. A person instituted heir under a testament is entitled to retain possession of the property in respect of which he was instituted, and if anything is

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\* In connection with this Opinion, read Opinion No. 15 (Holl. Cons. 3 (b.) 185), and Opinion No. 9 (Holl. Cons. 3 (b.) 196), with annotations.—[ED.]

left to another as a legacy, the legatee will have to claim it from the instituted heir.

I have seen further instructions\* in the cause of Sr. Hannibal Bovython against the nearest relatives of Agatha Ockerts.

(1) In answer to the points raised, I am of opinion that in this matter the customs of Zierikzee respecting citizenship deserve special consideration, for in some places citizenship was acquired by a residence of a year and six weeks; in some, on taking the necessary oath and receiving the consent of the rulers of the city; in others, upon marriage with a citizen's daughter; and in others again, in diverse manners. According to these customs, it will have to be decided whether Agatha Ockerts was a citizen at the time she made the testament or not. For if the said Bovython is held to have been a citizen, since he had his wife and furniture in Zierikzee, although he had his abode somewhere else, his wife would be a citizen too; but if not, she must be considered to have lost her citizenship; (2) *cum uxor omnino sequatur mariti conditionem.*(a) (3) This reason is strengthened by the fact that it is enacted that upon the marriage of a woman who is a citizen born with a stranger, she loses all the privileges of citizenship. It must further be noted that the 22nd Article of the Enactment of Zierikzee, when read

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\* See Opinion No. 15 (Holl. Cons. 3 (b.) 185).—[ED.]

(a) Glos. 4 Bart. in C. 10, 38, 4. Bald. Cons. 351, 411, and 451, lib. i, and Cons. 310, lib. iii.

together with the 72nd Article, seems expressly to refer to man and wife who are both citizens. (4) Now, since these Articles go further than the Common Law, they cannot be extended to those who are not citizens, but merely inhabitants. The Article referring to the customs and embodied in the Enactments must receive a restrictive interpretation.

I am further of opinion that the ante-nuptial contract was only annulled by the testament in so far as it conflicted with the testamentary disposition. The general law with regard to the community of property cannot therefore be applied to this case, and Sr. Bovython must be considered entitled, in accordance with the previous Opinion (III. B. 185), to two-thirds of the property left by his wife, and to the remaining third left him by codicil, in so far as it can be accepted that, (5) if Zierikzee be privileged to create customs, such customs must be confined to matters of general police, or if it should not appear that the 73rd Article was understood in practice to refer to testaments as well as to donations (the Article of the year 1570, sent to me as evidence of such practice, is insufficient), or if, according to the customs of Zierikzee, Bovython be not considered a citizen, and consequently his wife not entitled to citizenship either.

I am further of opinion that Sr. Bovython is entitled to retain possession of two-thirds of the afore-mentioned property as instituted heir.(b) As

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(b) C. 6, 33, 3.

regards the other property, however, left him as a legacy under the codicil, he must claim it from the nearest relatives, who are the instituted heirs to one-third, burdened with the afore-mentioned legacies to the said Bovython.

ROTTERDAM,

*30th April 1616.*

## OPINION No. 45.

HOLL. CONS. III. B. 158.

[GROTIUS II. 23, 20.]

Falcidian portion—How calculated—How deducted—Rights of heirs to.

1. THE Falcidian portion accrues to the instituted heirs unless prohibited by testament, and is one-fourth part of the inheritance after the deduction of all debts.

2. In order to deduct the Falcidian portion, all inventoried property and lands left must be valued.

3. The Falcidian portion does not lapse because the instituted heir received a legacy or prelegacy, but it is deducted also from such legacy or prelegacy as well as from the others. Also 5 and 6.

4. The Falcidian portion is deducted from all legacies also in case of substitution.

7. The Falcidian portion was deducted from the whole legacy—that is, from the bare ownership as well as from the usufruct.

8. The heirs are entitled to deduct a fourth part of each legacy, and are not bound to accept money in settlement of their portion, but must be placed in full possession of all the property, rendering the

legatees their legacies and deducting the amount to which they are entitled.

QUÆRITUR.

(1) Whether Lijsbet Ariens, Grietgen Ariens, and the children of Tryntgen Ariens, relatives on the mother's side and instituted heirs, could advisedly adiate the estate of the late Adriaange Gerrits, their half-sister, simply, and act as heirs according to the will or not?

I am of opinion that the instituted heirs should be advised to adiate, if they are sure that the assets of the estate exceed the liabilities.

(2) Whether the said Lijsbet Ariens, who, by virtue of the above-mentioned will, cannot inherit more than five or six Flemish pounds, whereas the whole estate is supposed to be worth about 20,000 guildens, is not entitled to her Falcidian portion of a third of the estate, *i.e.* a legal fourth, since she was instituted heir to one-third of the whole estate?

The relatives of the mother's side, who alone are found to have been instituted heirs under the will, are entitled to the Falcidian portion, since it is not specially taken away or prohibited by the will, and each heir must have his share. This portion is one-fourth of the inheritance after deduction of all debts.

(3) Whether on this account all the property and lands of the testatrix are not to be valued according to the inventory made thereof?

This must certainly take place.

(4) Whether Lijsbet Ariens, by virtue of her right to a Falcidian portion, can oppose the full claim of Grietgen Ariens, who receives nine morgen of land as a legacy, to the extent of the value of such legacy, the said Grietgen being subsequently instituted heir, as also Elizabeth?

What the instituted heirs received as legacies or prelegacies must not be taken into account as satisfaction for the Falcidian portion, but this portion must be deducted from such legacies and prelegacies, as well as from all others.

(5) Whether Grietgen can, by reason of the word "institution," although inserted after the said legacy in the last portion of the will, claim to hold the nine morgen free, without deduction of the Falcidian fourth?

No, for reasons afore-mentioned.

(6) Whether (5) can be urged with specially strong reasons, since the said nine morgen are left to Grietgen on condition "that, in case she predeceased her husband, the nine morgen are all to go to her children, who are substituted as her heirs?"

The Falcidian portion must be deducted from all legacies *also in case of substitution*.

(7) It was further asked whether Lijsbet Ariens was entitled to a Falcidian fourth on certain seven morgens of land left as a legacy to the children of Fijtgen Ariens, they being instituted heirs together with Lijsbet and Grietgen Ariens?

Yes, for reasons afore-mentioned.

(8) Whether the said Lijsbet was entitled to a

Falcidian fourth on a certain house, "De Poot," together with 11 morgen and 300 roods\* of ground, which were left as a legacy to Gerrit Jacobs, but on condition that it was always to be left to the relatives of his mother's side, and that the said Gerrit could in no wise alienate the whole or a part thereof, except in case of necessity?

Yes, for the same reason.

(9) Since the said Gerrit must allow his father, Jacob Cornelis Schout, the usufruct till he (Gerrit) comes of age, whether the rest of the Falcidian portion can be charged on the property itself, or whether the said Lijsbet Ariens must satisfy her claim with the use and the fruits of the property?

The Falcidian portion must be deducted from the whole legacy—that is, from the bare ownership, as well as from the usufruct.

(10) Whether Lijsbet Ariens is entitled to exercise her right to her Falcidian fourth over the house and each piece of ground separately, without being bound to accept money in settlement, unless she feels thus disposed? And further, what the said Lijsbet should be advised to do with reference to this point?

The heirs are entitled to deduct a fourth from each legacy, and cannot be compelled to receive money in settlement, unless, upon sufficient cause

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\* Three hundred roods (*Drie Honden*). The word "*hond*," as a land measure, is mentioned by Jacob Coren in obs. 19, lit. 8. He gives the exact meaning, and makes it equivalent to 100 roods. The same word is found in Simon van Leeuwen's *Censura Forensis*, pt. 1, lib. iv. cap. 19, n. 19, and in Voet, 18, 1, 7. Voet gives as an equivalent 100 decempedæ.—[TR.]



being shown, the court should deem it preferable. The instituted heirs are advised to take possession of the property at once, and to deliver to the legatees their legacies, after deducting what is due to themselves.

## OPINION No. 46.

HOLL. CONS. V. 134.

[GROTIUS II. 24, 9.]

Effect of revocation of a testament as regards previous dispositions.

WHEN a testament is revoked, every disposition made in such testament must be considered revoked.

I have seen a certain ante-nuptial contract made between Huibert Kornelisz and Pleuntjen Floris, bearing date 1st of April 1605, and also a copy of a certain mutual will between the said consorts dated 17th of August 1617,\* as well as a later testament of the said Huibert Kornelisz, dated 29th of December 1617. I have been asked whether the afore-mentioned Pleuntjen is entitled to one-half of the property of the said Huibert Kornelisz, or whether she must be satisfied with the thousand gulden and the other items mentioned in the ante-nuptial contract.

I am of opinion that she must be satisfied with the stipulations contained in the ante-nuptial contract, for although this contract had been revoked

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\* Evidently a misprint for 1607. Cf. *infra*.—[T.R.]

by the reciprocal testament of the year 1607, it must be noted that this revocation does not subsist by itself, but was merely made in order that the testament of 1607 should be of effect, as appears from the wording of the testament, "in all matters contrary to the disposition of the contract," and also because the said Pleuntjen was instituted by the testament afore-mentioned to one-half of all the property, which would not have been the case if the property had devolved upon her by virtue of the renunciation, either as gift or by contract. From this it follows that since the testament of 1607 has been revoked by the later testament, the aforesaid renunciation is also revoked, as being dependent on the said testament. The fact that the said testament of 1607 is only revoked by the later testament in so far as the latter is contrary to the terms thereof, does not affect the case, since in the later testament the relations of the testator were instituted heirs to all his property without exception, which is a direct contradiction to the institution of the said Pleuntjen to one-half of the property made by the testament afore-mentioned.

## OPINION No. 47.

HOLL. CONS. III. B. 157.

[GROTIUS II. 24, 11.]

Wills of the same date—When one considered codicil—Prohibition of alienation—Interpretation under *fidei-commis* clause.

1. Two testaments found to have been made the same day can have no legal existence if they contain the institution of different persons as heirs.

2. The words “my relatives or heirs” must be taken to refer *de eo, qui primus et immediatus heres* in case of a *materia odiosa*—as, for instance, in the prohibition of alienation.

3. When does prohibition of alienation operate *favore agnatorum*?

4. In the case submitted, by “existing heirs, those that may come into existence by marriage must be understood children representing their parents by a *substitutio vulgaris*, and not those succeeding *primus heredibus*.

5. In the case submitted, all life annuities, lay town properties, and allodial tithes are subject to the *fidei-commissum*.

6. *Dictiones* (id est videlicet) et similes, non solum tantum declarativæ, sed et restrictivæ.

7. Under "lands and erven" are included houses, but life-annuities and house-rents, not being perpetual revenues, are excluded.

8. In case the testator has not obtained a special dispensation, succession to the feuds will follow feudal law.

After considering a certain Statement of Case, the questions arising therefrom, and the copies of two testaments of Aernout Aernouts, both dated 20th May 1602 :

(1) I am of opinion that the doctrine of the jurisconsults which lays down that when two testaments of the same testator are found to have been made on the same day, it must be considered as if no testament had been made at all, is not applicable to the present case, for the said doctrine refers merely *ubi sunt duo testamenta singula habentia diversi heredis institutionem*, and not where one of the testaments makes no provision for the institution of heirs.<sup>(a)</sup> Such disposition, notwithstanding the erroneous word "testament," can and must be construed as a codicil *ex vi clausulæ codicillaris*, and can thus be reconciled with the dispositions contained in the true testament. Such is the case with the said two testaments of Aernout Aernouts.

(2) Assuming this to be the case, I am further of opinion that it may be contended with good reason that by the terms of the genuine will, which includes the fidei-commissary clause, the property there enu-

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(a) Arg. D. 29, 2, 51.

merated is burdened with a *fidei-commissum*. for one generation, and no further—to wit, until each of those heirs who adiated the inheritance of the said Aernout Aernouts is dead. The reason is that the words “my relatives and heirs” must be understood as referring *de eo, qui primus et immediatus est heres*, when treating of a *materia odiosa*.(b) Et autem prohibitio alienationis odiosa.(c) (3) Eo ha videtur communis DD. opinio extra eum casum, ut alienatio prohibita est favore agnatorum. This prohibition ceases in the present case, since a woman is instituted with a man. (4) And the words “existing heirs, or those who may come into existence by marriage,” in the will, do not weaken this contention for they must be taken to refer to children who are substituted *vulgariter* in the place of their parents under the will, and not to those who would succeed *primis heredibus*.

(5) I am further of opinion that no other property must be taken as subject to *fidei-commissum* than life-annuities, lands, erven, and allodial tithes. Although the testator at first uses the general term “property” and afterwards “immovable property” the application thereof must be restricted generally on account of the expression “to wit”—(6) nunc dictiones, *id est videlicet*, et similes, sunt non tantum declarativæ, sed et restrictivæ.(d)

(7) With reference to the houses, it seems that

(b) Arg. l. cum antiquitas, D. de usuf. ita Decius in l. qui per D. 50, 1.

(c) D. 37, 12, 2.

(d) Bart. ad D. 9, 2, 1.

they may be included under "property and lands" *cum vox prædiorum etiam ædificiis congruat*, but life-annuities and house-rents, not being perpetual revenues, must be considered as excluded. The feudal tithes can in no wise be made subject to a *fidei-commisum*, for it must be taken that the testator had not obtained a special dispensation, and succession to the feuds will therefore go *juxta usus feudales*.<sup>(e)</sup> But since the above point, and especially that *super gradibus fidei-commisso gravatis*, is disputed, it would be best for the administrator not to proceed with the sale of the grounds, erven, or quit-rents except by final order, and on behalf of all persons who are entitled to a fourth share of the estate.

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(e) C. 1 in princ. de succ. feudi.

## OPINION No. 48.

HOLL. CONS. III. B. 192.

[GROTIUS II. 24, 14, & II. 17, 23, & II. 18, 19.]

Closed wills—Nuncupative testaments—Revocation—Witnesses—Intention.

1. WHEN a testator had his testament written another, and had sealed the same and declared before a notary and witnesses that this was his last will and testament, which declaration was endorsed and confirmed on the back thereof by the notary and witnesses, he must be taken to have made a nuncupative testament. Et No. 3.

2. According to law, an heir can be designated any way or in any document, although in nuncupative testaments it is required *ut heredis nomen voce testatoris exprimatur*.

4. The confirmation of such a testament, done before a notary and witnesses, being revoked, and notarial deed endorsed thereon, setting forth that the testator revokes and annuls his testament and declares the deed of confirmation thereof null, void, and of no effect, such revocation is binding and of force, and the testament nullified, although such testament was found in the house of the deceased under seal of the testator, safe, sound, uncanceled, unopened, a



uncut; the legacies to the poor, however, remain of force.

5. A testament is validly revoked when the testator declared, in the presence of as many witnesses as are required by law, that he did not wish his testament to remain in force, and he is then considered to have died intestate. The lapse of a further period of ten years in addition to such declaration of intention is not required.\*

6. If the revocation was made before a less number of witnesses than required by law, an additional period of ten years will be required, besides the declaration of such contrary intention by the testator.

7. In dubio semper est judicandum contra non habentem testatoris mentem; etiamsi pia causa sit.

8. In the Provinces of the Netherlands the apparent intention of the testator always received more consideration than the subtleties of the law in respect of wills.

9. Lawyers who are of a contrary opinion, as stated in No. 4, allow this exception, nisi testator dixerit se velle intestatum discedere.

On the 10th March 1628, A. made a testament, which B. wrote for him. He desired that a notary and two witnesses, whereof B. was one, should sign the testament together with him. This was done. A. sealed the testament before the notary and two

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\* The succeeding Opinion, No. 49 (Holl. Cons. 3 (b.) 156) clearly shows the distinction to be observed between the revocation of a nuncupative and written will.—[ED.]

witnesses, and declared it to be his last will and testament, according to the notarial deed endorsed on the back thereof. The testament was, however, not read over to the notary and witnesses, and, with the exception of B., they therefore had no knowledge of its contents.

By the said notarial deed the testator reserved for himself the right of revoking or altering the testament.

Accordingly, on the 29th March 1631, he passed another deed before the same notary and witnesses, which was also endorsed on the aforesaid testament. Thereby he revoked, cancelled, and annulled his said sealed testament, and wished it, as well as the aforesaid deed of the 10th March 1621, to be considered null, void, of no effect, and as not written. He left the said testament, however, sealed, safe, sound, undestroyed, and uncut.

The testator died suddenly in the year 1633, without having made a subsequent disposition or another testament. The afore-mentioned testament was found in his house, sealed, safe, sound, uncanceled, unopened, and undestroyed, bearing the said notarial deeds endorsed thereon.

I have been asked, in the first place, whether the afore-mentioned testament must be considered *pro testamento scripto*; an *vero pro nuncupativo*; secondly, whether the revocation has the legal effect of validly annulling the said testament, or whether, notwithstanding the revocation, the testament remains of force, not only because it was found in the house

of the deceased testator, sealed in three places by him, and was safe, sound, uncanceled, unopened, and uncut, but also because by the afore-mentioned deed of revocation no fresh institution of heirs took place, nor did he declare that he wished to die intestate, and by the said testament the testator's only agnate was instituted as heir, having been mentioned immediately after the father of the said heir, who was then but seven years old, and the testator assigned no cause or reason for the revocation.

(1) After consideration of the case submitted, and perusal of a copy of the testament and the two deeds endorsed thereon, as set forth in the instructions, I am of opinion, in reference to the first point, that Arent van Suylen van Nyevelt must be understood to have made a nuncupative disposition by reason of the first deed afore-mentioned, whereby he declared, in the presence of a notary and two witnesses, "the said writing or closed document to be his last will and testament, desiring that it shall have effect as such," as appears from the deed.

(2) Although in nuncupative testaments it is required *ut heredis nomen voce testatoris exprimatur*, it is accepted law that such can be done in any way,<sup>(a)</sup> or in any document.<sup>(b)</sup> *Testamento data hereditas, si quis dixerit, quem heredem codicillis fecero, heres esto.* And such declaration, made before the full number of witnesses required by the Civil law (superseded in our country by a notary and

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(a) D. 28, 5, 9, 8, and 28, 5, 58.

(b) D. 28, 5, 77.

two witnesses), was called by the juriconsults a nuncupative testament, as can be seen from very many authorities.(c) Against this it cannot be contended that it was the intention of the testator to dispose of his property *in scriptis*, (3) for the tenor of the document indicates that such was not his intention absolutely, but only conditionally, viz., if he had nothing further placed therein by the notary. This was done, and the aforesaid conditional intention, *conditione deficiente*, became void, and his subsequent declaration concerning his estate must be taken as his testament for the reasons above set forth.

(4) With reference to the second point, I think that the said testament must be considered as validly revoked by reason of the deed of revocation above referred to, with the exception of the legacy to the poor of the place of his burial. (5) For although among the juriconsults there were diverse opinions with regard to the question whether a testament was effectually revoked if the testator declared before the full number of witnesses required by law that he did not wish his testament to remain in force—*vide* authorities quoted below,(d)—yet the opinion of those who hold that this could be done, and that the matter was brought *ad causam intestati*, seems better founded both as regards authorities and in equity;

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(c) Per Ludovicum Lanapatricium Brixens. in libro de formulis testam. nuncup. et claus. maxime circa No. 70, per Julium Clarum, § testam. quæst. 4, No. 3. Mich. Grassum, § testam. quæst. 10, ibi secundus casus.

(d) Guidonem Papæ decis. 200. Papon. tit. de testam. arr. 3. Julium Clarum d. § testam. quæst. 91; Grassum d. § testam. quæst. 84.

for the authority of the Digest is most applicable,<sup>(e)</sup> *si heres institutus non habeat voluntatem, vel quia incisæ sunt tabulæ, vel quia cancellatæ, vel quia alia ratione voluntatem testator mutavit, voluitque ab intestato decedere dicendum est ab intestato rem habituros eos, qui bonorum possessionem acceperunt.* (6) The authority of the Code,<sup>(f)</sup> whereon the other opinion is based, *ut præter talem voluntatis declarationem, decennii tempus, requirant* proves nothing to the contrary, since it refers to a declaration made before a less number of witnesses than is required by law, whilst we have to do with a declaration made before a notary and witnesses, which, according to custom, is the same as the seven witnesses required by the Roman law. Propter quas rationes efficaces, *quod testamentum fit valide revocatum, suo tempore testatur.*<sup>(g)</sup> This opinion also holds in equity, *ut ait Socinus jr.,*<sup>(h)</sup> *probante Grasso dicto loco quadrat cuilibet sensato et rationabili intellectui,* for no one can with any reason doubt the intention of the testator. (7) *In dubio autem semper judicandum est contra non habentem testatoris mentem, etiamsi pia causa sit.*<sup>(i)</sup> (8) This doctrine ought certainly to be adopted in the Provinces of the Netherlands, where it is always customary to consider the apparent intention of the testator rather than the

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(e) D. 37, 2.

(f) C. 6, 23, 27.

(g) Guido Papæ, dicto loco.

(h) Socinus Jr., Cons. 145.

(i) Lud. Zuntus responso pro uxor, No. 1063, ubi citat Alciatum responso, 570.

subtleties of the written law. But even should it be persisted in, *opinionem minus probabilem quam sequitur Clarus, dicto loco*, it must still be borne in mind that those who hold the said opinion allow this exception, *nisi testator dixerit se velle intestatum decedere. Id enim si fiat, censeri institutos heredes ab intestato, agnoscit non Grassus tantum, (k) sed et Clarus. (l)*

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(k) Grassus d. quæst 1, No. 5.

(l) Clarus, quæst. 92.

## OPINION No. 49.

HOLL. CONS. III. B. 156.

[GROTIUS II. 24, 15.]

Effect of wilful destruction of a copy of a will—Nuncupative wills—Revocation of—*Testamenta in scriptis*.

A NUNCUPATIVE will is not annulled by the wilful and intentional destruction through fire of the authentic copy thereof by the testator. Such, however, is the case with a written will. *Et quare*.

I have seen the copy of a certain testament by Marijtgen Jans of Nieuwerkerk, dated 12th August 1605. Having been asked whether the said will is still of full force, or must be considered as annulled and revoked, since the afore-mentioned Marijtgen Jans, during her lifetime, purposely and wilfully burnt the authentic copy in her possession, although the will itself remained in the notary's protocol :

I am of opinion, since the said will is not *in scriptis sed nuncupatorium*, which is apparent from the wording, that it could not be annulled merely by burning the authentic copy, for a nuncupative will cannot be otherwise revoked than by a subsequent will ; (a) nor does the passage from the Code (6, 23,

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(a) D. 50, 17, 35. Inst. 2, 17, 1.

30) conflict with this view, for that refers to written wills (*testamenti in scriptis*).<sup>(b)</sup>\*

The *testamentum in scriptis* is not a notarially executed will, as would be commonly supposed. It is either an under-hand or a closed will, written by the testator himself, or some one on his behalf and with his sanction.

A notarial will, on the other hand, was *nuncupatorium*, for the testator orally declared to the notary his intentions concerning the testamentary devolution of his property. The mere fact that this declaration of the testator was reduced to writing by the notary did not alter the case, and the testament remained nuncupative.

The form of will generally employed in South Africa is the *under-hand* testament—*testamentum scriptum*, which was common in Frisia; the notarially executed will—*testamentum nuncupativum*—obtained generally in Holland.<sup>(c)</sup>

See Chapter on Testaments, § 6, pp. 185, 186.

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(b) *Idem* decedit Clarus, quæst. 93, § testamentum.

\* With reference to the revocation of nuncupative wills, see also Opinion No. 48 (Holl. Cons. 3 (b.) 192).—[ED.]

(c) *Krynauw v. De Marillac* (O. F. S. Feb. 1892).



## OPINION No. 50.

HOLL. CONS. III. B. 155.

[GROTIUS II. 24, 19.]

Institution of poor—When it lapses—Consequences.

THE institution, as heirs, of the poor of a sect not recognised by law is not allowed, and in case of their incapacity, the inheritance must go *ab intestato*. The heirs, however, will act well and honourably in allowing the orthodox poor to claim the inheritance, although according to strict law they cannot be compelled to do so.

I have seen a certain testament by Jan Frans, bookbinder, dated 24th September 1609, wherein the poor of the sect of Arent Barents were instituted as heirs, after certain legacies had been paid out.

I am of opinion, with reference to the questions put me, that the institution cannot be allowed, since it refers to the poor of a sect not recognised by law, (a) and the inheritance, in case of the incapacity of the instituted heirs, must therefore go *ab intestato*. (b) Yet the heirs *ab intestato* will act well and honourably in allowing the orthodox poor to succeed to the

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(a) D. 34, 5, 21, et ibi Bart. C. 1, 9, 1.

(b) Inst. 3, 1, in pr.

inheritance, although, according to strict law, they cannot be compelled to do so. Non obstat l. Pand.(c) quia ibi non relinquitur personæ incapaci, ad causam prohibitam ut recte distinguit Bart.(d) Similiter non 'facit' Novella de Eccles. tit. c. 14, quia eo loco agitur de possessione, in qua sit Ecclesia.

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(c) L. Legatum D. de usufructu leg.

(d) D. 32, 1, 38.

SUCCESSION AB INTESTATO.

OPINION No. 51.

HOLL. CONS. III. B. 197.

[GROTIUS II. 26, 10, & II. 28, 6, & II. 30, 3.]

Succession *ab intestato*—When the Fiscus is admitted—Intestate succession regulated by customary law—Schependoms law obtains in Zeeland—The customs of Zeeland—How to decide dubious questions—Provisions of the Schependoms law—Effect of special legislation.

1. THE Fiscus is not admitted, *quamdiu aliquis ex quacunque linea reperitur defuncto agnatus, vel cognatus.* (Also No. 8.)

2. Intestate succession is regulated by the customary law of the country, and not by Civil Law.

3. Only Schependoms law obtained in Zeeland.

4. The customs of the country were held *pro jure civili hujus nostræ patriæ.*

5. According to the customs of Zeeland, the property was divided into four quarters, and, *ab intestato*, the inheritance devolved, in default of children, grandchildren, or other descendants *in recta linea*, on the nearest blood-relations of the deceased of the father's and mother's side, and all four quarters were equally called to the inheritance, notwithstanding

that on one side there were nearer relations than on the other. (See also No. 20, where the application of the said custom is explained.)

6. No one can succeed to more than devolves on the quarter or line he represents. If no relation of one of the four quarters can be found, the inheritance of the deceased, as far as that side is concerned, goes to the Fiscus.

7. Casus, qui non comprehenditur verbis statuti, relinquitur dispositioni juris communis. (See No. 14 for the interpretation of this maxim.)

9. All doubtful questions ought to be decided secundum regulas generales juris ejus, quod cuique civitati proprium est.

10. Representatio semper et in quocunque gradu locum habet et est causa unica et adæquata juris succedendi.

11. The Schependoms law takes into consideration all relations *in communi stipite*, and if there are no descendants *a proavo*, the succession goes *ad abavum*.

12. Abavi et abaviæ numero sunt octo, et qui succedit loco unius ex abavis, ad octavam duntaxat partem admittitur.

13. Inter descendentes ab abavis nulla est prælatio propinquioris in gradu, jure Scabinico, et succedunt duntaxat representative, et pro ea parte tantum, in qua, succederet repræsentatus.

15. Schependoms law was considered in Zeeland not *pro jure statutorio*, sed *Civili*.

16. Ubi statutum abrogat legem Communem in totum, tunc novus casus occurrens, si est conse-

quens et proximus statuto definiri debet secundum rationem statuti, non legis abrogatæ.

17. *In materia statutaria*, the rule quod in casu omisso recurri debeat ad jus Commune, receives this limitation: nisi in statuto expressa esset ratio, aut ejus unica duntaxat reddi possit ratio.

18. Argumentum ab identitate rationis in materia statutaria præfertur in casu omisso dispositioni juris Communis.

19. Ubi in statuto ratio pro expressa habetur, facienda est extensio etiam in correctoriis.

21. Although, according to Roman law: ii, qui apud hostes sunt, partem non faciant, and the other relations in the same grade succeed to the augmented inheritance, or it devolves upon the next in line of succession, the portions of such persons, however, in Holland and Zeeland go to the Treasury. *Et quare*.

Marinus Heyns Vosbergen died in the town of [Van der] Goes, and left several relations, descendants from the side of his maternal grandfather, his maternal grandmother, and his paternal grandmother, but left none from the side of his paternal grandfather, with the exception of one female descendant from the aunt of his paternal grandfather, the said aunt being his great-grandfather's sister.\*

I have been asked whether the Treasury of Zeeland is entitled to one-eighth portion of the said inheri-

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\* That is, a collateral by half-blood.—[ED.]

tance, to wit, that eighth part which should have gone to the descendants of his paternal great-grandmother, if any could have been found.

(1) I am of opinion, that if this question were to be decided according to the Civil Law, the Treasury would have no claim, since under its provisions the *Fiscus* was not admitted, *quamdiu aliquis ex quacunq̄ue linea reperitur defuncto agnatus aut cognatus.*(a) (2) Since, however, it is well known that in the Provinces of Holland and Zeeland succession *ab intestato* was regulated by the prevailing customs from the earliest times, and before we ever came to consider the written Roman law. (3) These customs obtained in Holland partly according to the *Aasdoms* and partly according to *Schependoms* law, and in Zeeland according to the *Schependoms* law alone. For the purposes of the present case, we must therefore consider not the Roman law, but only the afore-mentioned customs, which are held (4) *pro jure civili hujus nostræ patriæ.*(b) (5) Now according to the customs of Zeeland, the whole of the property is divided into four quarters, as provided by the *Keuren* of Zeeland,(c) or as accepted since earliest times, and advised by the Attorney-General, to the effect that intestate inheritances devolve upon the nearest relations of the deceased from his father's and mother's side, in default of children, grandchildren, or other direct descendants. The inheritance is

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(a) C. 10, 12, ult.

(b) *Instit.* 1, 2, 2.

(c) *Cap.* 2, art. 24.

distributed in four parts to the nearest relations of the deceased coming from the side of his paternal grandfather, paternal grandmother, maternal grandfather, and maternal grandmother, so that all four quarters were equally called to the inheritance, notwithstanding that in one quarter there were nearer relations than in the other. (6) For no one of the heirs could succeed to more than devolved on the quarter or line from which he is descended, and if no one was found related to one of the aforesaid four quarters, the inheritance of the deceased, as far as that side is concerned, went to the Treasury. Having stated this custom, the question still remains whether a collateral of the half side can succeed to a full one-fourth, or only to a half of such fourth, whilst the other half goes to the Fiscus, if there were found to be no descendants or collaterals by full blood of one of the quarters, but only collaterals by half blood *ut in casu nostro?*

(7) *Prima fronte*, it would seem that such collaterals succeed to the full fourth, first, since this case, *qui non comprehenditur verbis statuti, relinquitur dispositioni juris communis,*(*d*) (8) *quæ quidem dispositio juris communis in hac materia talis est, ut Fiscum excludat, extantibus ullis agnatis aut cognatis.*

Secondly, since the custom above mentioned seems to divide an inheritance into four parts, and to consider whether there are any relatives from the four quarters without distinction, nevertheless, after mature con-

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(*d*) Dd. ad D. 1, 3, 32.

sideration, it appears that the contrary contention should prevail: (9) for in all doubtful matters judgment should go *secundum regulas generales juris ejus, quod cuique civitati proprium est.* (10) And *regula generalis juris Scabinici sive Zelandici, quod repræsentatio semper et in quocunque gradu locum habet: imo quod repræsentatio est causa unica et adæquata juris succedendi.* (11) For the Schependoms law refers to all relatives in *communi stipite*, and allows them to succeed to the inheritance to which *ille communis stipes* is entitled, when such relatives are in the same degree of relationship to the deceased as others. Therefore, when no descendants are found *a proavo*, the succession goes *ad abavum*: (12) *abavi autem et abaviæ numero sunt octo: quare qui succedit loco unius ex abavis, ad octavam duntaxat partem admittitur.* That this rule of representation is allowed, not only *inter descendentes ex proavis*, but also *inter descendentes ab abavis*, is quite clear, because *etiam inter descendentes ab abavis nulla est prælatio propinquioris in gradu jure Scabinico: unde sequitur eos succedere duntaxat repræsentative.* Quod si succedunt duntaxat repræsentative, ergo tantum pro ea parte, in qua succederet repræsentatus. (13) If the meaning had been otherwise, a gross absurdity would have been the consequence, to wit, *quod descendentes ab abavis demum qui sunt remotiores a defuncto, essent melioris conditionis quam descendentes a proavis: nam descendentes a proavis, manifestum est non ultra posse succedere, quam pro modo repræsentativa*



tionis, ita ut potius filio fiat locus, quam successio extra repræsentationem extendatur: descendentes autem ab abavis, posita sententia contraria, succederent amplius quam pro modo repræsentationis et Fiscum excluderent.

(14) The argument quod omissum in statuto suppletur a jure Communi is easily met, since it only refers to places where the *jus commune* has been adopted, and no contrary statute has been enacted. The *jus Romanum* has, however, never been adopted in Zeeland; (15) but, on the contrary, the Schependoms law has been considered there pro jure non statutorio, sed Civili. Moreover, the dictum of the jurisconsults is applicable *a majori*: (16) quod ubi statutum abrogat legem Communem in totum, tunc novus casus occurrens, si est consequens et proximus statuto, sine dubio definiri debet secundum rationem statuti non legis abrogatæ.(e) Hoc enim si locum habet pro statuto contra legem receptam, sed abrogatam, multo magis obtinere debet pro jure Civili alicujus Gentis, contra legem nunquam receptam. Of this we have a clear illustration in the law of succession, when no relative of the deceased was found, but only the husband or wife; for if we refer back to the Roman law *tanquam in casu omissio*, it is clear that such husband or wife would be preferred to the Fiscus, whilst the contrary practice obtained in Holland and Zeeland.

(17) Further, it must be noted that *in materia*

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(e) C. 7, 6, 1.

*statutaria* the rule quod recurri deberet ad jus Commune was thus restricted: nisi in statuto expressa esset ratio, aut ejus unica duntaxat reddi possit ratio, quod perinde habetur, quasi ratio esset expressa. (18) Nam in casibus argumentum ab identitate rationis in casu omisso præfertur dispositioni juris Communis. Exemplum illustre tradunt Doctores, et inter alios Stephanus *de Phedericis in tractatu de interpretatione legum*, et Jason *in d. l. de quibus*, no. 16: multos allegans consentientes, in statuto tali, quod filius masculus excludit fœminam. Ajunt enim hoc statutum ita extendendum, ut excludatur etiam masculus per fœminam veniens. Ratio enim, ajunt, quamvis expressa non est, unica tamen reddi tantum potest, respectus scilicet agnationis. (19) Ubi autem ratio pro expressa habetur, facienda est inquit extensio etiam in correctoriis. (20) The wording of the custom indicates nothing to the contrary; for although mention is there made of the four parts, it must be understood that, first of all, the inheritance was immediately divided into such parts if there were descendants from the side of the paternal grandfather, the paternal grandmother, the maternal grandfather, and the maternal grandmother; but a subsequent subdivision was not done away with if no descendants from these four quarters were to be found. Yet the contrary opinion can be adduced, in preference, from the general rule stated in the custom, that no one can succeed to more than devolves on the quarter or line he represents—that is, from which he is descended. And

as a further indication that the afore-mentioned custom also, in respect of its provisions in favour of the Treasury, must not be strictly interpreted, but that it admitted *extensionem non tantum ab identitate rationis, verum etiam a simili*, it happened that a testator, who had disposed of his property by testament to his legal heirs, had left one-third undisposed of; no relative of the deceased from his paternal grandmother's side being found, the court held that one-fourth of this third of the inheritance went to the Treasury as unclaimed.

(21) In considering this point, the Roman law does not affect the question where it lays down : *ii, qui apud hostes sunt, jure Romano partem non faciant*, but that the other relatives of the deceased in the same degree inherited so much more according to the same law, or that the inheritance devolved on the next in order of succession. In the Provinces of Holland and Zeeland, however, the practice was from earliest times, as was on several occasions decided, that such portion to which the hostile persons were entitled went to the Treasury, *sine dubio ea ratione quod nostro jure non homo sed lex ipsa partes faciat ; et quod eæ partes, quæ vacare reperiuntur, ad Fiscum pertineant*. To act, however, with greater certainty in this matter, depending as it does upon ancient customs (which, through lapse of time, have little weight with the Judges, and must therefore be clearly proved), it would be advisable to make a thorough investigation of all the accounts of the officers of Zeeland, in order to see whether any instances can

be found where one-eighth part was allowed to the Treasury.

THE HAGUE,

30th November 1612.

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In connection with this Opinion read Opinion No. 9 (3 (b.) 196), which treats of intestate succession with reference to domicile and according to the law of place *rei sitæ*.

## OPINION No. 52.

HOLL. CONS. III. B. 311.

[GROTIUS II. 28, 24.]

SUCCESSION AB INTESTATO.

How far representation allowed—Collaterals—Succession by half-hand.

1. REPRESENTATION is allowed as far as and including the children of uncles and aunts. All collaterals related to the deceased from one side succeed with the half-hand.

2. Full collaterals get one-half, and the other half is divided between the full and the half. Such division also takes place when the deceased was related to one side and leaves relations of full and half blood.

A certain child died in the Ambacht of Charloos, leaving an uncle and aunt who were full brother and sister of his father, and also certain children of two aunts who were half-sisters of his father, being from his father's mother's side. The mother of the child survived him, and I have been asked to whom the inheritance of the said child should go.

(1) I am of opinion that the said inheritance must go, to the extent of one-half and one-fourth part, to the full uncle and aunt, and the remaining fourth to the children of the half-aunts; for the 28th Article of the Political Ordinance says that representation is allowed up to and including the children of uncles and aunts; and the 23rd Article of the same Ordinance says that all collaterals related to the deceased from one side only must succeed with the half-hand. (2) This, by the *Interpretation* of the 13th of May (1594), was declared to mean that full collaterals should have one-half, and that the other half should be divided between the full and the half. This *Interpretation* implies that the said division will also take place if the deceased of one side leaves relatives some of whom are related to him in full and some in half blood.

ROTTERDAM,  
31st March 1615.

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This Opinion serves as an illustration of the provisions of the Political Ordinance and the Edict of 13th May 1594, as regards "succession with the half-hand."

Representation is allowed as far as the fourth degree of relationship.

The father, mother, and children were in the first degree.

The grandfather, grandmother, brother, sister, and grandchildren of the deceased were in the second degree.

The great-grandfather, great-grandmother, nephews and nieces, uncles and aunts, and great-grandchildren were in the third degree.

The great-great-grandfather and mother, children of uncles

and aunts, children of nephews and nieces, were in the fourth degree of relationship.

The *Modification* contained in the Charter of 1661 will affect the rights of the heirs if a case, like the present, occurred at the Cape of Good Hope, for the surviving parent would have succeeded to the whole of the estate.

In succession by the half-hand the estate is divided between the full and half-blood relations in the manner prescribed in § 2 of this Opinion.

Under the Charter of 1661, if one of the parents survive the deceased son, such parent takes one-half of the intestate estate and the full or half brothers and sisters take the other half. But the brothers and sisters who are half-blood relations of the deceased must be related to such deceased *on the side of the deceased parent.*(a)

Thus A., a widower resident at the Cape, had two children by a former marriage, B. and C. He then enters into a second marriage with D., by whom he has two children, E. and F. B. dies intestate. He leaves surviving (1) his father, (2) his brother C., and (3) his half-brothers E. and F.

Since E. and F. are not related to him on the side of the deceased parent, his father and brother C. will divide the inheritance between them to the exclusion of E. and F.(b)

If A. had predeceased B., C. would take one-half of B.'s estate, and the other half would be divided between C., E., and F.

The law as to intestate succession in Holland is fully described by Grotius in his "Introduction," in the 28th chapter of the second book.

Before the year 1580, a very great difference existed in the laws and customs regulating succession *ab intestato* between the different Provinces of the Netherlands. The *Aasdoms* law, which somewhat resembled the Roman law of succession, prevailed in West Friesland and North Holland,

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(a) Raubenheimer v. Executors of Van Breda, F. 111.

(b) Opinion of W. V. Helvetius, quoted by Tennant, Appendix No. 6.

whilst the *Schependoms* law obtained in Zeeland and South Holland.

The operation of these laws was found to be most inconvenient, and in 1580 the Political Ordinance\* was promulgated, which adopted a middle course, although it in most points followed the *Schependoms* law.

At the Cape of Good Hope, the laws relating to intestate succession were introduced by the Dutch East India Company under the Charter of 10th January 1661. This Charter adopted as the law of succession *ab intestato* the Political Ordinance of 1580, together with the Interpretation thereof, proclaimed as an Edict of the States-General, dated 13th May 1594; and a *Modification* enacting, in case of the predecease of one of the parents of the deceased, the surviving parent shall enjoy the whole of the estate of the deceased, jointly with the brothers and sisters of the deceased, whether full or half brothers and sisters, or their children and grandchildren, by representation, to wit: the father or mother of the deceased, one-half, and the brothers and sisters or their children or grandchildren, the other half.

A short but accurate history of the subject will be found in the judgment of De Villiers, C.J., in the case of *Raubenheimer v. Executors of Van Breda* (Foord, 111), see also *Spies v. Spies* (2 Menzies, 476).

The whole law of intestate succession at the Cape of Good Hope, which has become the law of South Africa, except in so far as it may have been altered by local statutes, will be found fully discussed in Tennant's *Notary's Manual*, chap.

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\* Grotius is perfectly right where, in Book 2, 18, 11, he calls this Statute the "*Politique Ordonnantie*." Decker, in his notes to Van Leeuwen, Commentaries, 3, 16, 2, says that Van Leeuwen refers to the *Politique Ordonnantie* of 1580 (to be found in Groot Placaat Boek, iii. p. 502); this ought to read *Ordinance of Police* of 1st April 1580 (Groot Placaat Boek, i. p. 330). Upon reference to the Placaats, it will be found that the mistake is Decker's; the titles being used controvertibly. In fact the *Extract from the Political Ordinance* (G. P. B. vol. iii.) is merely a repetition of the first seventeen articles of the *Ordinance of Police* of 1st April 1580 (G. P. B. vol. i.).



5, and in the Opinion of Mr. Willem Vincent Helvetius, given *in extenso* by Tennant in Appendix No. 6 to his work.

On the 19th June 1714, the Governor in Council passed a resolution by which the Board of Orphan Masters was directed in all cases of intestate succession to follow the 19th to 29th Articles of the Political Ordinance of 1580, and the Edict of 13th May 1594, in so far as they had been adopted by the Dutch East India Company's Charter of 1661.

The following are the provisions contained in the 19th to 29th Articles of the Political Ordinance of 1st April 1580. (*d*)

Article 19 repeals the laws and customs previously in force in cases of succession *ab intestato*, and directs that, in the absence of any testamentary disposition, the following laws shall be adopted within the countries of Holland and Friesland.

20. Children and other lineal descendants shall succeed *in infinitum* to the estate of their parents (*e*) *per stirpes* or by representation (in right of their deceased parents).

21. On failure of children and other descendants, the father and mother, if both are living, shall succeed their children as their universal heirs.

22. But the parents, or either of them, failing, the brothers and sisters of the deceased, and their children and

(*d*) The translation has been taken over from Tennant's Notary's Manual, chap. 5.

(*e*) It is necessary to consider the rights of illegitimate children in connection with this article.

Illegitimate children cannot succeed to the estate of their father or of his relations unless they have been legitimated, which can be effected in one of two ways—by subsequent marriage of the parents, or by “an act of grace” on the part of the sovereign. If legitimated in the latter manner, the legitimation does not affect the relatives of the father who have refused to consent thereto, and such children cannot inherit from them (Grotius, 1, 12, 9).

As regards the maternal property, illegitimate children succeed equally with the legitimate children, if any, unless the illegitimates are adulterous or incestuous children (Grotius, 2, 16, 6; 2, 27, 28; 28, 31, 6. Regtsgel. Obs. 2, Obs. 41).

grandchildren by representation, shall succeed to the estate of the deceased.(f)

23. It being understood, however, that half brothers and sisters, and their children and grandchildren, as also all collateral relatives whose consanguinity with the deceased is derived from the one parent only, shall inherit with the half-hand, and thus in so far as they are related to the deceased by consanguinity.(g)

24. All descendants, and father and mother, brothers and sisters, and their children, grandchildren, and other descendants failing, the uncles and aunts of the deceased and their children shall inherit the estate *per stirpes* or by representation. (Illegitimate collaterals succeed each other if related on the mother's side. Grotius, 2, 27, 28, and Van der Vorm Versterfregt.)

25. Unless the grandfather and grandmother of the deceased be both living, in which case they shall be preferred to the uncles and aunts of the same side and to their children, being the children or grandchildren of the said grandparents; provided always there be no brothers or sisters of the same side living to succeed to the inheritance of the deceased.

26. If the parents or other ascendants fail, or if the bed be separated, and one of the parents only be living, the children or other descendants shall inherit the estate.

27. The estate of the deceased shall go to his next of kin on the father's and mother's side, and be divided into two equal parts, without any distinction being made, whether the deceased inherited more from his father than from his mother, or *vice versa*.(h)

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(f) This article was subsequently altered by the *Modification* enacted by the Charter of 1661, referred to below. The surviving parent now shares the inheritance of the deceased child with the brothers and sisters, the illegitimate succeeding to each other equally with those who are legitimate, if they are descended from the same mother, unless they are by two different fathers, in which case they would inherit by the half-hand.

(g) See Interpretation, 13th May 1594.

(h) In case the deceased left neither parents nor descendants (*Raubenheimer v. Executors of Van Breda*), F. 111.

28. Representation shall not be admitted among collaterals further than the grandchildren of brothers and sisters, and the children of uncles and aunts inclusively, and all other collaterals, being the next of kin of the deceased, and in equal degrees, shall take *per capita*, to the exclusion of all who are in a more remote degree of consanguinity, the nearest excluding those more remote.(i)

29. Children having received from their parents marriage gifts, or goods or money to establish themselves in trade, shall be obliged, before they are admitted to succeed with the other heirs to the estate of their parents, first to bring into the joint estate the advancement so received, or the just value thereof at the time such advancement was made to them, in case the property was not valued on the occasion; but if a valuation was made, they shall bring into the collation the estimated amount, producing, however, the deed of valuation; and after the same shall be brought in, the whole estate shall be divided into two equal parts, one of which shall go to the surviving parent, and the other to the children of the deceased.

The like distribution shall also take place in second, third, and subsequent marriages.(k) To secure, however, the portions of minor children in the event of re-marriage of the surviving parent, Act No. 12 of 1856 of the Cape

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(i) Raubenheimer v. Executors of Van Breda, F. 111.

(k) If, however, a mother having a child by a former marriage married again in community of goods without ascertaining the paternal inheritance of such child, the joint estate of the mother and second husband was divided into three equal parts. The children of the first marriage took one-third part thereof for their paternal inheritance; the mother one-third for her share, and the second husband the remaining third. In this case the children succeeded to the inheritance of the father *ab intestato*, and were therefore entitled to one-half of the joint estate of their deceased father and mother. This half was commingled with the goods of the mother and her second husband on their marriage. A third party was thus associated in the community, and each took one-third of the joint estate of the mother and her second husband. But if both the spouses had children by former marriages, the estate was divisible into four parts, the children on the paternal and maternal sides took on each side one-fourth, and the parents divided the remaining moiety between them in equal shares. Holl. Cons. D. 3; Cons. 16, u. 3.

Colonial Parliament, entitled "An Act for better securing in certain cases the inheritances of minors," provides that the paternal or maternal inheritance of the minor children shall be first duly ascertained and paid into the "Guardian's Fund," or otherwise secured by deed of Kinderbewijs, and a certificate from the Master of the Supreme Court of the payment of such inheritance into the Guardian's Fund, or from the Registrar of Deeds of the due execution of such deed of Kinderbewijs, shall be delivered to the Resident Magistrate,<sup>(l)</sup> and a certificate from the Magistrate that it has been made to appear to him that no reason exists, arising out of unsecured inheritances of minor children, why the banns of marriage should not be published,<sup>(m)</sup> shall be delivered to the minister before the solemnisation of any such marriage. In case of doubt or question as to the minor's title to inheritance, involving matter of law, the Magistrate may decline to take upon him to determine without legal advice, and may require the party applying for his certificate to state, under the inspection and subject to the correction of such Magistrate, a case for the written opinion of Her Majesty's Attorney-General of the Colony, and to obtain such opinion for the information of such Magistrate, who shall grant his certificate in case the Attorney-General shall be of opinion that the minors are not by law entitled to any inheritance; but the certificate must be withheld if no such opinion is given, or in case no opinion of the Attorney-General be produced.<sup>(n)</sup> The provisions of the Act No. 12, 1856, shall apply, *mutatis mutandis*, to all marriage officers appointed under Act 16 of 1860, and in every such case no certificate, as before mentioned, will be required.<sup>(o)</sup>

*Interpretation of May 13, 1594.*—It was found that the Ordinance of 1580 required elucidation. An interpretation by Edict was therefore proclaimed on the 13th May 1594,

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(l) Act No. 12, 1856, § 1.

(m) Act No. 12, 1856, § 2.

(n) Act No. 12, 1856, § 3.

(o) Tennant's Notary's Manual, chap. 5.

stating that the order of succession was framed with the intent and meaning that half brothers and sisters, and their children and grandchildren, should succeed by representation with the half-hand, if both the parents of the deceased be dead. In such case the full brothers and sisters, or their children or grandchildren by representation, related to the deceased on the side of the father and mother, shall take one-half of the goods, and shall divide the other half equally with the half brothers and sisters, or their children and grandchildren by representation, related to the deceased on one side only,<sup>(p)</sup> and the half brothers and sisters, and their children and grandchildren by representation, shall take the whole of the goods, if only that parent of the deceased be dead by whose side the half brothers and sisters are related to the deceased, and the same distinction shall be observed among all remoter collaterals related on one side only, in their respective degrees of consanguinity.<sup>(q)</sup>

The descendants of the grandchildren of brothers and sisters related to the deceased in the fifth or remoter degree shall be preferred in the succession to the grandfather and grandmother and other ascendants, and to the uncles and aunts, and their children and grandchildren or remoter descendants, and they shall take *per capita*, and not *per stirpes*; and if either the grandfather or grandmother be dead, not only the ascendants, but also all those who are related to the deceased on the side of the deceased parent only, shall be debarred from the inheritance of the deceased, and the inheritance shall be divided into two parts, one of which shall go to the father's, and the other to the mother's side; and if both the grandfather and grandmother of the deceased be dead, the whole inheritance shall go to the side of the deceased parent; and the same rule shall be observed with

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(p) For the application and illustration of this rule, see Opinion No. 52 (Holl. Cons. 3 (b.) 311).

(q) If there are half brothers and sisters on both sides, the full brothers and sisters divide one-half of the estate with the half brothers and sisters on the father's side, and the other half with those on the mother's side. Van der Linden, 1, 10, 2.

regard to those successions that has been laid down in respect to the halves and further subdivided parts above mentioned.

On the 10th January 1661 the States-General granted a Charter to the Dutch East India Company with reference to the law of intestate succession in the territories under the jurisdiction of the Company. This Charter, therefore, also applied to the settlement at the Cape of Good Hope. The Charter enacted that the Political Ordinance of 1580 should be adopted in the afore-mentioned territories, subject to the Edict of 1594, and the following *Modification*, to wit: that one of the parents of the deceased being dead, the surviving parent shall inherit the whole of the estate of the deceased, jointly with the brothers and sisters of the deceased, whether full or half brothers and sisters, or their children or grandchildren by representation, to wit: the father or mother of the deceased, one-half, and the brothers and sisters, or their children or grandchildren, the other half. In such case, the half brothers and sisters, or their children or grandchildren, must be related to the deceased on the side of the deceased parent; and if the deceased left no brothers or sisters, but brothers' and sisters' children or grandchildren, the children or grandchildren of the brothers or sisters of the deceased shall, in like manner, take by representation one-half of the estate, and the surviving father or mother the other half; and if there be neither brothers nor sisters, nor brothers' nor sisters' children or grandchildren of the deceased living, in such case the surviving father or mother shall succeed as universal heir to the property of the deceased, and be preferred to all collaterals, but the immovable property of the deceased shall follow the law of the place in which it is situated. The order of succession at present in force, as contained in the Ordinance, Interpretation, and Modification, is as follows:—

(1.) The lineal descendants' children, grandchildren, and further descendants *per stirpes in infinitum*; the children in equal portions, and the children of a deceased child taking

the share of that child *jure representationis*; illegitimate children succeeding, to their mother's estate equally with those who are legitimate.

(2.) On failure of children, grandchildren, and further descendants, the parents or lineal ascendants in equal shares, the mother succeeding her illegitimate child; and if one of the parents be dead, the surviving parent takes one-half, and the brothers and sisters of the whole and the half blood the other half, in equal proportions; if the latter are related by the side of the deceased parent, together with the representatives of a deceased brother or sister, the illegitimate brothers and sisters succeeding to each other equally with those who are legitimate, if they are the offspring of the same mother.

(3.) In default of brothers and sisters or their descendants, the surviving parent takes the whole estate.

(4.) Both parents being dead, the brothers and sisters, or their children and grandchildren by representation, subject to the interpretation of 13th May 1594, if they are half brothers and sisters.

(5.) In defect of full brothers and sisters or their descendants, the half brothers and sisters on the deceased father's side take one-half, and those on the mother's side the other half. The descendants of the brothers' and sisters' grandchildren take *per capita*, the nearest excluding those more remote.

(6.) Grandfathers and grandmothers.

(7.) Uncles and aunts, with their children by representation.

(8.) The descendants of uncles' and aunts' children *per capita*, the nearest excluding those more remote.

(9.) Great-grandfathers and great-grandmothers.

(10.) Great-uncles and great-aunts.

(11.) Their descendants *per capita*.

(12.) Great-grandfathers' and great-grandmothers' descendants.

(13.) Their next descendants.

(14.) Great-grandfathers' and great-grandmothers' grandparents, or their descendants.

(15.) Great-grandfathers' and great-grandmothers' great-grandparents, or their next descendants.

(16.) The husband or wife of the deceased, on failure of kin.

(17.) The Crown.

To meet the numerous cases of native residents in the native locations of the Colony dying intestate, and leaving property to be administered and distributed according to native customs and usages, "The Native Succession Act" was passed, prescribing the mode in which such distribution should take place.

In the Transvaal the laws, customs, and usages of the native tribes are declared by law No. 4 of 1885 to be effectual, unless they appear to conflict with the general principles of civilisation as recognised by the civilised world. Thus the succession laws of the natives are considered binding in native cases.



## OPINION No. 53.

HOLL. CONS. III. B. 312, & I. 86.

[GROTIUS II. 28, 14, & III. CAP. 2.]

Donations *inter vivos*—Prelegacy—Collation.

1. If a certain sum of money be given any one as a donation *inter vivos*, and the donor does not leave a like sum in his testament to his other heirs as a prelegacy, but states therein where his property will be found, and it is found that such sum of money is brought up again as part of the capital, the money must be collated in the estate. Et quare num. 4.

2. Relatum censetur inesse referenti.

3. Testator potest disponere de re heredis, et collationem inter collaterales introducere. (*Cf.* Opinion No. 42.)

I have seen a certain decision of the Provincial Raad, given on the 16th May 1614, in the cause between Govert de Prees, holding the power of attorney of Reyer ter Avest and of Geertgen ter Avest of Rommerswaal, widow of the late Hendrik Schinkel, and of Arent Harmans and Outgert Pieters Spiegel, guardians of the children of Aaltgen Wichmans, and Jeuriaan Timmermann, procurator of the Protectors of the poor of St. George of Riga, and of the other heirs of Hans ter Avest, *appellants*, on the

one side; and Arent ter Avest of Riga, for himself and as heir of Hendrik Muller, husband and guardian of Trijn ter Avest, Hendrik Kok and Thielman Borrewijn, guardians of the orphans of Arent ter Avest, senior, being also his heirs, *respondents*, of the other side. I have also seen the testament of the said Hans ter Avest, passed and sealed on the 3rd June 1609, and certain passages appearing in two separate books which belonged to him.

(1) In reply to the questions submitted, I am of opinion that, although it may appear from the letter written by Hans ter Avest, testator, to Hendrik Muller, as also from the word "to honour" (*vereeren*) used by him in one of the said books, that it may be concluded that he had given the thousand "daalders" therein mentioned as a *donatio inter vivos* to Trijn, Arent, and Hans ter Avest, junior; nevertheless, the said Hans ter Avest, senior, was not debarred from stipulating that the said donees should receive so much less out of his estate, in order to preserve an equality of distribution among his relations. Although this is not expressly stipulated and provided in the testament, yet it can be inferred from the words of the testament that such was his intention and meaning, the words reading as follows:—"To know where my property is to be found, I have made an inventory in my ledger, folio 212." For in the said book and page the above-mentioned thousand "daalders" are brought up as part of the capital which was to be distributed. This appears to be of like effect as if the testator had said that he wished the afore-

mentioned thousand "daalders" to be again brought into the estate by those who had received them, they being co-heirs of the testator. (2) *Cum relatum censeatur in esse referenti.* (3) *Et liceat testatori disponere etiam de re heredis, et sic collationem etiam inter collaterales introducere.* (4) This interpretation is greatly strengthened by a passage in the memorandum-book of the testator, written in his own hand, where he expressly states that he had given the sums in question, together with sundry others, to his relatives, on account of his estate (that is, of his succession). It is also strengthened by the customary practice of the testator, who advanced sundry sums to most of his relatives, but always on the understanding that these should be deducted from their inheritances, so as better to preserve an equal distribution.

It appears, therefore, that the afore-mentioned appellants, who had been unsuccessful according to the decision of the Provincial Raad, are well advised to appeal to the High Court. Further, to come to details, it appears that the book wherein the passage just quoted occurs was not merely a waste book, but that the testator had entered many matters of importance therein, with regard to which he desired that the book should be considered correct, and that the liberality shown by him towards some of his future heirs should not be to the disadvantage of the other co-heirs.

ROTTERDAM,

11th February 1615.

This opinion also occurs in Vol. I. Cons. 86. The head-note there reads as follows:—

“A testator having made a donation *inter vivos* to one of his heirs, but under such circumstances that it was placed in his books for the purpose of valuing his estate, it must be considered that the testator had made the said donation subject to its being brought into collation after his death.”

At the foot of the same Opinion appears the following note:—

“I have seen the above advice of Mr. Grotius, and have considered everything.

“I am of opinion that the learned counsel has well advised, both by reason of the principles of law therein set forth, and because, according to law, all writings of the testator, although private, even mere memoranda or ledgers, may serve to corroborate the interpretation of the testator's testamentary disposition, in so far as they are private documents referring to the property left by the testator of which he has disposed, as is more fully discussed by Simon de Praetis in *Tract. de interpretatione ultimæ voluntatis*, lib. 5, interp. 2, dubit. 3, fol. 5, num. 41–46, ubi allegat. ll. et DD.

REYNIER INGEL.

“AMSTERDAM,  
17th February 1615.”

## OPINION No. 54.

HOLL. CONS. III. B. 159.

[GROTIUS II. 28, 14, & II. 41, 1, 8, 20.]

Collation—Feudal property—Educational expenses—How limited and when collated—Marriage expenses, when collated—Gifts—Legitimate portion does not include maternal feuds—Legitimate, how reckoned in respect of purchased feuds—A widow entitled to a child's portion, and a second wife has no claim on feuds under the former marriage—Grant of free disposition (*Octroy*)—Personal feudal services.

1. FEUDS standing in the wife's name, especially ancient fees (*oude leenen*), are not considered as included under a universal institution in favour of the husband; but feuds purchased by the husband are not liable to make compensation on that account to the children for their inheritance.

2. Under a general acknowledgment that the maternal property had been received by the children, are not included feuds belonging to her; and ample relief will be granted in so far as this general acknowledgment has been extended to these feuds. Et 3.

4. Children are entitled to claim that their legitimate portions be paid out in full, and feuds bought, or their purchase price, must be brought up for the purposes of valuation of the property. When the

legitimate portions have been paid in full, the surviving father is not bound to make any further compensation to the children.

5. Costs of education and clothing, when reckoned as part of the maternal inheritance, cannot be again charged against the legitimate portions of the paternal property due to the children. When any one is intrusted with the education of children till they arrive at a certain stage of proficiency, such education cannot be limited to eighteen years.

6. Moderate marriage expenses incurred conformably with the rank of the children must be brought into collation; but not expenses incurred by the father for his honour, or beyond what the rank of the children requires. Gifts must also be collated.

7. A widow cannot receive more under her husband's testament than *liberi primi gradus*. *Quod nepotibus relictum est, non est relictum filio et filiaë.*

8. No restitution need be made to the second wife of feuds purchased during the first marriage.

9. A grant which gives the feudatory leave to dispose of all feuds by will must be taken to apply to small as well as large fees. Personal service is no longer required.

#### *Queritur.*

Maria de Vos left two children, Elizabeth and Marinus Cesars, and had made a certain testament

before their birth, leaving them a legal fourth of the lands in her estate, on condition that her husband should retain the same for the children until they became of age, and had reached a certain approved state. He was to bear all costs of education and clothing during that period, but in consideration thereof, he could enjoy the usufruct of the lands belonging to them; whether the said disposition must be taken to embrace the *ambachten* of the county, tithes, and interests appertaining thereto, since, according to feudal law, the children are entitled to compensation to the amount of the purchase price, and whether the general heirs must pay the children the sixteenth penny (6·25 per centum) on these in addition to their hereditary portion?

(1) I am of opinion that if the said Maria de Vos had any feuds standing in her name at the time of her death, these would devolve upon her children, and would not be included under the universal institution made in favour of her husband, especially if they were ancient feuds.<sup>(a)</sup> The husband is, however, not bound to make restitution to the children as regards the feuds purchased by him, since by the institution and subsequent adiation his rights and liabilities have become merged.

(2) If this is the case, will their claims be barred by reason of the acknowledgment made by them, when they became of age, that they had received their maternal portions without having seen them,

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(a) Per ea quæ tradit. Jason, de usibus feudorum, No. 46.

and had signed *metu reverentiaque paterna*?—The general acknowledgment by the children that their maternal portions have been satisfied must be understood in case of doubt as *secundum subjectam materiam*, that is, with reference to that which was disposed of by testament; and the feuds belonging to their mother would not be included under this. *Generalis enim quietatio ad feuda non trahitur.*(b)

(3) Whether they would obtain a “mandament of relief” with “committimus” to the Gerechte van der Goes?—Ample relief will be granted as far as the general acknowledgment would be extended to the feuds.

(4) Item, even if the said signatures were to bar their claims to the tithes, *ambachten*, and their interests?—The answer to this has been already given.

(5) Item, since the tithes, *ambachten*, and their interests brought up in the estate have been allowed to go to the father by the Orphan-Masters, whether such allowance can bar the rights of the children without giving them a claim for restitution, especially if it is evident from the inventory that the legitimate portions of the two children were not satisfied in full by the lands and ready cash left to them, and no mention was made in the testament of any feuds?—The children are entitled to claim to have their legitimate portions supplemented when these have not been paid in full and feuds bought; or their purchase price must be brought up for the

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(b) Jason de tract. de usibus feudorum, No. 45.



purpose of valuation of the estate in order to estimate the legitimate. When the legitimate of the children has been satisfied in full, the father is not bound to make any further restitution.

(6) Item, whether my father can legally attempt to charge against my legitimate portion the excess of my costs of education, &c., above my yearly income after my eighteenth year, since my mother's testament clearly states "that my father must support me and have me educated till I shall have reached an approved state," *cum expensæ studiorum non veniant in collationem?*—Since the father is bound by the testament not only to support and clothe the children, but also to have them educated, and that this shall be *pars hereditatis maternæ*, these cannot again be charged against the children *in legitimam hereditatis paternæ*. And the father cannot limit the costs of education which he had to incur under the testament to eighteen years, seeing that the testatrix explained what she meant by majority, namely, when the children had arrived at a certain approved state.

(7) Item, since our father has given us our marriage expenses, whether we must bring these again into collation, firstly, as far as Cesar is concerned, for our father promised to pay them in the ante-nuptial contract, and did not mention in his will that he wished the expenses brought in collationem, *et præsertim cum expensæ nuptiarum magis fiant parentum gratia quam liberorum*; secondly, as regards Elizabeth Cornelis as well as Cesar?—I think that moderate

marriage expenses, according to the rank of the children, must be collated, quia etiam donata conferuntur,<sup>(c)</sup> so that the promise in the ante-nuptial contract does not annul this; but if the father had incurred marriage expenses for his own honour, and beyond what the rank of the children required, such costs need not be collated.

(8) Item, since according to the *lex hac edictali*, C. de secundis nuptiis, a widower cannot leave his second wife more than a child's portion—that is, as much as the least that is left to his children by his first marriage—whether the widow can receive more under the testament than an amount equal to the legitimate portions of the children above mentioned, seeing that her children were instituted to the rest *titulo institutionis, et bona eorum puerorum, non sunt eorum bona?*—The widow cannot receive more under the testament of her husband than *liberi primi gradus* are entitled to, *et quod nepotibus relictum est, non est relictum filio et filiæ.*

(9) Item, since certain tithes and *ambachten* have been purchased during my father's first marriage, whether his second wife is entitled to any restitution in respect thereof?—The second wife is not entitled to any restitution in respect of feuds bought during the first marriage.

(10) Item, since our father has left the said tithes, *ambachten*, and interests to his children equally, and some *ambachten* brought in only five stuivers or eleven groats per pound, whether such a disposition

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(c) Dd. in auth. ex testam. C. 6, 36.

can hold good notwithstanding the grant of free disposition, *cum hoc sit intelligendum in suis terminis*, and that by such disposition *ipsum feudum non venit caducum*, so that *an non mutaretur natura feudi, quod conceditur ratione servitii præstandi, tempore necessitatis?*—The grant allows free disposition over all feuds, and it is therefore applicable to small as well as large feuds, *cum quoad hæc, feuda redigantur ad instar allodialium*, especially since personal service is no longer required.

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Ad. (1) *Compensation*.—In treating of this matter Grotius says (2, 41, 8): “When the feud has been purchased by the deceased, or has been surrendered by him out of his own property and received back in fee, the son or other descendant of the first feudatory must, for the benefit of the widow and co-heirs, make compensation to the extent to which the estate has been diminished thereby, by bringing its true value into the common estate before any division thereof. If, however, the purchase price has not yet been paid, or if the feudal property has been mortgaged for the same, the burden falls on the successor to the feud, who will have to guarantee the other heirs against all liability on that account. Such compensation is not due by other feudal successors, *who are not descendants of the grantee*, in favour of their co-heirs, but it is in favour of the widow.”

Ad. (2) *Relief in case of error*.—See Chapter on Wills, § 10, p. 209.

Ad. (5) *Education of children*.—The words “certain state” and “stage of proficiency” have been taken over by South African notaries, who render it “*other approved state*” when inserting the clause referring to the maintenance and education of the minor children.

See Chapter on Wills, § 10, p. 211.

Ad. (6) *Gifts*.—If I read the Opinion correctly, Grotius does not intend to imply that all gifts must be collated, but *all dotal gifts*; for he is speaking of marriage and marriage expenses.

In his Introduction (2, 18, 11) he says: “Whatever may be given to a child *inter vivos*, for the purpose of marriage or *otherwise*, must be brought into account in computing the legitimate portion.” The words “or otherwise” must refer to purposes *ejusdem generis*, as marriage. What these are is fully explained by reference to Book 2, 28, 14, where he says: “Children who have received any property or money for the purposes of their marriage, or to start them in trade or business” (and he might have added “or in any other profession”), must return or collate such property, or its true value at the time of *the donation*.”

Under these circumstances it cannot be argued that Grotius contends for the collation of all donations, whether given *simpliciter* or not. (See also notes on “Collation,” *infra*, pp. 391–395.)

Ad. (7) Since legacies and gifts to the grandchildren cannot be considered as gifts to the children, the *lex hac edictali* will not take such legacies and gifts into consideration in computing the proper share that may be left to the spouse under a second marriage. For the same reason the children need not collate gifts to the grandchildren.

## DONATIONS, PRELEGACIES, AND COLLATION.

Opinions No. 53 (Holl. Cons. 3 (b.) 312, and 1, 86), and No. 54  
(Holl. Cons. 3 (b.) 159).

Donations are of three kinds:—

1. *Inter vivos.*
2. *Mortis causa.*
3. *Propter nuptias.*

A *Donation or Gift Inter Vivos* is a promise whereby a person, without being liable to another, out of liberality binds himself to give that other something belonging to himself, without receiving anything from him in return or stipulating for anything for his own benefit.<sup>(d)</sup>

The following authorities may be consulted on the subject:—

Grotius, Introduction, Bk. 3, chap. 2, and 2, 14, 2.

Schorer ad Grot. 3, 2, secs. 3, 5, 8, 9, 11, 12, 13, 15, 18–21, and 23.

Van der Keessel, *Theses Selectæ*, 485–493.

Van Leeuwen (R. H. R.), Bk. 4, chap. 30.

Van Zurek, *Codex Batavus*, *sub voce* “Donatien.”

Huber, *Hedendaagsche Rechtsgeleerdheid*, 3, 14.

Domat, *Civil Law*.

Woordenboek Holl. Regtsgel. (Aanhangsel) “*Donatio inter vivos.*”

Lybreght’s *Notaris Ambt.* 1, 16.

Voet ad *Pand.*, 39, 5.

Tennant’s *Notary’s Manual*, chap. 6, p. 256.

In the case of *Oliphant v. Grootboom*,<sup>(e)</sup> donations *inter vivos* and *mortis causa* were fully discussed and the authorities bearing on the subject referred to.

Grotius states that gifts from parents to their minor

<sup>(d)</sup> Grotius, *Introd.* 3, 2, 1.

<sup>(e)</sup> 3 E. D. C. p. 9.

children *in potestate* are invalid. This is true of the Roman law, but under the Roman-Dutch law such donations were valid. Acceptance could be made by a public person on behalf of the minor or by the child upon his attaining the age of majority.(f) Gifts over 500 *aurei* (£500) had to be registered. This law has been adopted at the Cape of Good Hope.(g)

In order to be valid and effectual the donation must be accepted.

If the donor gives the donee by unregistered deed a piece of land, his executor after his death is bound to give the donee transfer. If the donor's estate became insolvent before transfer was passed, the *dominium* of the ground would vest in the trustee for the benefit of the creditors.(h)

As between donor and donee the gift holds good even if above 500 *aurei* and unregistered. Therefore, if a grandfather makes a donation *inter vivos* of land to his grandson, a minor, and the father of the minor accepts the gift on his behalf, an action can be brought to obtain transfer in the name of the minor.(i)

When the donation is accepted and completed by the happening of the condition (if such be imposed), the donee acquires a personal right to claim the property.(k)

Such rights cannot, however, prevail against the claims of creditors in case of insolvency.(l)

If the donation caused an excess of the liabilities over the assets of the donor, the donation will be invalid to the extent of the excess caused by it.(m)

A donation made by a testator before his second marriage,

(f) Schorer ad Grot. 3, 2, 8. Van der Keessel, Thes. 485. Groenewegen de Leg. Abrog.

(g) Elliot v. Elliot's Trustees, 3 Menz. 86. Thorpe's Executors v. Thorpe's Tutor, 4 J. 488.

(h) Melck, Executor of Burger v. David and Others, 3 Menz. 468.

(i) Barrett v. Executors of O'Neil, Kotze, Trans. Rep., p. 104; cf. Melck v. David, 3 Menz. 468.

(k) Grotius, 3, 2, 14.

(l) Trustees of Brink v. Mehan and Others, 1 R. 209.

(m) Trustee of Otto v. Brister and Others, 5 J. 24.

and accepted by the donee, and therefore a debt actually existing against the joint estate during the subsistence of the marriage, but made payable after the testator's death, ceases with the dissolution of the marriage by his death to be a joint liability, and becomes demandable from his separate estate.(n)

A deed of donation, whereby a certain sum of money is left to a donee, but upon the condition that the donor should retain the management of the fund, and have the use of the interest during his life, can only take effect after the death of the donor.(o)

A donation *inter vivos*, once completed, is valid and irrevocable, but this does not prevent the donor from imposing collation of such gift, if the donee takes under his will.(p)

Donations between husband and wife *stante matrimonio*, even when married by ante-nuptial contract, are not allowed, unless confirmed by death.(q) Reciprocal gifts which amount to a *bona fide* exchange are valid.

If the creditors or donating spouse do not impeach the donation, it will remain of force.

The case of the *Union Bank v. Spence* (4 J. 339) clearly shows the attitude taken up by courts of law in respect of such donations. The facts were briefly as follows. Spence and his wife (the respondent) were married by ante-nuptial contract, which gave her the free administration of her property. Spence after his marriage held certain shares in the Union Bank. Some of these shares he made over to his wife without consideration. She agreed thereto, and authorised her husband to sign the trust-deed of the Bank on her behalf, and the shares were thereupon registered in her name. The Bank did not know that the shares had been given by way of donation. Subsequently a call of £5 per share was

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(n) *Reis v. Executors of Galloway*, 1 Menz. 186. Cf. *Van Veuren v. Van Veuren*, 5 J. 415.

(o) *Trustees of Brink v. Mechan and Others*, 1 R. 209.

(p) Opinion No. 53 (Holl. Cons. 1, 86, and 3 (b.) 312).

(q) *Hall v. Hall's Trustee and Mitchell*, 3 J. 3. *Union Bank v. Spence*, 4 J. 339.

made by the Bank, which Mrs. Spence was unable to pay. The Bank thereupon moved for the sequestration of her estate. For the respondent it was contended, that since such a donation was null and void, no liability was incurred by her; but the court found that the circumstances disclosed a binding contract between the Bank and Mrs. Spence, and that she was therefore liable for all calls on the shares in question, in the same manner as she would have been entitled to all dividends accruing therefrom.

From the judgment delivered in the above case, it seems that such donations will rather be considered voidable than void.

The spouses are at liberty to contract among themselves *stante matrimonio*, provided such contracts do not constitute either a direct or indirect donation.(*r*)

A transferee with notice is in exactly the same position as the donor, and the donee can claim the gift from either.(*s*)

A donation given upon condition that it shall only vest after the death of the donor is valid; but if a written document be executed which purports to be a donation, but is virtually a testamentary writing, it cannot take effect if unwitnessed.(*t*)

*A Donation Mortis Causa* is a gift made by a donor in contemplation of death or threatening danger.

*Mortis causa donatio est, quæ propter mortis fit suspicionem, cum quis ita donat, ut si quid humanitus ei contigisset, haberet is, qui accepit: In summa, mortis causa donatio est, cum magis se quis velit habere, quam eum cui donatur, magisque eum cui donat, quam heredem suum.*(*u*)

It partakes of the nature of a legacy, and must be left in the same way.

(*r*) *Reis v. Galloway*, 1 Menz. 186.

(*s*) *Thompson v. Malgas*, 6 J. 281.

(*t*) *Van Wijk v. Van Wijk's Executor*, 5 J. 1.

(*u*) Justinian, *Instit.* 2, 7, 1.



Donations *mortis causa* resembled legacies in the following points: (v)—

(1.) Neither required formal acceptance in order to be valid and effectual.

(2.) Like legacies, they have to be executed before a notary and two witnesses, or before two witnesses under-hand.

(3.) The donation and legacy are both revocable.

(4.) Donee or legatee predeceasing the donor or testator, the gift or bequest reverts to him.

(5.) Both are subject to the deduction of the Falcidian fourth (where such still obtains).

They differ from legacies in that—

(1.) They do not lapse upon non-adiation.

(2.) They revert to the donor upon his recovery from illness.

(3.) They are void, if given by minors (according to Grotius), but since they have now become assimilated to legacies in respect of the formalities required for their execution, any one who is capable of testating can also make a valid donation *mortis causa*.(x)

If the estate is insufficient to pay all such donations in full, they must abate ratably.

If a donation is left to two or more donees conjunctively, and one predeceases the donor, the others acquire his share by accretion.

Donations *mortis causa* are subject to succession duty at the Cape (Act 5 of 1864).

(v) Van Wijk v. Van Wijk's Executor, 5 J. 1. See argument in Brink and Others v. Meyer, 1 Menz. 552. Van der Keessel, 492, 493, and Schorer ad Grot. 3, 2, 22. Grotius, 3, 20, 22, 23.

(x) Van der Keessel, Thes. 493. See the case of Oliphant v. Grootboom, 3 E. D. C. 9, where the requisites of a *donatio mortis causa* are discussed.

\* The following writers may be consulted on this subject:—Grotius, 2, 14, 2; 3, 2, 22–26. Van Leeuwen, Cens. For. i. 1, 4, 12, 16, and R. H. R. 4, 30. Van der Keessel, Thes. 492–493. Schorer ad Grot. 3, 2, 22–26. Huber, Hedend. Regtsgel. 2, 35. Domat, Civil Law, tit. Donations Mortis Causa. Voet, 39, 6. Lybreght's Notaris Ambt. 1, 17. Tennant, Notary's Manual, 3, 19. 3 E. D. Court Reports, p. 9.

*A Donation Propter Nuptias* is a gift given by one of the intended spouses to the other in contemplation of marriage.

Such gifts are usually embodied in the ante-nuptial contract, but they may be given in any other manner *before* marriage, for gifts *inter conjuges stante matrimonio* are not allowed.

The term has obtained a wider significance than was given to it under the Roman law. The expression Marriage Settlement is the generic term in modern law which most nearly renders both *dos* and *donatio propter nuptias*.

The Code defines it as a contribution or settlement made by a man to and upon the woman to whom he is betrothed, and intended to be devoted to the expenses of the marriage.(y) (Voet, 23, 3, 21, 22; Van Leeuwen, Cens. For., 1, 12, 1, 2, 3, 4, 5.)

In addition to the three kinds of donations above given, a fourth distinct kind is introduced by some writers, viz. :—

*The Donatio Impropria vel Remuneratoria*, given by a donor in recompense for services rendered. This kind of donation is not subject to the restrictions of registration imposed upon donations *inter vivos*, or of formal execution imposed upon donations *mortis causa*.(z)

All donations are given *without valuable consideration*, although the *causa* may be affection, friendship, beneficence, or gratitude.

The difference between *causa* and *consideration* and *justa causa* and *valuable consideration* is treated of by Kotze, C.J., in his translation of Van Leeuwen's Roman Dutch Law, vol. ii. p. 30.

*Prelegacies*.—A prelegacy was a bequest left to an heir to be paid out of the inheritance *before* it was divided among the heirs; in other words, it was a legacy left to an heir over and above his inheritance.(a)

(y) See also Justinian, Introd. 2, 7, 3.

(z) Brink and Others v. Meyer, 1 Menz. 552.

(a) Digest, 28, 5. Hunter's Roman Law, p. 608.

The heir need not collate the prelegacy.(b)

He could repudiate the inheritance and accept the prelegacy.(c)

If made unconditionally, the heirs of the legatee succeed thereto; but if made subject to a condition, *e.g.* in view of marriage, and the condition failed, the legacy reverted to the testator or his estate.(d)

It is subject to the deduction of the Falcidian portion.(e)

*Collation.*—Any money or property received by children or grandchildren for the purpose of marriage, trade, or otherwise establishing themselves, must be brought into collation if they wish to inherit, as co-heirs, their share of the estate, testate or intestate, left by their ascendant.

They must either bring in the actual property received or the value thereof, and collation must be made whether the heirs take under a will or are such *ab intestato*, unless the testator has willed otherwise.

The Ordinance of 1st April 1580 directs that children and grandchildren by representation, who succeed as co-heirs, *ex testamento* or *ab intestato*, to the property of their parents or grandparents, shall collate the property, or the value thereof, which they have received from their parents or grandparents for their advancement or marriage, unless the testator has expressed a contrary intention.

Collaterals and ascendants are excluded from the obligation to collate benefits conferred on them by the deceased during life.(f)

The main object of the law of collation was to ensure satisfaction and equality of distribution among the children of the deceased.

Although collaterals are not obliged to collate, the testator

(b) *Vide* "Collation," *infra*.

(c) *Censura Forensis* (Van Leeuwen), 3, 8, 11.

(d) *Censura Forensis* (Van Leeuwen), 3, 8, 9, 10.

(e) *Digest*, 28, 5, 35, 1.

(f) Van Leeuwen, *R. H. R.* 3, 16.

can by last will impose collation upon such collaterals and ascendants.(g)

Heirs who are unwilling to collate may refuse or repudiate their inheritance, in which case they will be allowed to remain in possession of the benefits or donations received from the deceased without being compelled to collate the same, and without any further share in the inheritance.

As regards the fruits or profits of the property, these need not be brought into collation, except *ex tempore moræ*.(h)

Collation also takes place upon the division of property between the surviving spouse and the children.(i)

Both children and grandchildren must collate. As regards the latter, they must bring into collation not only that which they have received for themselves out of the estate of their grandparents, but also that which their parents had to collate, in so far as they have been heirs of their parents.

If grandchildren succeed in their own right *per capita*, they are not bound to collate that which their father or mother received. *Quod nepotibus relictum, non est relictum filio et filiæ*.(j)

If grandchildren claim their inheritance from their grandparent's estate solely *jure representationis*, and not as heirs of their father and mother, they need not collate or allow compensation against their claims and benefits received from or debts due to the grandfather's estate by their own parents, if there was no *aditio hæreditatis* by such grandchildren of their parents' estate.(k)

Grandchildren are, however, bound by the acquittances made by their parents in respect of moneys advanced against their inheritance. Thus where a son had received certain sums from his parent, and had given an acknowledgment stating that such advances were to be a discharge *pro tanto*

(g) Opinion No. 53 (Holl. Cons. 1, 86, and 3 (b.) 312).

(h) Van Leeuwen, R. H. R. 3, 16, 1.

(i) Political Ord. April 1, 1580, § 29.

(j) Opinion No. 54.

(k) Children of Fehrzen v. Widow Horak, 2 M. 434.

of his claim as heir, he is himself bound by the acknowledgment, and also all who derive their rights through him; and compensation must be allowed against the claim of the children of the son who predeceased his parent.<sup>(l)</sup>

Gifts and prelegacies must be collated according to Grotius. It is, however, difficult to see why prelegacies should be brought in, seeing that they partake of the same nature as legacies, which are not subject to collation. As regards gifts, jurists are by no means agreed. The opinion of the majority is in favour of the collation of donations *inter vivos* given for the purpose of marriage or advancement of the children, under which is not included a *donatio simplex*. See also p. 384.<sup>(m)</sup>

Marriage and education expenses must be collated.

Collation takes place upon a division of property between the surviving spouse of the first, second, or subsequent marriage and children, for the purpose of an exact valuation.<sup>(n)</sup>

The full legitimate portion, where it has not been abolished, must be left free, but all payments subject to collation may be deducted therefrom.<sup>(o)</sup>

Prescription does not bar the right of co-heirs to claim collation.<sup>(o)</sup>

The following are subject to collation:—

- (1.) Marriage expenses incurred by the parents.
- (2.) Money advanced for the purchase of an office.
- (3.) Dotal gifts.
- (4.) Education expenses, if the parents have expressed a wish that such should be collated.
- (5.) Simple donations, if entered in a ledger showing the intention of the deceased that the gifts had to be brought in.
- (6.) Debts due by the son or grandson.
- (7.) Suretyships paid by the father on behalf of his son.

<sup>(l)</sup> Richert's Heirs *v.* Stoll & Richert, 1 M. 566.

<sup>(m)</sup> Opinion No. 54 (H. C. 3 (b.) 159).

<sup>(n)</sup> Scheepers *v.* Scheepers' Executrix, Buc. 1873, p. 1.

<sup>(o)</sup> Van Heerden *v.* Marais, Buc. 1876, p. 92.

Collation does not take place—

- (1.) When the descendant repudiates his inheritance.
- (2.) When the testator has expressly freed the heir from the obligation.
- (3.) When the heir who had to collate has been disinherited.
- (4.) When a renunciation has been agreed upon after the death of the testator.

As before stated, advances made by parents, and debts due to them but not paid during their lifetime, must be collated, if the deceased parent has not expressed a wish to the contrary. And the fact that the money was not demanded within the period of prescription does not bar the right of the co-heirs to insist upon collation of such debts, nor does this fact by itself constitute sufficient proof that the deceased parent had intended that the amounts should not be collated.<sup>(p)</sup>

Likewise, if the child becomes insolvent during the lifetime of the parent, and such parent does not prove in the insolvent estate his claim for the advances made, it is not considered sufficient indication of a wish on the part of the parent that no collation should take place.<sup>(q)</sup>

The executors of the parent's estate can set off against the claim made by the trustees of the insolvent estate of a child for the amount of the inheritance due to such child, the sums advanced or lent to the child, and which he had to collate upon adiation.<sup>(r)</sup>

This subject will be found discussed in—

Note on Testaments, pp. 209, 210, *infra*.

Digest, 37, 6, and 37, 7, *Collatio Bonorum*.

Vinnius de Coll. Novell., 18, 6, 7.

Lauterbach ad Pand., 37, 6.

Voet ad Pand., 37, 6, and 37, 7.

Van Leeuwen, Cens. Forens., 3, 13.

(p) Jooste v. Jooste's Executor, 8 J. 288.

(q) De Villiers, Tutrix of Wehr v. S. A. Association, 2 S. 297.

(r) Hiddingh's Executors v. Hiddingh's Trustees, 4 J. 200.

- Van Leeuwen, *Room. Hol. Recht.*, 3, 16.  
Carpzovius, *Def. For.*, 3, cons. 11, def. 31, 33, 34.  
Grotius, *Introd.*, 2, 11, 13; 2, 18, 11; 2, 28, 14.  
*Regtsgeleerde Observatien*, 2, 45.  
Lybreght's *Notaris Ambt.*, 1, 14.  
Huber, *Hedendaagsche Regtsgel.*, 3, 32.  
Burge on Colonial and Foreign Laws, "Collation."

OPINION No. 55.

HOLL. CONS. III. B. 339.

[GROTIUS II. 29, 3.]

Election of law in ante-nuptial contracts—Burdened property—  
Fidei-commissary heir.

1. ACCORDING to our customs, the spouses and relations may elect either the Aasdoms or Schependoms law, or partly the one and partly the other, when making an ante-nuptial contract. Such election has effect non tanquam dispositio hominis, sed tanquam dispositio legis.

2. That which is subject to restitution remains in our possession, quanquam sub certo onere.

3. Is etiam heres dicitur, qui sub onere fidei-commissi est heres.

I have seen the documents, &c., in the suit which first of all pended before the court of Amsterdam, and was subsequently removed by leave to the court of Holland, between Hester de Witte, widow of the late Sybrand Stam, as heiress under benefit of inventory of her sister, Dirkge de Witte, widow of the late Rijk Gijsberts, and mother and heiress of



the late Hildegonde Rijken and her daughter by the said Rijk Gijsberts, defendant in the first instance, and now appellant, *contra* Jasper van Diemen, respondent in the said cause.

I have considered the documents, the decision of the court of Amsterdam, the judgment of the court of Holland confirming the same, and the questions asked.

(1) I am of opinion that the afore-mentioned decision and judgment, firstly, as regards the property which came from Gijsbert Rijken, are founded upon our custom, which lays down that spouses and friends may, when making an ante-nuptial contract, elect either the Aasdoms or Schependoms law, or partly the one or partly the other, and when such election has been made, it has effect non tanquam dispositio hominis, sed tanquam dispositio legis. The property therefore left by the children of such a marriage goes to the side pointed out by the ante-nuptial contract, without any deduction of either the legitimate or Trebellianic fourth; the side in this case being that from which the property was derived. The wording of the ante-nuptial contract between Rijk Gijsberts and Dirkge de Witte is also applicable to the property which was derived from Gijsbert Rijken aforesaid, since the said ante-nuptial contract refers to all property brought in, among which, according to the specified list attached to and considered as inserted in the ante-nuptial contract, is included the property derived from Gijsbert Rijken.

(2) The fact that the property was made subject to restitution does not affect the case, for property subject to restitution remains in our possession, *quamquam sub certo onere*. The heirs *ab intestato* referred to in the testament must be taken to be those designated by the ante-nuptial contract, since the succession as provided for in the contract is a *successio ab intestato*.

The reason for the afore-mentioned decision and judgment rest on the same basis as regards the property derived from Geertge Gijsberts; for the said ante-nuptial contract regulates the succession not only to such property as would be brought in at the time of the marriage, but also to all inheritances and legacies accruing to the spouses *stante matrimonio*, under which must be included the property left by Geertge Gijsberts to Rijk Gijsberts, although subject to restitution in favour of his child: nam heres dicitur etiam, qui sub oneri fidei-commissi est heres.(a)

Now, as regards the alternative count of the claim made by Hester de Witte to recover compensation for the property brought in by her deceased sister, and more fully specified in the said claim, from the property herein afore-mentioned, the judgments aforesaid declared her action to be premature. These seem to be based on the fact that the recovery of compensation, to which Jasper van Diemen and Hille-

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(a) D. 36, 1, 3, 4, et C. 6, 42, 16, 1.

The fiduciary remains vested with the *dominium* of the property, although not *dominium plenum*. See chap. on Wills, § 10 and 12.—[Ed.]

gond Gijsberts might become entitled, was by their consent under the ante-nuptial contract only allowed should no other property be found in the estate, and the judges deemed that there was not sufficient proof of this condition.

The learned advocates will take these matters and reasons into consideration whether in arguing the case before the High Court or in drawing up an accord, as they may deem best.

*19th February 1632.*

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This Opinion has already been referred to on p. 149 when treating of ante-nuptial contracts, and on p. 216 in discussing the position of the survivor under a mutual will.

The Aasdoms and Schependoms law have been fully discussed on pp. 362–372 under Intestate Succession.

The South African law of succession is there fully set out. From this it is clear that choice of law is no longer possible, and the parties must abide by the law of the place where the contract is made; except, of course, that they may specially stipulate as to the devolution of their property in the same manner as they could do by last will.

## OPINION No. 56.

HOLL. CONS. III. B. 314.

[GROTIUS II. 31, 17.]

Custom—Interpretation and construction—Position of the son of a king before the latter became king—Bastards—Legitimation of—Rights and succession of—Effect of abrogation of laws—Interpretation of laws—Roman law concerning succession to the mother's estate—No one can derive any benefit from his own wrong.

1. IF the wording of a custom does not define the subject-matter sufficiently, it ought to receive a wider or a more restricted interpretation according to extrinsic or intrinsic circumstances.

2. A son born before his father actually became king, and whilst he was still a private person, is not called the son of a king, although, when his father becomes king, the son too becomes the son of a king, and immediately takes rank as the first-born of the king.

3. Upon the marriage of the mother, the child becomes legitimate from that time, not by any legal fiction, but in actual fact.

4. Bastards take equal rank with those born in wedlock.

5. If a restriction imposed by law be again

removed by law, the original position is reverted to as a matter of course.

6. Bastards also inherit from their mothers at the present time.

7. Those things which are lawful are actually made so by law, even though couched in words indicating a fiction.

8. A law which lays down what things are lawful, contains truth, not fiction.

9. There is a difference between legitimate and legitimated.

10. Children born before marriage are considered legitimate after the marriage of their parents, and in fact are such in respect of all matters.

11. The nature of related subjects is such that, granted the one, the other also follows.

12. Whenever a law makes a fiction equal in every respect to a reality, an extensive interpretation concerning the enactments or results of this law must be employed with regard to the whole legal or civil effect thereof—the reason.

13. The excuse from tutelage over a freedman granted to a freeborn is extended to him who has obtained the equestrian rank (*jus annulorum*).

14. A wider or even an extended interpretation is often given from inferences which indicate the intention of the lawgiver.

15. Laws must be interpreted more favourably in order that effect may be given to their spirit.

16. That law is considered to be favourable which specially concerns public utility.

17. A law which takes from heirs that which belongs to them is unfavourable.

18. According to ancient Roman law, even if the children survived their mother, the ownership and full *dominium* of the property of the mother accrued to the father; but Constantine changed this in so far that the usufruct was left to the father upon his re-marriage.

19. No one can acquire any benefit from his own wrong.

20. In one and the same matter it is possible, by careful consideration, to separate the naturally good from the morally bad.

21. With what women incest is not committed according to the *jus gentium* or the civil law of Justinian.

#### NORMAN CUSTOM.

A man who had living issue by his first wife retains the usufruct of her property which she had at the time of her death, so long as he remains unmarried, even though the issue may have died before the dissolution of the marriage. If, however, he enters into a second marriage, he retains a third of the usufruct.

#### CASE STATED.

A certain man who had made his cousin pregnant sought and obtained from the Pope the right to marry her, and also a dispensation that all children born or to be born should be legitimate. A child is born in wedlock and dies, and after its death the

mother dies. The husband claims the usufruct. The heirs of the wife oppose.

I shall proceed as Procius Latro used to do, and shall divide the matter under consideration into distinct questions. (1) Are the words setting forth this custom sufficiently definite? If they are not sufficient, are there not extrinsic or intrinsic circumstances from which either a wider or a more restricted interpretation should be given to the words? The husband will contend that the words are sufficiently definite. He was husband—he was father of the issue by his wife—the custom requires nothing more. The others will contend that at the time the child was born the woman was not his wife. But the law does not require this. It reads “had,” not “begot.” Now he actually had a child by his wife, after she became his wife, for the child lived until then; and therefore the condition or contingency required by the law had been fulfilled. (2) By a similar line of argument Tiracquellus (b) decided the celebrated question whether the son of a king before the latter ascended the throne should be called the first-born of the king; and indeed this question, from the sound of the words used, seems to involve more difficulty. Granted, he said, that the child born to a father whilst he is a private person and before he ascends the throne is not called the son of a king, yet as soon as the father becomes king, the son also

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(b) Tiracquellus, de primogen. quæst. 32, n. 27, et quæst. 34, n. 48.

becomes the son of a king, and thus at once becomes the first-born of a king.

(3) But if any one contend that since mention is made of a wife, the custom refers to legitimate issue, we admit that; but add that a child whose mother is subsequently married becomes legitimate from that moment, not by a certain fiction, but in fact. (4) The reason for that is that bastards are on an equal footing with those born in wedlock according to nature, if we refer to marriage. Euripides wisely remarks—

*Τῶν γνησίων γὰρ οὐδὲν ὄντες ἐνδεεῖς νόμῳ νόσοῦσιν.*

(5) Law therefore has imposed a disability on those born out of wedlock, and if the law itself removes that disability, the original position is reverted to as a matter of course, just as the pure and natural light enters when you open a window. And Justinian himself argues in a similar manner, and that not in one place, but in several.(c) He says that those born from the first parents become legitimate by reason merely of their birth,\* and Vasquius(d) shows this conclusively (6) from the fact that even now bastards inherit from their mothers, from which it is evident that they do not inherit from their fathers by virtue of an actual enactment of the law; and if the law abrogates this enactment,

“Nature resumes her sway unrestrained.”

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(c) Novel 74 and Novel 89 (1 and 9).

\* When as yet there were no laws, every child born was legitimate as regards both father and mother. The solemnities of marriage and subsequent prohibitory laws created the legal disabilities.—[T.R.]

(d) Vasquius, Contr. lib. 6, c. 42.



(7) Tiracquellus, (*f*) in advancing the same argument and proceeding further, adds, that all things which are lawful are really constituted by some law, even where the words thereof appear to indicate a legal fiction, because, as a matter of fact, such fiction does not refer to nature, but to the right created. See also Menochus. (*g*) (8) A law which lays down what is lawful contains a reality, and not a fiction. (9) The term "*legitimatus*" is used properly and correctly, indicating that after legitimation one becomes legitimate; and this is the sense in which it is employed in the Decretal of Alexander. (*h*) Such is the force and effect of marriage, that even those born prior to its celebration are subsequently considered as legitimate. (10) And it cannot be contended that they must only be considered legitimate as regards those matters which are to their advantage; for the law simply removes a disability, and therefore they are held to be legitimate altogether and absolutely (*ἀπλῶς*), and in fact are so as regards every one. (*i*) (11) Moreover, the nature of related subjects is such that, granted the one, the other also follows. If this child is legitimate, it follows that the father is his legitimate father. If the father is legitimate, why should he not have the privileges of a legitimate father? Let us suppose that the *jus trium liberorum* created by the *leges Julia et Papia* had continued

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(*f*) Tiracquellus in l. si unquam in verbo, suscepit liberos, quæst. 293, n. 42.

(*g*) Lib. 4, præ. 39, num. 27.

(*h*) 3 C. tanta, Extr. qui filius sint legitimi.

(*i*) Novel 75, no. 2, et Novel 89; Gl. in clem. unica in verb. æternaliter C. 1, 1; C. 6, 40; D. 46, 4, 23.

to exist up to the time of Justinian; will any one doubt that, in order to make up that number, the father would have been able to take advantage of a child born before marriage, and who obtained the rights of a legitimate child by reason of the father's marriage? This is also the case with respect to the privilege of excuse from guardianship granted on account of legitimate issue. The wording *ὡς κείται* shows that this ought to be for the benefit of the father.

(12) Moreover, why should a wider or more extensive interpretation of the words not be allowed in favour of the father? In the first place, by virtue of those laws which were made for legitimated issue, as above stated by us; for although it may be stated that this is a fiction, yet it is applicable; for whenever a law makes a fiction in every respect equal to a reality, an extensive interpretation concerning the enactments or results of this law must be employed with regard to the whole legal and civil effect thereof, because the law is considered to make provision in terms of the use and creation of that right. (*k*)

(13) Therefore the excuse from tutelage granted to a freeborn over a freedman is extended to him who has obtained the equestrian rank (*jus annulorum*). (*l*)

(14) Secondly, a wider or even an extended interpretation is often given from inferences indicating the will of the lawgiver. Among these the subject-

(*k*) Suares de legibus, liber 6, c. 3, n. 6. Bart. ad l. si is qui pro emptore, D. de usur. et ad D. 1, 1, 9.

(*l*) D. 27, 1, 46.

matter of the law is the strongest; wherefore the word “donation” is so construed that it includes transaction, and there are many other similar instances.<sup>(m)</sup> (15) And the general rule is that laws must be interpreted more favourably in order that effect may be given to their spirit. What the Normans intended when they began to use this custom we must consider to have been the object of the rewards granted to fathers according to the *lex Papia Poppea*, viz., that the Republic should have numerous legitimate issue, and for this purpose inducements were held out to the men. Moreover, I believe that they did not allow, as formerly (for they came from a heathen stock), the practice of procuring abortion, but took all possible precautions to prevent it. Since, therefore, the Republic obtained the object of its wishes upon the marriage of the men and the women made pregnant by them, why should there be any objection that the rewards granted for this purpose should be allowed to (such) a father?

(16) Thirdly, an extensive construction of those laws is allowed which contain a favourable decree. And since no law can be said to create a favour without encroaching upon another’s right, it is certain that a favour is considered to have been enacted in that law which most promotes the public welfare.<sup>(n)</sup> That this custom is of such a nature appears from what has gone before, to which I shall add the dictum of Tiracquellus<sup>(o)</sup>; legitimation, which tends to the

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(m) L. si vero D. locati.

(n) Suares, lib. 5, cap. 11, num. 4.

(o) Tiracquellus ad verb. susciperet, n. 72.

preservation of succession to the patrimony, has more force and effect, and more in its favour than other matters.

(17) Hence it will not be difficult to reply to the possible contention for an exception to this effect of the law, or for a strict interpretation, or even for a restriction of the law. In the first place, they can say that it is a *lex odiosa*, because it takes away from the heirs that which belongs to them. The reply is ready: this right is anterior to the right of the heir, and thus nothing is taken away from him, since he had acquired nothing. Add to this that the Norman law itself esteemed the privilege of the fathers a very great favour, and that it considered the husband vested with this right during the lifetime of the wife, and that it intended the same to be of force even against the feudal lords, to whom the property of the wife reverted, either through confiscation, through failure of issue, or otherwise. (18) And, moreover, there *is* no reason why that should seem hard which the custom of Normandy concedes to the fathers, seeing that according to ancient Roman law, even if there be issue living after (the death of) the mother, possession and full ownership of the property of the mother is acquired by the father, which was altered by Constantine in such a manner that he left the father, even after a second marriage, the *jus utendi et fruendi*,<sup>(p)</sup> and this right was retained by Justinian in favour of the father.<sup>(q)</sup>

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(p) C. 6, 60, 1.

(q) C. 6, 61, 6 et ult.

(19) Another point which the relatives of the wife seem to contend for is this, that no one ought to benefit from his own wrong-doing. And he did commit a wrong, for he had intercourse with a woman to whom he was not married, and who was, moreover, a near relation. (20) To this it can be well replied, that in one and the same matter it is possible, by careful consideration, to separate that which is naturally good from that which is morally bad. Augustinus also makes such a distinction where rewards were granted by God to the Egyptian midwives, of whom mention is made in the first chapter of Exodus, not on account of their untruthfulness, but for their reverential love for the innocent infants, and yet these were included in one and the same act. The same can be said to be more frequently the case in rewards which human laws of the State offer, and which generally considers that possible which advances the public welfare from any deed, and it matters little whether a wrong is connected with such act or not. But there is no necessity to rely on such subtleties, since it is more reasonable that this husband should have merited the reward of which we treat, not when he produced offspring, but when, from a kindly feeling, he solemnly took the mother as wife. For this action is holy itself, and includes a praiseworthy deed of justice, since both to the woman her lost honour is restored as far as possible, and because, as it were, that status of the children is returned which their birth had denied them as being not in accordance with law. Thus, by this very

deed, the husband began to have legitimate issue, and, if I may so express myself, begot it again according to law. (21) Add to this that this woman does not fall in the category of those with whom it was incestuous to live, either by the *jus gentium* or by the civil law of Justinian. The law of Moses is thus far silent, that it does not denounce such marriages, and commands it between an only daughter and her next of kin (*ἐν τοῖς ἐπικλήροις*), Num. 35. Nor have the Gospels or the ancient canons laid down anything concerning this matter. Those who afterwards opposed such marriages removed the disabilities as regards the issue, as we have before stated. Thus the matter returns to the original position when it was allowed; nor is it of such a nature as those concerning which the old interpretation of the Canonical said that it was specially allowed by Papal dispensation.

OPINION No. 57.

HOLL. CONS. VI. PART II. 56.

[GROTIUS II. 33.]

Servitude undivided.—*Servitus est individua.*

I AM of opinion that the two brothers, each of whom possesses a portion of the erf situated at the Rooster, and mentioned in the document of April 1580, are as much entitled to the said servitude as the third brother who possesses the house. The reason for this is, that a servitude in favour of the *prædium dominans* belongs to all the sons who own any share in the said erf.\*(a) The fact that mention is made of the house and erf in the afore-mentioned document does not affect the case, for the servitude being a *servitus via, actus iter, &c.*, indicates that it really belongs to the erf, and belongs to the house merely for the sake of the erf. *Sunt enim via et iter servitutes rustici prædii, quæ proprie fundi non*

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\* The word *erf* is here employed in the sense of a piece of ground partaking of the nature of a *prædium urbanum*.—[TR.]

(a) D. 8, 3, 23, 3.

ædificii causa constituuntur.(b) Nor does it affect the case that it is stated in the said document that this is directly opposite the said Brouwerpe, and that the house faces this directly, but not the divided erf; for the said allusion there stated was for the purpose of designating not a portion, but the whole of the erf, as is also clearly indicated by the aforementioned words, "situated at the Rooster." A portion of the said erf, therefore, is not deprived of the right to the said servitude, the erf having been undivided at the time the document was drawn up. Est enim servitus tota in toto et tota in singulis partibus prædii dominantis, ut ait Bart. in d. l., D. 8, 3, 23, 3.

ROTTERDAM,  
11th April 1614.

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(b) Instit. 2, 3, 1.



## OPINION No. 58.

HOLL. CONS. III. B. 316.

[GROTIUS II. 36, 2, & III. 8.]

Rights of pledgor in respect of a pledge—How a servitude is constituted—Placaat of 1531 regulating transfers—Registration of servitudes—*Actio hypothecæ*—Prohibition to alienate.

1. DEBITOR manet dominus pignoris.

2. Quibusvis pactionibus servitus constituitur.

3. According to the Placaat of the Emperor of 1531, all burdens on or alienations of immovable property had to be made before the court of the place where the property is situated.

4. Alienatione prohibita, simul prohibita censetur servitutis impositio.

5. Servitutis impositio non comprehenditur sub alienatione, vi vocis sed ex quadam interpretatione; et quo modo illa interpretatio est porrigenda.

6. In Holland servitudes were constituted underhand, and not before the court.

7. Qualitatis additio, vel detractio in jure hypothecæ, nihil mutat.

8. Actio hypothecæ non competit contra tertium nisi eum qui aliquid hypothecæ possidet.

9. Qui servitutum in hypotheca acquisivit, non potest dici aliquid hypothecæ possidere.

10. A creditor cannot revoke or rescind an agreement made between his debtor and a third party, unless such has been done to defraud him.

11. *Prohibitus alienare, non prohibetur bona fide transigere.*

I have seen a certain agreement of the 30th of March 1599, made between Joost de Visscher and Krijn Michiels, and another of the 18th of August 1611, between Jan Van den Bronke and Jonas Cabailau. It was premised that Jan Van den Bronke had mortgaged to one of his creditors the house which he had inherited from Joost de Visscher before the agreement of the 18th of August was entered into, by which agreement he resigned certain privileges attached to the house, by virtue of the agreement of the 30th of March, in favour of the said Cabailau, and on the other hand made the house subject to certain servitudes with which it had not been previously burdened. Jan Van den Bronke subsequently became insolvent. I have been asked what the effect of the said agreement of the 18th of August will be as regards the afore-mentioned creditor, and whether it can remain of force as against the said creditor or not.

I think that in this matter three points must be taken into consideration. First, whether the said agreement of the 18th of August was null *ipso facto*, or whether it was valid according to law? Second, whether the creditor, notwithstanding this agreement, retained any right to sell these privileges

at the same time as the sale of the house, to which he was entitled before the date of the agreement? Third, whether the creditor has any right to revoke or rescind the said agreement?

(1) With reference to the first point, there is no dispute according to civil law, since *debitor manet dominus pignoris*,<sup>(a)</sup> nor can there be a dispute as to its form,<sup>(2)</sup> since, according to the same law, *nam quibusvis pactionibus servitus constituitur*.<sup>(b)</sup> (3) But it appears that a dispute might arise from the Placaat of the Emperor of 1531, which prohibits any alienation or encumbrance of immovable property except before the court of the place: (4) *alienatione enim prohibita, simul prohibita censetur servitutis impositio*.<sup>(c)</sup> This difficulty is removed when we consider *quod servitutis impositio non comprehenditur sub alienatione, vi vocis, sed ex quadam interpretatione*.<sup>(d)</sup> (5) *Illa autem interpretatio non est porrigenda ultra intentionem legis, agentis de rebus quarum alienatio simpliciter prohibetur, non autem de forma, quæ alienationi præscribitur*. (6) The intention and meaning of the Placaat seems to have been sufficiently fixed by the general practice in Holland, since the constitution of servitudes is always effected under-hand, and not before the court.\*

Although the house has become of less value by

(a) C. 4, 24, 9, et D. 20, 5, 12.

(b) Inst. 2, 3, 4.

(c) C. 4, 51, 7.

(d) Ut ait Gl. ad C. 4, 51, 7.

\* This is controverted by Voet, 8, 4, 1.—[Tr.]

the removal of the said privileges and the constitution of new servitudes, yet nothing that was pledged to the creditor has been alienated: *sed duntaxat mutata est rei qualitas.* (7) *Qualitatis autem additio vel detractio in jure hypothecæ nihil mutat.*(e) (8) To this must be added *quod actio hypothecaria non competat tertium nisi eum, qui possideat aliquid hypothecæ.*

(9) *Non potest autem dici aliquid hypothecæ possidere, qui servitatem in ea hypotheca acquisivit.*(f)

(10) With reference to the third point, I am of opinion that the creditor cannot revoke the aforesaid agreement or have it rescinded, unless he is prepared to prove that it was entered into *in fraudem*, and that both the said Jan Van den Bronke and Cabailau were cognisant of the insolvency of the same Jan Van den Bronke at the time the agreement was made: this is specially the case since the agreement was entered into as an ordinary transaction. (11) *Nam etiam alienare prohibitus non prohibetur bona fide transigere.*(g)\*

ROTTERDAM.

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(e) D. 20, 1, 16, et ibi Bartol.

(f) D. 31, 1, 66, 6, et ibi Gl. et Dd.

(g) Castr. in D. 13, 1, 10, 2.

\* See p. 445 and the case of Stewart's Trustees and Marnitz v. Uniondale Municipality, which lays down the negative view as regards the competition of servitudes against prior mortgages.—[Tr.]

## OPINION No. 59.

HOLL. CONS. III. B. 142.

[GROTIUS II. 36.]

Servitudes—Præscription—Strict interpretation.

1. DRAINAGE servitudes and others of a similar nature are prescribed in a period of thirty years, especially when the transfer of the *prædium* after such previous use is interpreted *ita ut præscriptio sit titulata*.

2. All stipulations, and especially servitudes, must be strictly interpreted (*stipulationes omnes et præcipuè servitutum, stricte sunt interpretandæ*).

3. The special stipulation by which it is agreed that only *ovens* shall be erected, and that *ovens* on a certain piece of ground may remain, cannot be extended to other erections.

(1) Having seen a certain contract entered into between the children and the heirs of the late Maritge Cornelis, and dated the 13th August 1576 :

I think, firstly, that the successor of Tonis Marts is entitled to the water running from the inclined roofs of her kilns, taking for granted that she had enjoyed this privilege for thirty-eight years ; for, according to

the best authorities, all such servitudes can be prescribed in the period of thirty years, more especially where the transfer of the property after such previous use is interpreted *ita ut præscriptio sit quasi titulata*.

(2) Secondly, that the said successor cannot raise the inclined roofs; for the privilege of draining the ovens, specially granted to him by contract, referred only to those ovens which were drained at the time of the contract. *Stipulationes enim omnes, et præcipuè servitutum constitutiones, stricte sunt interpretandæ.*

(3) And, thirdly, that he cannot replace them by anything else, for the same reasons as above set forth; because it is specially stipulated that the ovens on the ground of Diert Jans should remain in existence, and the privilege cannot therefore be extended to other new erections.

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## SERVITUDES.

Ad Opinions Nos. 57, 58, 59 (Holl. Cons. VI. (Pt. II.) 56, 3 (b.) 316, and 3 (b.) 142).

It will be unnecessary to set forth in detail the common law on this important subject. It will be found fully discussed by the authorities quoted below; and, moreover, there are very few disputed points amongst these jurists. It will therefore suffice if a list of text-writers be prefixed to a resumé of the cases decided by the South African courts upon the law of servitudes.

The following authorities may be consulted with advantage.

- Justinian, Institutes, 2, 3, de Servitutibus.  
 „ „ 2, 4, de Usufructu.  
 „ „ 2, 5, de Usu et Habitatione.  
 Digest, lib. 7, 8, and Code 3, 34.  
 Gaius, 2, 30, *et seq.*  
 Grotius, Introd. 2, chaps. 33–39.  
 „ Opinions, Nos. 57, 58, 59.  
 Voet ad Pand., books 7, 8.  
 Schorer ad Grotium, 2, 34; 2, 34, 4; 2, 34, 5; 2, 34, 7;  
 2, 34, 10; 2, 34, 16; 2, 34, 20, 23; 2, 35, 6, 8, 13; 2, 36,  
 4, 6; 2, 37, 2, 7.  
 Van der Keessel, Thes. 181, 369.  
 Van Leeuwen, Censura Forensis, 2, 14; 2, 15 (Part 1).  
 „ „ Room. Holl. Recht., 2, 21; 2, 22.  
 Kesterman, Hollandsche Rechtsgeleerd.  
 „ Woordenboek, *sub voce* “Servitut.”  
 Boey’s Woordentolk, *sub voce* “Servitut.”  
 Lybreght, Notaris Ambt Vertoog, pp. 122, 148.  
 Muhlenbruch, Doctrina Pandectarum, ii. 288.  
 Savigny’s Roman Law, 2, 641; 2, 279.  
 Dalloz, Repertoire de Legislation, *sub voce* “Servitude.”  
 Van der Linden, i. 11 (Introduction).  
 Vinnius ad Instit., 2, 3.  
 Toullier, tit. 4, des Servitudes.  
 Burge’s Colonial and Foreign Laws—“Servitudes.”  
 Kotze’s Note ad Van Leeuwen, Room. Holl. Recht., pp. 302–  
 309 (Kotze’s translation).  
 Austin’s Lectures on Jurisprudence, Lecture 50.

The following are the divisions of servitudes.

1. Personal and Real.
2. Rural and Urban.
3. Affirmative and Negative.
4. Continuous and Discontinuous.
5. Apparent and Non-Apparent.
6. Legal and Conventional.
7. Qualified and Non-Qualified.

1. *Personal and Real Servitudes.*—A *personal* servitude is that which vests in an individual as such only, and not in respect of his being the owner of a *prædium*.

A *real* servitude is that which vests in an individual as owner or occupant of a *prædium*.

It is therefore quite clear that in one aspect all servitudes are *personal*, for they must operate in favour of certain persons; whilst in another all are *real*, for they are *jura in rem*.(a)

Servitudes are “*jura quibus prædia prædiis serviunt*,” according to Vinnius; (b) it is therefore essential to the constitution and existence of a real servitude that there should be both a dominant and a servient tenement—a *prædium cui prædium servit*, for if this is wanting, no real servitude exists. Voet defines servitudes as “*jura in re alterius alteri constituta, quibus res alteri quam domino commodum adfert contra dominii naturam*.” And he adds, “*Harum aliæ personales sunt, quoties scilicet res personæ servit; aliæ reales, quoties res servit rei, prædium prædio. Præter quas aliæ non dantur, quibus persona serviret rei*.”(c)

Servitudes are construed strictly, and an extensive interpretation will not be allowed to the prejudice of the owner of the servient tenement. If it is stipulated in a deed of sale between purchaser and seller that a certain quantity of water shall be allowed to flow down free and undisturbed, but no mention is made of any dominant tenement in whose favour the flow is to be allowed, a *real* servitude will not be constituted. All that the purchaser, as owner of the *prædium dominans*, is entitled to is a *personal* servitude. The rights conferred by such servitude he can, as *usuarius*, enjoy for life, but he cannot transmit his rights to his heirs, or cede them to others for a consideration.(d)

(a) Austin, Jurisprudence, Lec. 50.

(b) Vinnius in Instit. 2, 3. Noodt de Usuf., and Dreyer v. Ireland, Buc. 1874, p. 193.

(c) Voet, 7, 1, 1. See also Voet, 8, 1, 4.

(d) Voet, 8, 1, 4. Dreyer v. Ireland, per Watermeyer, J., Buc. 1874, p. 200.



*Habitatio, usus* and *usufructus* are personal servitudes, and although not treated of in the same title as servitudes in the Digest and Institutes, there can be no doubt that they were for all practical purposes classed under the category of servitudes and considered as such under the Roman law.(e)

Where the owner of land allows another to occupy the same "as long as he may think fit," *servitus habitationis*, which is a servitude for life, is not considered to have been granted, and the grant does not confer an irrevocable right of occupancy for life, but rather a revocable right subject to reasonable notice to quit.(f)

2. *Urban and Rural Servitudes*.—A good deal of controversy exists between different text-writers as to the proper distinction between urban and rural servitudes. The best authorities agree that the servitude takes its denomination not from the *prædium serviens*, but from the *prædium dominans*.(g) If the *prædium dominans* is *urbanum*, the servitude will be urban; if *rusticum*, the servitude will be rural.

Here another difficulty occurs. Lawyers are by no means fully agreed as to the distinction between *prædia urbana* and *prædia rustica*.(h) According to the prevailing opinion, however, the distinction should depend upon the use and nature of the tenement, or, as Burge says, "This distinction is made, not with reference to the place in which the property is situated, but to the nature of the property, or to the purpose or use for which they are enjoyed." The same writer then proceeds to explain what servitudes may be considered urban and what rural:—"Those constituted in favour of houses or buildings, whether they be within the city or in the country, are called urban; whilst those constituted for a farm or garden are called rural servitudes."(i)

(e) Hunter's Roman Law and Sanders' Instit. Justin.

(f) Dickson qq. *Ellis v. Biddulph*, 2 Menz. 310.

(g) Vinnius, Instit. 2, 3, 1.

(h) For a sketch of the controversy see Kotze's Van Leeuwen, R. H. R. pp. 304-305.

(i) Burge, vol. iii.

Very few South African decisions bear on urban servitudes; by far the larger number relate to rural servitudes, especially to questions of water-right, which is bound to form a fertile source for frequent disputes in a country where water is scarce and private schemes of irrigation are constantly attempted.

*Urban Servitudes.*—The owner of the soil is *dominus usque ad cælum*, and no one can build a projecting roof or masonry over the ground owned by another.(*k*)

The owner of the dominant tenement must be allowed free enjoyment of his servitude, and if the *dominus prædii servientis* encroaches upon the rights of the servitude holders or obstructs the use in any way, he will be compelled to remove such obstruction and will be liable for all damages sustained.(*l*)

The owner of the *prædium dominans* must, however, proceed within reasonable time to obtain a removal of the obstruction. If he allows the other to erect and complete buildings which he knows constitute a trespass on his rights, and then, subsequent to such completion, claims the removal of the obstructions, the court will refuse to order the removal, and the plaintiff will have to be satisfied with damages.(*m*)

The rights of parties to a common or party-wall are discussed by Grotius, 2, 34, 4, Voet, 8, 2, 17, and Burge, vol. iii.

Each neighbour may build upon his half of the common wall, provided it be strong enough to support the weight of such building, but he may not build upon his neighbour's half, nor allow the building to project over his neighbour's ground.(*n*)

If a servitude is granted in favour of a tenement to the effect that the view shall not be obstructed by the erection of buildings on the servient tenement, an obstruction of the view by the planting of trees will not be considered to fall within the condition.(*o*)

(*k*) *Brittain v. Cape Government.*

(*l*) *O'Reilly v. Lucke*, 4 J. 103.

(*m*) *Myburgh v. Jamison*, 4 S. 8.

(*n*) *Pike v. Hamilton, Ross, & Co.*, 2 S. 191. *O'Reilly v. Lucke*, 4 J. 103

(*o*) *Myburgh v. Jamison*, 4 S. 8.

The right to cut fuel may be either a personal or a real servitude, according as it vests in an individual as such, or as owner of a dominant tenement.

If a servitude of wood-cutting is imposed upon a *prædium serviens* in favour of the public or of a certain community, every member of the public or of such community is entitled to the enjoyment thereof, and the servitude is *personal* in favour of the public or designated community (*Van Niekerk v. Wimble*, 3 R. 61). Any member of the public or of the said community who *bona fide* requires firewood in the neighbourhood, has a right to take it for domestic use. He has the right-of-way to drive a vehicle over the servient tenement for the cartage thereof. The owner of such tenement can, however, point out a reasonable track to be used for that purpose, but he must allow an outspan for the cattle, which can likewise be pointed out by him, although he cannot be compelled to allow grazing and watering rights for such cattle. Moreover, no person has the right to fell trees or take firewood for purposes of sale (*Meintjes v. Oberholzer and Others* 3 S. 265).

All servitudes being onerous, whether personal or real, must be strictly interpreted. *Stipulationes omnes et precipue servitutum stricte sunt interpretandæ.* (Opinion No. 58.)

*Rural Servitudes.*—Prædial privileges of this kind are chiefly confined to rights of way and of water.

The following are the more common servitudes:—

- (1) Iter.
- (2) Bridle-road.
- (3) Actus.
- (4) Viæ.
- (5) Right of road *ex necessitate*, to which reference will be made when treating of conventional and legal servitudes.
- (6) Aquæductus.
- (7) Aquæhaustus.
- (8) Right to ford.

- (9) *Servitus pecoris ad aquam appulsus*.
- (10) Right of drainage.
- (11) Right to cut fuel.

Although, in a strict sense, the *servitus actus* gives no greater right than to drive cattle over the ground of another, yet there may be circumstances under which the *servitus actus* will be construed to include a right of way for vehicles, and if the road is wide enough to allow the free passage of vehicles, the law will presume the grant of a right to draw vehicles. Likewise the *servitus vice* does not only include a right of carriage-way, but also the right to draw logs, stones, &c. This is the opinion of Voet; (*p*) and in this respect he has been followed by the Supreme Court in the case of *Breda's Executor v. Mills.*(*q*) In that case the defendant's farm was subject to a servitude of "cattle road" in favour of the farm owned by Breda. It was proved that, according to custom, the width of a "cattle road" was at least eight feet (sufficient for the passage of vehicles), but the defendant refused to allow any cattle of the plaintiff using the road to draw vehicles after them, although he admitted that the plaintiff had the right to drive his cattle along the road. The court, however, held that since the road was eight feet wide, it was sufficient for the free passage of vehicles, and that where a *servitus actus* had been granted with a sufficient width of road to allow vehicles to pass, the right to draw vehicles must also be presumed to have been granted.

If a servitude exists in favour of a dominant *prædium*, the owner thereof will be entitled to such right of way as he may require for the enjoyment and exercise of the servitude.(*r*)

If a right of way has been granted in favour of the owner of a *prædium dominans*, "his heirs or successors," such right

(*p*) Voet, 8, 3, 2, and 8, 3, 3.

(*q*) 2 J. 189.

(*r*) *Hawkins v. Munnik*, 1 Menz. 465. *Meintjes v. Oberholzer and Graafreinet Municipality*, 3 S. 265. Voet, 8, 4, 16.

is not restricted to a particular successor, but will apply equally to all general successors; and each of the heirs or successors to the prædium or portions thereof will be entitled to enjoy the servitude.(s)

A right of way *ex necessitate* cannot be claimed further than the actual necessity of the case demands.

According to our law, there are two kinds of public roads, the *via publica* and the *via vicinalis*.

A *via publica* is constituted such by the authorities when declared by them to be a public road.

A *via vicinalis* or "neighbour's road" is a road either in a village or leading to a town or village which has been used by the people of the neighbourhood from time immemorial (*Peacock v. Hodges*, Buc. 1876, p. 65).

A road used by the public must be kept free from all danger, and if any obstructions, holes, insecure bridges, or fencing, &c., are placed in or in the immediate vicinity of the road, and one of the public using the road is damaged thereby, the owner of the land over which the road passes or of the road, or the person who created such nuisance, will be liable for all damages sustained.(t)

*Servitudes as set out on General Plans, especially in the case of Sale of Building Lots.*—It is of very great importance that the actual ground referred to in grants should be definitely ascertained. This is best done by means of diagrams, to which I shall refer when we come to consider the registration of servitudes.

Private lands are frequently put up to auction for the purposes of sale as "building lots." The ground is usually subdivided, and the roads intended to be thrown open for the benefit of owners of the purchased lots are marked upon a "general plan." Other servitudes of water-rights, &c., if any,

(s) *Ebden v. Anderson*, 2 S. 64. Grotius, Opinion No. 57 (Holl. Cons. 6 (pt. 2), 56). Digest, 8, 1, 17. Voet, 8, 1, 6.

(t) *Liesbeek Municipality v. Partridge*, 4 J. 305. *Buskes v. Government of S. A. R.* (S. A. R. 1891). *Marais v. Eloff* (S. A. R. July 1893).

may also be indicated thereon, but the main feature is the sketch of the roads established in favour of the purchasers.

The first case with reference to this subject is that of *Parkin v. Titterton*.<sup>(u)</sup> For the purposes of a discussion of the value and binding force of "general plans," the decision is not of very great value, since, to a certain extent, the judgment was based upon a different ground.

It may, however, be inferred from the decision, that if the seller by a general plan at the auction constituted a servitude in favour of the lots sold upon another *prædium* owned by him, he and his successors in title are bound thereby. If the successor is a purchaser of such *prædium*, without notice, and the servitude has not been registered, he is not bound by the conditions of sale as shown on the plan. (See p. 445 *infra*.)

The rights of a purchaser of one of such lots, in respect of the use of *all* the roads on the plan, whether all the lots have been sold or not, were discussed in the next case—*Hiddingh v. Topps*.<sup>(v)</sup> The facts in that case were as follows:—The Newlands Estate was subdivided into 387 building lots, and put up for sale in 1853, when, however, only 65 lots were sold to different purchasers, according to a general plan on which were indicated several roads. This general plan was filed with the Registrar of Deeds. No purchaser was found for the unsold portion till 1859, when Hiddingh bought and obtained transfer. The diagram attached to his title-deed showed no roads except such as led to the other lots sold in 1853. Topps, the owner of two of the lots sold in 1853, now claimed the unrestricted use of all the roads appearing on his general plan. The court, however, decided that Topps had only the right to use such roads laid down on the plan as were *necessary or convenient* for access to the main road from his lots, these roads to pass between lots sold at the time of the sale, but he had no right to the use of *all* the roads sketched on

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<sup>(u)</sup> 2 Menz. 314.

<sup>(v)</sup> 4 S. 101.

the general plan, where such roads passed between the unsold lots; Watermeyer, J., holding that each purchaser was entitled to a right of inter-communication with each of the lots sold. The same Judge held (as gathered from the report of his judgment) that the general plan is in itself a contract between the purchasers and seller, and becomes a part of the conveyance after its registration, and the establishment of a servitude ought to depend upon the interpretation of the contract at the time of the sale.

In the case of the *Ohlsson's Cape Breweries Limited v. Whitehead*,<sup>(x)</sup> it was decided that the mere registration of a diagram attached to the transfer of a purchaser or his successor of a lot, and showing a road adjoining such lot which corresponds to the general plan, does not amount to a registration of a servitude over the land marked off as such road, in favour of every other plot on such general plan.

The facts in that case were briefly as follows. The Palmboom Estate at Newlands was subdivided into building lots, with roads marked off upon a general plan, and sold according to such plan. The plaintiff company owned certain property and lots bounded on the north by a road, and on the west by a cross-road, as shown on a general plan exhibited at the time of the sale. On the diagram of the transfer of the defendant's lot the cross-road is continued on the western boundary of his lot. The plaintiff company closed the cross-road which ran along the western boundary of their lot, but the defendant contended that he was entitled to use not only the continuation of the cross-road which bounded his own lot on the west, but also the cross-road bounding the plaintiff's property. Under these circumstances it was decided that—

(a.) Where land has been subdivided into lots, and such lots have been sold and transferred according to a general plan of subdivision in which the roads for the different lots are laid down, the owner of each lot may use all such roads

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(x) 9 Juta, 84.

as are reasonably necessary for convenient access to and egress from the public or high roads.

(b.) Such owner is not, however, entitled to the use of every road marked on the plan merely because it appears on such plan and the diagram attached to his transfer.

(c.) Such owner, if his lot does not adjoin a certain road laid down on the general plan, is not entitled to any servitude thereover, unless it be *ex necessitate*, by prescription, or by registration, although such land is shown on the said plan as a road. And the owner of the plot adjoining this road is entitled, as against the owner of the former lot, to occupy and enclose such land or road.

It must be noted that in the case of *Hiddingh v. Topps* the court went very far in allowing oral evidence to be led to explain the conditions of sale and the titles of the parties interested. As a rule, oral evidence will not be admitted to prove certain representations made at the time of the sale, if these representations do not appear in the deed of transfer, or to explain or vary the titles of the owners as appearing on their respective conveyances.(y) In the case of *Hiddingh v. Topps* the conditions of sale had been lost, and this circumstance may to some extent be considered a justification for the procedure followed; moreover, from the reported case it appears that no objection was made at the time.

The *dominium* of the soil marked out as roads remains in the seller, unless he has divested himself thereof in favour of the purchasers. He will be at liberty to use the roads, to go thereon at any time, to fell trees, and do other work necessary for their reparation.(z)

The intention of the seller as regards the ownership of the roads is to be gathered from the circumstances of each case. If the ownership is transferred to the purchasers of the lots at the sale, it vests in the owners of the lots adjoining

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(y) *Executors of Hofmeyr v. De Waal*, 1 J. 424.

(z) *Executors of Hofmeyr v. De Waal*, 1 J. 424. See also *Municipality of Beaufort West v. Wernich*, 2 J. 36.



ing the road up to the middle thereof. And if no servitude of right of way, &c., exists over such road in favour of the owners of other lots, any person who becomes the proprietor of all the lots adjoining the road becomes the proprietor of the soil of the road, and may close up such road.(a)

According to English law, the presumption is that the ownership of the soil of a common road vests in the owners of the adjoining property.(b)

*The right to cut fuel*, as a servitude, has been considered under Personal Servitudes on p. 423.

### *Water-Rights.*

*Aquæductus* is the right of leading water through or out of another man's landed property, either from the fountain-head or any other place,(c) according to agreement.

A servitude (*e.g.* of *aquæductus*) established in favour of the owner of the dominant tenement, in respect of certain rights belonging to the owner of the servient property, must be restricted to the rights vested in such last-mentioned owner at the time of the constitution of the servitude, and cannot be extended to embrace other rights not at that time so vested.(d)

An unqualified right of servitude duly constituted by the transfer and the title-deeds of the property cannot be restricted or impaired by merely personal agreements or arrangements between the grantor and the owner of the dominant property.(e)

The right of water-leading having been granted, it must be presumed that all things necessary for the enjoyment

(a) *Porter v. Phillips*, Buc. 1876, 192.

(b) *Berridge v. Ward*, 10 C. B. N.S., 400. See authorities quoted in argument of *Beaufort West Municipality v. Wernich*, 2 J. 38, 39, 40.

(c) Voet, 8, 3, 6.

(d) *Cloete v. Ebden*, 2 Menz. 311.

(e) *Hawkins v. Munnik*, 1 Menz. 465.

of the servitude have been granted at the same time. *Ac servitute concessa simul concessa censeatur omnia, sine quibus servitus exerceri nequit. Quomodo haustu, aquæ dato, iter quoque ad puteum datum intelligitur. Et, si mihi per aream tuam in domum meam ire agere cesseris, nec ex plano aditus ad domum meam per aream tuam sit, dum modo mea altior area tua est, vel gradus vel clivos propius januam meam jure facere possum; dum ne quid ultra, quam quod necesse est, itineris causa demoliar. Is quoque, qui aquæ ducendæ jus habet vel sistulam in rivo ponere, vel aliud quidlibet facere potest, quo aquam latius excipiat; modo ne domino vel rivalibus aquagium deterius efficiat.*(f)

Does this include the right to go on to the servient property for the purpose of repairing or deepening trenches to promote the free flow of water, in the case of a *servitus aquæductus*? According to Voet, in the paragraph above quoted, such right must be conceded to the owner of the dominant property. He must, however, exercise this right *civiliter modo*, in a reasonable manner,(g) and must not impose any new burden on the servient property,(h) and no damage must be caused.(i)

This rule also applies to the *servitus aquæhaustus et pecoris ad aquam appulsus* and the right to cut fuel.(k)

No deviation or extension can be made in a watercourse or aqueduct within the limits of the servient tenement, but the course originally selected and fixed upon must be adhered to, unless the owner of the servient tenement consents to the deviation or extension.(l)

The *Servitude Aquæhaustus* is the right of drawing water

(f) Voet, 8, 4, 16.

(g) Glück, De Servitut, § 666 in fine.

(h) Digest, 8, 2, 20, 5.

(i) *Wolvaardt v. Pienaar*, 1 C. L. J. 345. In that case Kotze, C.J., held the law to be as above quoted, and this appears to be the correct view, although the majority of the court were of a different opinion.

(k) See the two succeeding paragraphs.

(l) *Municipality of Potchefstroom v. Cameron* (S. A. R.), 1 Kotze, p. 206.

from another person's private fountain, well, or stream, and, by our customs, even from another's cistern.(*m*)

This servitude includes the right of way to the fountain, stream, well, or cistern,(*n*) which must, as in the case of a right to cut fuel(*o*) or to lead water,(*p*) be exercised *civiliter modo*.

*Right to Watering-Place* (servitus pecoris ad aquam appulsus).—Unless any particular spot has been definitely constituted a watering-place for the purpose of the above servitude, the owner of the servient property may point out a convenient and easily accessible place for that purpose. He must, however, not be unreasonable, for in that case the court will interfere. The cattle driven to the water must do no damage to the servient tenement, and must use a defined track, of such width as the circumstances of each case requires. If the watering-place is at a great distance, the cattle must be allowed a reasonable rest along the way.(*q*)

Upon the terms of the grant will depend whether all cattle pasturing on the dominant tenement, the property of the owner of such tenement or not, can be driven to the watering-place.(*q*)

A personal servitude of aquæhaustus, aquæductus, &c., must be in favour of an individual, and must be distinct from his capacity as owner of a tenement. The individual vested with such right is termed a "*usuarius*." He cannot sell or cede this right, which terminates upon his death, and it is not transmissible to his heirs.(*r*)

The grant of a servitude of water-rights to draw water and to water cattle and stock includes, as before stated, a free right of way. If a farm on which are certain springs is divided among two co-proprietors of undivided shares, upon condition that the owner of the portion on which are the

(*m*) Grotius, Introd. 2, 35, 10. Voet, 8, 3, 7.

(*n*) Hawkins *v.* Munnik, 1 Menz. 465. Voet, 8, 3, 7.

(*o*) Van Niekerk *v.* Wimble, 3 Ros. 61.

(*p*) See Wolvaardt *v.* Pienaar, 1 C. L. J. 345.

(*q*) Laubscher *v.* Reve and Others, 1 Ros. 408.

(*r*) Dreyer *v.* Ireland, Buc. 1874, 193.

springs shall allow the others the use of the spring water for domestic purposes and to water their stock, the latter can use and carry away as much water as they may *bona fide* require, provided they leave the other co-proprietors their share of the water.(s)

*Right of Drainage.*—The right to discharge water on a neighbour's land may exist by virtue of a duly created servitude or by virtue of the natural situation of the locality. And if it is difficult, owing to the nature of the surface, to ascertain what the natural channel is, then the course in which the water has flowed from time immemorial, *i.e.* for the period of thirty years or more, will be considered as the natural channel.

Where once the right to discharge water into such a channel has been established, the person entitled to the right may increase the ordinary flow, to the prejudice of the lower proprietor, if such increase be occasioned in the ordinary course of draining, ploughing, or irrigating the upper land, and if it be not greater than is reasonable under the circumstances. If the channel becomes choked through neglect, he may compel the lower proprietor to clean it himself, or to allow him to do so (*Ludolph and Others v. Wegner and Others*, 6 Juta, 193.)

*Water-Rights of Riparian and Lower Proprietors.*—The conflicting rights of upper and lower riparian proprietors have met with full consideration in the various judgments delivered by the South African courts in a series of well-reasoned and clearly-worded decisions. In fact, so definite, clear, and well considered are these decisions, that they may be said to have given a certain finality to the law, and thus to have obviated a vast amount of litigation which would otherwise have been inevitable.

The broad principle is, that a private stream belongs to the owner of the property in which it rises and takes its

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(s) *Landman v. Daverin*, 2 E. D. 1.

course; whereas the waters of a public stream belong to the riparian owners along its banks.

At the outset, therefore, it becomes of very great importance to have an accurate definition of the terms "public and private streams."

The Civil Law (*t*) draws a distinction between a river and a streamlet, *flumen* and *rivus*: "Flumen a rivo magnitudine discernendum est aut existimatione circumcolentium," and states further that, according to its waters, rivers are either *permanens* (perennial) *aut torrentia* (torrents). The test whether a certain water-flow is a river or streamlet becomes clearer when it is coupled with the capability or otherwise thereof to be used in common by the dwellers on its banks, as has been done by Baldus (*u*) and Vinnius (*v*)

Ulpian's views are set forth in the Digest (43, 12, 1, § 2, 3). "Item flumina quædam sunt *perennia*, quædam *torrentia*; perenne est quod semper fluat, torrens id est hyeme fluens. Fluminum quædam *publica* sunt, quædam non; publicum flumen esse Cassius definit quod perenne est; hæc sententia Cassii, quam et Celsus probat, videtur est probabilis."

The doctrines of the Civil Law were ultimately incorporated in the Roman-Dutch law. Voet, in his commentaries on the title of the Digest quoted above, draws a very clear and concise distinction. He says, "Est autem flumen vel publicum vel privatum; publicum quod perenniter fluit, ac ad totum populum pertinet; privatum quod æstate exarescit, et in privati dominio est, nec a cæteris locis privatis differt." (*x*)

From this it follows that a public stream is a permanent one, whereas a private stream is either pure surface water or an occasionally running stream.

We must, however, guard against the error of considering a perennial stream as one that flows freely and constantly.

Broadly stated, the Roman-Dutch law recognises two kinds of natural streams or watercourses, viz., public and

(*t*) Digest, 43, 12, 1, 2, 3.

(*u*) Baldus ad Digest, 1, 8, 3.

(*v*) Vinnius ad Instit. 2, 1, 3.

(*x*) Voet, 43, 12.

private. Under the designation of public streams are included all perennial rivers, whether navigable or not, and all streams which, although not large enough to be considered as rivers, are yet perennial, and are capable of being applied to the common use of the riparian proprietors. Under the designation of private streams are included rivers and streams which are not perennial, and streamlets which, although perennial, are so weak as to be incapable of being applied to common use.<sup>(y)</sup> The designation of perennial or permanent is not forfeited if the river sometimes becomes dry.<sup>(z)</sup> If a stream ordinarily runs in ordinary weather, it is not the less a running stream if it is occasionally dry on hot days in dry seasons; if this were not so, there certainly would not be many running streams in the Cape Colony.<sup>(a)</sup>

Bearing this in view, a public river has been defined as a stream of water usually flowing in a definite channel, having a bed and banks, and usually discharging itself into some other stream. In a public river the volume of water need not be large or constant, but it must be something more than mere surface drainage to avoid being a dry river (*torrentia*), and must run during the greater part of the year in a definite channel, and in such quantity as to be capable of being enjoyed by other riparian proprietors in common with the one in whose land it rises.<sup>(b)</sup>

The water of a perennial spring, which flows down in a definite and defined channel, but which for a portion of its course disappears and sinks into the ground, but reappears lower down and continues to flow in a well-defined channel, is a public stream.<sup>(c)</sup>

A river which has a continuous channel and well-defined banks, and is perennial at its source, and is fed during its course by perennial streams and fountains, although dry in

<sup>(y)</sup> Van Heerden *v.* Weise, per De Villiers, C.J., 1 A. 7.

<sup>(z)</sup> Van Heerden *v.* Weise, 1 A. 5.

<sup>(a)</sup> Per Smith, J., in Vermaak *v.* Palmer, Buc. 1876, 28. See also Shield *v.* Arndt (3 Green Ch. 247); Kaufmann *v.* Griesemer, Pen., 407.

<sup>(b)</sup> Per Barry, J., Pres., Southey *v.* Schombie, 1 E. D. C. 295.

<sup>(c)</sup> De Wet *v.* Hiscock, 1 E. D. C. 257, and 1 A. 58.

parts in consequence of the diversion of its waters, is nevertheless a public and permanent river.(d)

Mere surface drainage, torrents, and springs of water-courses so weak that they are incapable of common user by the riparian proprietors, and private springs *erumpentum in suo*, are included under private waters.(e)

The waters of weak springs, which have taken a certain course and have been joined in their flow by the waters of other weak springs, remain private waters.(f)

Underground water, running in undefined and unknown channels or veins, becomes the private property of the person who abstracts it on his own ground by digging, &c., although the abstraction may cause a diminution in the supply of other wells, or even of a public stream.(g)

*The Use of the Waters of Public and Private Streams.*—The broad principle underlying the rights of various riparian proprietors to the use of waters of public and private streams was fully discussed in the case of *Van Heerden v. Weise*.(h)

“The importance of the distinction between public and private streams,” says De Villiers, C.J., in that case, “consists in this, that whereas in the case of the former the rights of each riparian proprietor are limited by the rights of the public and of the different riparian proprietors *jure naturæ*, in the case of the latter the rights of each proprietor are only limited by such rights as long usage may have conferred on the remaining riparian proprietors.” The learned Chief-Justice then proceeds to explain the origin and early history of these rights in the following terms: “It is important to bear in mind that by our law, differing in that respect from the law of England as well as of France, even rivers that are not fit to be used for navigation are deemed

(d) *Southey v. Schombie*, 1 E. D. C. 286.

(e) *Van Heerden v. Weise*, 1 A. 7. *Vide* also footnotes (b) and (d), and *Meyer and Others v. Johannesburg Waterworks Co.*, C. L. J. (1893) p. 159.

(f) *Retief v. Louw*, Buc. 1874, p. 165.

(g) *Struben and Others v. The Cape Town Districts Waterworks Co.*, 9 J. 68.

(h) 1 A. 5.

to be public provided they be perennial. They were deemed to be public or common, as has been justly remarked by Lord Denman, C.J., 'in this sense only, that all might drink it or apply it to the necessary purposes of supporting life.' (*i*) The rights of the public were established long before those of the different riparian proprietors were defined. If a river was perennial, the use of the water became common to all; if not perennial, the public had no right to the water, and the owner of the property might deal with the water as his own. (*k*) In course of time, however, the rights of the riparian proprietors, as distinct from those of the general public, came to be defined. In regard to public streams, the Emperors Antoninus and Verus were the first to decide that water from a public river ought to be divided for purposes of irrigation according to the measure of possession of the riparian proprietors. (*l*) And subsequently it was enacted by the Emperors Diocletian and Maximilian that an upper proprietor shall not be allowed to have the exclusive enjoyment of water, which by ancient custom had been shared by the lower proprietors for purposes of irrigation. As there was no necessity for such an enactment in respect of public streams, it appears to me probable that this was intended to refer only to private streams. The context in which the Constitution is referred to in the Code would seem to confirm this view. It is quoted as an exception to the general rule that a person may deal as he chooses with water rising on his own land; but even this general rule appears to me to be subject to the limitation that the water thus rising in a man's own land is not the source or the main source of a public stream. When once the public nature of the stream or river is established, the rights of each riparian proprietor, whether at its source or along its course, are limited by the natural rights of the public, so far as those rights are capable of being exercised,

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(*i*) *Mason v. Hill*, 5 B & Ad. p. 24.

(*k*) See *Vinnius ad Inst.* 2, 1, 1.

(*l*) *Digest*, 8, 3, 1.



and by the common rights of the remaining riparian proprietors. When once the private nature of a stream or river is established, the public has no right in respect of it, and the lower proprietors can claim no other right than such as long usage may have established in their favour against the upper proprietors."

In the case of *Retief v. Louw*,<sup>(m)</sup> the earliest in connection with the rights of riparian owners (decided in 1856), Bell, J., held that the waters of a public stream do not belong absolutely and exclusively to the proprietor of the land through which it flows, but all the riparian proprietors have a common right to use the water. This use, at every stage of its exercise by any one of the proprietors, is again limited by a consideration of the rights of the other proprietors. The learned judge then proceeds with great care to discuss what the nature of such use is, and he comes to the following conclusion :—

The usage of public waters is therefore—

- (1.) For the support of animal life.
- (2.) For the increase of vegetable life.
- (3.) For mechanical works.

If the upper proprietor require all the water for the support of life, the lower proprietors must submit. If there be more than sufficient water for this purpose, sufficient must be allowed to flow down for the supply of the animal demands of all the lower proprietors before the upper proprietor can use the rest of the water for (2)—*i.e.*, irrigation and the promotion of vegetable life. The proprietors in sequence are entitled to use the water for agricultural purposes. When the demands of agriculture have thus been satisfied throughout the course of the stream, the proprietors are entitled in sequence to use the water for (3)—*i.e.*, mechanical works. No proprietor is entitled to use the water without regarding the wants of the other proprietors. The extent to which any one proprietor is entitled to use the water will depend upon the circumstances of each case.

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(m) Buc. 1874, p. 165.

In considering the use to which the water of a public stream may be applied, a difference must be drawn between the ordinary or primary and the extraordinary or secondary use thereof. The ordinary use arises *ex necessitate*, the extraordinary out of convenience.

In the next case, that of *Hough v. Van der Merwe*,<sup>(n)</sup> the court arrived at almost the same conclusions as those laid down in the previous case of *Retief v. Louw*, although that case was not referred to in judgments. It was there laid down that if the upper proprietor of land adjoining a public stream, in the enjoyment of his ordinary use, deprives the lower proprietors of their enjoyment of ordinary use, he will not be liable; but if in the enjoyment of his extraordinary use he deprives the lower proprietors of their ordinary or extraordinary use, he will be liable, for no one has the right to intercept the regular flow of a stream, if he thereby interferes with the lawful use of the water by other proprietors and inflicts on them a sensible injury.<sup>(o)</sup>

The practical outcome of these principles has been set out at length in the same case (*Hough v. Van der Merwe*) as follows:—

The owner of property by or through which a public stream flows is entitled to divert a portion of the water for the purposes of irrigation, provided, Firstly, That he does not thereby deprive the lower proprietors of sufficient water for their cattle and for domestic purposes. Secondly, That he uses no more than a just and reasonable proportion of the water, consistently with similar rights of irrigation in the lower proprietors; and, Thirdly, That he returns the water to the public stream with no other loss than that which has been caused by irrigation.<sup>(p)</sup>

<sup>(n)</sup> Buc. 1874, p. 148, and see *Baillie v. Hendriks and Others* (S. A. R.), 1 Kotze, p. 211.

<sup>(o)</sup> *Milner v. Gilmour*, 12 Moore's P. C. C. 156.

<sup>(p)</sup> See also *Southey v. Schombie*, 1 E. D. C. 286. *De Wet v. Hiscock*, 1 E. D. C. 249, and 1 A. 58. *Jordaan v. Winkelman and Others* and the Cape Government, 1879, p. 79. These decisions have also been followed by the High Court of the Orange Free State in the case of *Allison v. Pretorius*,

The question of a just and reasonable use is one of degree, and depends entirely upon the circumstances of each particular case (compare *Retief v. Louw*).

Over *private waters* the owner of the land on which such waters rise has full right of disposal. Water *erumpentem in suo* is the property of the owner on which it rises.(q)

He has an absolute right to the exclusive use thereof, so long as no one else has acquired a right or servitude there-over.(r)

If such private stream has not been allowed to flow down in a definite and accustomed channel for any length of time to the land of a lower proprietor, the upper owner retains his right of exclusive usage, and the lower proprietor cannot restrain him from diverting the water of the stream.(s)

On the other hand, the upper proprietor is not entitled to the unlimited and exclusive use of water rising on his land, if this water has been allowed for the period of prescription to flow down in a definite and accustomed channel, so that lower proprietors have for that period enjoyed the common use of the water.(t)

At first sight the case of *Erasmus v. De Wet* (u) seems to restrict the application of the general principle laid down in *Retief v. Louw*. In that case Watermeyer, J., laid down that the proprietor of an upper farm is entitled to the free use of water flowing through, and to a great extent rising upon, the upper farm, for the purposes of irrigation and of increasing plantations, though such free use of the water may cause

decided 15th May 1880, and by the High Court of the Transvaal in *Bailie v. Hendriks and Others, Kotze, 211*, and *Meyer v. The Johannesburg Waterworks Co.*, C. L. J. 1893, p. 159.

(q) *Retief v. Louw*, Buc. 1874, p. 165.

(r) *Dreyer v. Ireland*, Buc. 1874, p. 193.

(s) *Mouton v. Van der Merwe*, Buc. 1876, p. 18.

(t) *Vermaak v. Palmer*, Buc. 1876, 25. Compare with this case *Silberbauer v. Breda*, and the judgments delivered therein by Sir William Hodges, C.J., and Watermeyer, J., and also the judgment of the Privy Council in appeal. See Buc. 1876, p. 33. *Vide also De Wet v. Hiscock*, 1 E. D. C. 249, and 1 A. 58.

(u) Circuit Court of Robertson, decided in Cape Town, Buc. 1873, 204.

damage to the lower proprietors. In the face of subsequent decisions, and the doubts expressed by the Privy Council in the case of *Silberbauer v. Van Breda*, this decision as a general principle cannot be accepted. There were, however, peculiar and exceptional circumstances in the case, and a special condition as to water-leading in the title-deed, whence it may be gathered that the decision was meant to cover only the exceptional circumstances of that case.

The user for the purposes of irrigation by lower riparian proprietors for the period of thirty years and upwards of the water of a stream which had been allowed to flow down to them free and unobstructed, does not *per se* confer on them a prescriptive right against the upper proprietor to prevent him from making any use of the water; but the parties are thrown back on their ordinary rights as riparian owners.(v)

The upper proprietor does not acquire a prescriptive right of user of the whole stream as against the lower proprietors, where he has not used the whole stream to the same extent for a period of thirty years.(x)

Water flowing underground in undefined and unknown channels or arteries becomes the property of the person who causes it to rise to the surface by excavation, pumping, or any other process. He is then entitled not only to the use of the water, but to the water itself.(y) In these respects underground waters were placed upon the same footing and governed by the same rules of law as surface rain water.

Si in meo fundo aqua erumpat, quæ ex tuo fundo venas habeat, si eas venas incideris, et ob id desierit ad me aqua pervenire, tu non videris vim fecisse, si nulla servitus mihi eo nomine debita fuerit, nec interdicto quod vi aut clam teneris.(z)

(v) *Jordaan and Others v. Winkelman and Others and the Cape Government*, 1879, p. 79. Compare *Myburgh v. Van der Bijl*, 1 J. 360.

(x) *Rossouw v. Burgers and Others*, 1 J. 119.

(y) *Struben and Others v. Cape Town Districts Waterworks Co.*, 9 J. 74.

(z) *Digest*, 39, 3, 21, per Pomponius.

This view is slightly modified by Marcellus, who suggests that an action might lie and liability be incurred where water is maliciously intercepted. *Cum eo, qui in suo fundo fodiens vicini fontem averterit, nihil posse agi. Nec de dolo actio est; et sane non debet habere, si non animo vicino nocendi, sed suum agrum meliorem faciendi id fecit.*(a)

Upon these authorities was based the judgment in the case of *Struben and Others v. The Cape Town Districts Waterworks*,(b) where it was decided that the lower proprietors have a right to the accustomed or natural flow of a perennial stream only; and therefore, if the upper proprietor, by operations upon his own land, acquires an additional supply, he is not bound to allow such additional supply to flow down, but may treat it as his own.

“Where,” says De Villiers, C.J., in that case, “the water abstracted is percolating water, not flowing in any defined channel that could possibly have been known to the landowner abstracting it, I am satisfied that he is entitled to the water itself, and not merely to the use of it, even although the abstraction may cause a diminution in the supply of a public stream;” and the learned Chief-Justice then proceeds to apply this principle, and comes to the conclusion that the landowner on whose property is a spring, the main source of a perennial stream, can open up such spring, and can use as his own property the increased supply of water obtained by such operations.

This decision has been questioned by Kotze, C.J. (S. A. R.), in the case of *Meyer and Others v. The Johannesburg Waterworks Estate and Exploration Company and Others*.(c) Kotze, C.J., is reported to have said there, “The public and common character appertaining to the stream itself also appertains to the springs forming its source; and if it were proved that the springs used and the water opened up by the Waterworks Company are the actual source or the main source of the public stream in question, I would have

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(a) Digest, 39, 3, 1, § 12.

(b) 9 Juta, 74.

(c) Reported in C. L. J. for 1893, p. 159 *et seq.*

no hesitation in holding that they have no right whatever to the exclusive use of the water; and supposing they had by their excavations at the source itself materially increased the ordinary and accustomed strength of such springs, I would be disposed to say, notwithstanding the decision in the recent case of *Struben v. The Cape Districts Waterworks Company* (9 J. 68), that even with respect to such increase, the persons who have caused it have no exclusive user, and the lower proprietors may be heard to complain against any such exclusive use and appropriation of it by those on whose land it rises and who have so increased the supply. If a party by excavation, or any other means, takes it upon himself to assist Nature by opening up, further than Nature herself may already have done, a well-ascertained spring forming the source or main source of a public stream, and thereby increases the flow or strength of the water, he is dealing with that which, like the stream itself, is of a public and common character, and if now by his acts he increases or materially improves the strength of a spring of a common and public character, I can see no reason either of law or policy why the common or public character of the spring, attaching to the normal or accustomed quantity of its flow, may not or should not also attach to the increased quantity. The increased quantity of water is quite as capable of common use as the normal or accustomed quantity, and should therefore be made subservient to it. It is not like the case of digging or draining one's own land, and thereby diverting mere surface or percolating water not flowing in a defined channel. In this latter case no one can tell how the water percolates or wends its way along through the soil, nor determine beforehand what may be the precise results of his so cutting off or draining the water. In the case, however, of digging and excavating at the source of a permanent stream with the view of increasing the flow, the party knows that the spring with which he is dealing is the feeder or main feeder of the stream. He knows he is dealing with that which, like the stream itself, is of a public or

common character. It is apparent on the face of it, and he can calculate the precise result of his acts. He may be at full liberty to make such excavations and to increase the strength of the spring, and thereby obtain more water for the better and more profitable use of his land, but I very much question his right, unless some approved authority be cited or produced, to the exclusive use in such increase. It seems to me that his right to such increase should, like his right to the original and accustomed flow, be limited by the similar rights of the lower proprietors."

This, of course, is merely an *obiter dictum*. The statement of law contained therein seems, upon mature consideration, to conflict not only with Struben's case, but also with the law as laid down in the Digest and accepted in Roman-Dutch jurisprudence. With all respect for the reasoning of the learned Chief-Justice, it seems that the person who increases the flow of water of a feeder of a perennial stream is *not* "dealing with that which, like the stream itself, is of a public or common character." He is dealing with the extra supply, that is to say, with the water which naturally did *not* rise in such spring, but flowed away somewhere else in unascertained and undefined channels. It is true that he can determine the result of his operations, viz., to increase the flow, *if successful*, but beyond that he *cannot determine* beforehand what may be the precise results of his so cutting off or draining the water. All that he knows is, that the increase did not rise in the spring before, and that if he did not cause it to rise there, it would flow somewhere else. The water abstracted by him previously flowed in unknown and indefinite channels underground, and therefore he who abstracts it *bona fide* on his own land is entitled thereto, no matter where the operations take place. There can be no doubt that if the proprietor of the land dug a well, say, two feet below or above the feeder, and obtained thence a vast quantity of water, he would be entitled to it. This flow could only have been caused by giving certain underground arteries or channels of water a direct facility to rise to the

surface. Now, if the excavations are made, not two feet from the feeder or spring, but in such spring or feeder itself, it cannot alter the fact that, but for such excavations, the underground water would not have risen to the surface, but would have flowed away in unascertained channels somewhere else. This being the case, there can be no difficulty in applying the law as laid down by Pomponius and Marcellus to the increased supply from feeders or springs due to operations carried on by the owner of land on which such feeders or springs are situated.

In questions of servitudes, it is sufficient if the registered owners or the proper representatives of the *domini* are before the court, though notice of action should be given to remaindermen, in order that they may intervene should they so desire.(d)

If an interference with the common rights of riparian owners has taken place, the proprietors need not wait until actual damage has been sustained in order to come to court with a prayer for redress and an interdict restraining any further interference.(e) In the case of *Coleman v. Lynch* (O. F. S., Dec. 2, 1892), Melius de Villiers, C.J. (O. F. S.), is reported to have said: "It is sufficient to observe that by law he who has a right to the user of water in a public stream, whether such stream be navigable or not, is entitled to an interdict against those who interfere with the course of the stream to his detriment (Voet, 43, 12); and he need not wait until actual damage has first been caused, and so leave an opening for the setting up of a plea of prescription, where no damage has for a considerable time been produced by the interference."

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(d) *Fourie's Executrix v. Greef's Executrix*, Buc. 1879, 122. See also exceptions taken in the case of *Meyer and Others v. The Johannesburg Estate and Exploration Co. and Others*, C. L. J., 1893, p. 159.

(e) *Beckett v. Morris* (12 Jur. N.S., 806). *Struben and Others v. Cape Town Districts Waterworks Co.*, 9 J. 68. *Coleman v. Lynch*, O. F. S., Dec. 2, 1892. *Meyer and Others v. The Johannesburg Estate and Exploration Co. and Others*, C. L. J., 1893, p. 159. See also *Allison v. Pretorius*, O. F. S., May 15, 1880.



*Registration of Servitudes—Notice to Third Parties—  
Hypothecation of Burdened Tenement.*

Registration and notice must be considered together, registration being "notice to all the world." Since the object of registration is to give notice of certain facts to persons, the question arises, How far does actual notice of the facts to a person dispense with the necessity of registration as far as such person is concerned? Registration, as Grotius says, is not the *substantia actus*, but is required *ad faciliorem probationem* (Opinion No. 65, Holl. Cons. 3 (b.) 173).

If a person has actual and definite notice of the existence of certain facts, he cannot contend that his actions with regard to them were based upon the circumstance that no registration of them had been effected. Fraud or *mala fides* is the ground on which the court is governed in cases of notice, and such person is bound by the notice given to him, and cannot ignore it merely on account of the want of registration. (*f*)

The first South African decision bearing on this point is that of *Parkin v. Titterton*. Parkin claimed a right of way to his land over the adjoining land of Titterton, both parties deriving their title from a common vendor. This right of way was not registered, but was alleged to have been granted at the time of the sale. The court gave judgment in favour of Titterton, on the ground that the servitude had not been registered, nor had it been proved that Titterton, at the time he bought the ground over which a servitude was claimed, had any notice of the servitude now claimed by Parkin. This case is discussed on p. 426, *supra*.

The case of *Hawkins v. Munnik* (*g*) is in some respects a converse view of the law considered in *Parkin v. Titterton*.

(*f*) *Le Neve v. Le Neve*, White and Tudor's L. C. ii. 32. See also *Jansen v. Fincham*, 9 J. 289.

(*g*) 1 Menz. 465. Cf. Voet, 8, 1, 6. See also Opinion No. 58, and Voet, 8, 4, 1. Vide *Hofmeyr v. De Waal*, 1 J. 424.

In that case the servitude was duly registered and set forth in the title-deeds, and it was decided that the full enjoyment thereof could not be impaired by setting up personal arrangements made at the time of the sale of the servient property. The court held that "an unqualified right of servitude, duly constituted by the transfer and title-deeds of the land, cannot be limited or impaired in the person of a singular successor by any merely personal agreements between the granter of the servitude and the person in whose favour the servitude was granted, or any person subsequently acquiring the servient tenement from the granter."

The cases of *Judd v. Fourie* (*h*) (Eastern Districts Court), and *Richards v. Nash and Another* (*i*) (Supreme Court), were decided about the same time. The former came on for hearing on 7th and 9th June 1881, and judgment therein was delivered on 29th November 1881. The latter was heard on 23rd and 24th November 1881, and decided on 24th November 1881.

In *Judd v. Fourie* the whole question of registration and notice, and the authorities bearing thereon, will be found exhaustively discussed both in the arguments and the judgments in connection therewith. It will therefore be unnecessary to enter more fully into the matter here.

Two legal points were decided in the case. In the first place, it was held that prædial servitudes partake of the nature of immovable or real property, and consequently they must be registered *coram lege loci*. An unregistered agreement granting a right of servitude is not sufficient to constitute a servitude. And, secondly, it was decided that express notice before purchase of an unregistered right of servitude will bind a purchaser for valuable consideration.

The first point was decided by the unanimous judgment of the court. The second was decided by the majority of the court, Barry, J., Pres., and Buchanan, J. Shippard, J., *dissentiente*, was of opinion that since, in the absence of prescription

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(*h*) 2 E. D. C. 41.

(*i*) 1 J. 312.

or testamentary devise, nothing short of actual registration can suffice to create or constitute a prædial servitude, notice of the existence of a right will not bind a purchaser for valuable consideration, *unless it can be distinctly and affirmatively proved that one of the conditions of purchase was a collateral agreement (or pactum adjectum) to the effect that the purchaser should be personally bound to grant the real servitude already promised by the vendor, and to give effect thereto by due registration, or unless it can be shown that there was an error, or unless there was mala fides on the part of the purchaser.* Barry, J., Pres., said, "Where express notice is given to a purchaser before he buys that the seller of the property intended to be sold had bound himself by distinct contract to create a servitude upon it, it would be a fraud by the seller, to which the purchaser would become a party, if he refused to carry out the contract creating the servitude. The rule as to the effect of express notice seems common to the Civil, the Roman-Dutch, and the English law."(*k*) Buchanan, J., said, "If the object of registration is to prevent fraud by giving notice to the world, I cannot, on principle, understand why express notice, given directly to the person sought to be affected by it, differs in its effect from notice which, by the operation of law, is held to be given to him by registration. Registration, no doubt, is the easiest and most certain means of proving notice, but in this case express and direct notice before purchase has been brought home to the purchaser *aliunde*."

In *Richards v. Nash and Cooper* the facts were as follows: A., the owner of certain land, sold a portion to Richards, with a right of way over the remainder. He subsequently sold the remainder to Nash, subject to a right of way in favour of the portion sold previously to Richards, but the servitude was not registered upon the title-deeds of the portion bought by Nash (the servient tenement). Under these circumstances the court found that at the time of the purchase of the remainder, Nash was fully aware and had express notice

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(*k*) Story's Equity Jurisprudence, sec. 397.

of the rights vested in Richards, and it was decided that Nash was bound by such notice, and that Richards was entitled to the enjoyment of the right granted to him. "The important question," says De Villiers, C.J., "then is the question of law whether, under these circumstances, the plaintiff is entitled to his remedy? I should have considered it a grave defect in the law if the plaintiff were not entitled to have a clear error of this kind rectified. Fortunately the law of the Colony does, in our opinion, give the plaintiff a right of redress. The transfer to Nash under the circumstances, without a reservation of the plaintiff's right, was a fraud upon him, which entitles him to relief in this court."

It must be observed that the notice required in order to dispense with the necessity of registration must be "express" and "actual." A mere suspicion or report of the existence of the onerous right is not sufficient to debar the purchaser for value from freeing himself on the ground of non-registration.<sup>(l)</sup>

Registration must be effected upon the title-deeds of the servient tenement. The registration of a servitude with the transfer-deeds of the dominant tenement will not bind a purchaser of the servient tenement, who has bought without notice and has received a clean transfer.<sup>(m)</sup>

Nor is the mere reference in a transfer to a deed of sale which constitutes certain servitudes sufficient notice to establish such servitudes as against a *bona fide* purchaser for value.<sup>(n)</sup>

On the other hand, if the grantee of a servitude is aware of the existence of prior rights which conflict with such grant, the servitude can be set aside as prejudicial to these prior rights.<sup>(o)</sup>

To the transfer deeds of landed property diagrams are frequently attached for the purpose of showing the exact

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(l) Faure v. Van der Merwe (O. F. S.), 4 C. L. J. p. 133.

(m) Jansen v. Fincham, 9 J. 289.

(n) Botha, Smit, and Another v. Kinnear (S. A. R.), Kotze, 215.

(o) Stewart's Trustees and Marnitz v. Uniondale Municipality, 7 J. 110.

situation thereof. The legal effect of such diagrams have been frequently discussed. The diagram is not absolutely incontrovertible. If the diagram contains an error or is palpably incorrect, the inaccuracy will be rectified.

In the case of *Visser v. Du Toit*,<sup>(p)</sup> one of the earliest in connection with this subject, it was laid down by Watermeyer, J., that "we must always endeavour to find the actual ground described. Sometimes the description may be so vague that we are bound to take the diagram; sometimes the description may be so thorough that it would be absurd to take the diagram in opposition to it. Thus, if Robben Island were granted to me, 'bounded by the sea, as will appear by the diagram annexed,' and the figures were by mistake to represent only half the island, that would not be the land conveyed to me. The diagram should be amended; the grant has been of the whole island. If the ground described land as bounded by a river, and the diagram did not agree, it would be an erroneous diagram, and the grantee could claim up to the river."

The principle laid down by this very able Judge has been acted upon frequently in subsequent cases. As stated by De Villiers, C.J.,<sup>(q)</sup> "the diagram was *not* transferred, but the land, and the diagram was merely appended to the transfer-deed in explanation of that document."

In *Laubscher v. Reve and Others*,<sup>(r)</sup> Hodges, C.J., remarked, "Defendant was mistaken in supposing he could oblige the plaintiff to send his cattle to a place other than the usual one, because it was placed on the diagram by an error on the part of the surveyor."

The following cases also bear upon the subject, and will indicate the position taken up by courts in regard thereto:—

*Esterhuizen's Executrix v. Vermeulen*.<sup>(s)</sup>

*Barrington and Others v. Colonial Government*.<sup>(t)</sup>

<sup>(p)</sup> 5 J. 94.

<sup>(r)</sup> 1 Ros. 408.

<sup>(q)</sup> *Anderson v. Van Niekerk*.

<sup>(s)</sup> Buc. 1868, p. 76.

<sup>(t)</sup> 4 J. 408.

Beaufort West Municipality *v.* Wernich.(*u*)

Roux *v.* Bezuidenhout.(*v*)

Mouton *v.* Van der Merwe.(*w*)

See also the Land Beacons Act of the Cape Colony, Act No. 7 of 1865, and Act No. 9 of 1879, and the local laws of the South African Republic. According to the latter, a diagram once approved of and signed by the State President is unimpeachable, due time being allowed for the handing in and consideration of protests.

A servitude can, of course, be effected over hypothecated property, and this servitude will retain full force and effect if the mortgage was not duly registered at the time of the grant. If, however, a servitude is imposed upon a *prædium* which had previously been hypothecated, such deed of hypothecation having been duly registered, it is postponed to the rights of the mortgagee.

Thus, where a mortgagor, subsequent to the registration of the mortgage, granted a servitude over the hypothecated property and then became insolvent, his trustees were held to be entitled to sell the property without the burden of servitude, after they had attempted to sell it subject to the burden, but had failed to obtain a price sufficient to pay off the bond, on the ground that where a mortgagor imposes a servitude upon land already mortgaged, it is prejudicial to the legal rights of the mortgagee, and the latter is entitled, without proving actual pecuniary damages, to have such servitude set aside.(*x*)

This decision is contrary to Opinion No. 58, Holl. Cons. 3 (b.) 316. It definitely and expressly settles a question of law which, from an equitable point of view, should have been without controversy and void of all doubt. Grotius's argument will be found in the body of the Opinion referred to. He contends that the mortgagor, and not the mortgagee,

(*u*) 2 J. 36.

(*v*) 2 S. 142.

(*w*) Buc. 1876, 18.

(*x*) Stewart's Trustees and Marnitz *v.* Uniondale Municipality, 7 J. 110. Compare Opinion No. 58 (Holl. Cons. 3 (b.) 316).

is the *dominus* of the hypothecated property, and that he is therefore at liberty to impose any burdens or servitudes he may deem fit; and since servitudes affect only the quality, and not the integrity or title of the hypothecated property, the imposition thereof cannot adversely affect or prejudice the rights of a mortgagee. This line of reasoning is by no means tenable, for the alteration even of the *qualitas hypothecæ* by a debtor cannot be said not to affect the interests of the mortgagee, and it cannot be maintained that the mortgagor is at liberty to make any such alteration regardless of his creditors' rights. (y) *Servus pignori datus, etiamsi debitor locuples est, manumitti non potest*, is a well-known maxim in Roman jurisprudence (Digest, 40, 1, 3; 40, 9, 4; Voet, 20, 6, 6). A decision of the Court of Holland in exact conformity with that of the Supreme Court of the Cape Colony is cited in *Hollandsche Consultatien*, 6 Append. p. 323, and Amsterdam edition, 3 Append. p. 31, the case referred to being that of *Van Kloetwijk v. Dirksz.* The legal principle underlying *Stewart's case* is that the prior rights of a prior mortgagee cannot be prejudiced or detrimentally affected by subsequent burdens imposed upon the hypothecated property by the mortgagee, such imposition being considered and construed *in fraudem* of the rights of the creditor. Upon the same principle are based the decisions of the courts in the case of the grant of a lease subsequent to a mortgage, to the effect that the claims of the lessee are postponed to those of a prior mortgagee, and if the mortgaged property subject to the lease does not realise a sum sufficient for the payment of the bond, the property can be sold without such lease (*Cape Commercial Bank v. Fleischmann and Van Rensburg*, 1 Kotze (S. A. R.), p. 1; *Reed's Trustee v. Reed*, 5 E. D. C., 30; *Dreyer's Trustee v. Lutley*, 3 J. 59; *Barnard v. The Colonial Government*, 5' J. 122; *Albertyn v. Van den Westhuyzen*, 5 J. 385; *Fichardt & Co. and Schekl v. Webb*, C. L. J. vi.

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(y) Bynkershoek, *Quæst. Juris. Privati*, 2, 16, n. 8, and *Aanmerkingen op Lybrecht's Red. Vert.*, 2, 36, 23, Aanm. 53. This question is fully discussed in the *Cape Law Journal*, vol. vii.

p. 258). See also the English case of *Keech v. Hall*, Smith's Leading Cases, where the same doctrine is laid down.

Lastly, it has also been decided that the owner of a quitrent farm cannot defeat the tacit hypothec of Government for quitrent by imposing a burden or servitude on such farm for the benefit of a third person (*Colonial Government v. Fryer*, 3 J. 371; *Colonial Government v. Fryer and Huysamen*, 4 J. 317).

3. The third division of servitudes is into *affirmative* and *negative*. The distinction lies in this, that in the one kind the owner is obliged to allow another to do a certain act on his property, whilst in the other he is restrained from doing certain acts.(z)

An affirmative or positive servitude is one which allows the commission of some act on the property of another, *e.g.*, *servitus viæ*, grazing, &c.

A negative servitude is one which prevents the owner of the tenement from doing something thereon, or making a certain use thereof, which, but for the existence of the servitude, he would have been entitled to do or use in any way he may think fit, *e.g.*, *servitus ne luminibus officiat*, *altus non tollendi*, &c.

A positive servitude in respect of the owner of the *res serviens* is considered to consist *in patiendò*—he must allow free enjoyment and exercise of the right vested in the owner of the *res dominans*.

A negative servitude in respect of the same owner consists *in non faciendò*—he must not use the *res serviens* in the given manner or mode. In the first instance he is *passive*, in the other he is *not active*.(a)

The distinction between these two kinds of servitudes becomes important when the constitution of servitudes by prescription have to be considered.

(z) Burge, Colonial and Foreign Laws.

(a) See Austin's Lectures on Jurisprudence, No. 49.



4. The division of servitudes into *continuous* and *discontinuous* constitutes a fourth distinction.

A continuous servitude is one of which the cause constantly exists, or the exercise and enjoyment of which continues without the intervention of any act of man, *e.g.*, *servitus altius non tollendi, serv. stillicidii*.

A discontinuous servitude is one the continuance whereof depends upon its exercise by act of man, *e.g.*, *itineris, aquæ haustus*.

The latter can be lost, and consequently extinguished, by non-user; not so the former.(b)

5. Servitudes are, fifthly, distinguished as *apparent* and *non-apparent*.

If the existence of a servitude is indicated by external evidence or signs, it is considered as apparent; otherwise as non-apparent. Instances of the former kinds are water-courses, roads, &c., and of the latter are *altius non tollendi ne luminibus officiat* (see Gale, pp. 22 and 91). Those things are apparent which would be so upon a careful inspection by a person conversant with such matters.(c)

6. A sixth division of servitudes is into *natural* (legal) and *conventional*, or *ex necessitate* and *by agreement*. This division will be quite clear when compared with the division of hypothecs into *legal* or *tacit* and *conventional*.(d)

Legal and natural servitudes or *servitudines ex necessitate* are those constituted not by grant or prescription, but by natural situation. Paulus says, "In summa tria sunt per quæ inferior locus superiori servit; lex, natura loci vetustas."(e)

Very few text-writers on Roman-Dutch law mention the natural servitudes at all. Most writers have ignored them

(b) Burge, Col. and For. Laws—Servitudes.

(c) Pyer v. Carter, 1 H. & N. 916; but see Suffield v. Brown, 10 Jur. N.S. 111, and Crossley v. Lightowler, L. R. 2 Ch. App. 478.

(d) Thus Harmenopolus speaks of the natural servitude as "tacit" (Hexabiblos, 2, 4, 10, 11).

(e) Digest, 39, 3, 2.

entirely, and the references of the few are meagre and of little import.(f) Certain necessary servitudes were also recognised by Roman law.(g)

Chief among natural servitudes are (1) the right to allow drainage water to flow down on to adjoining ground lying at a lower level ;(h) (2) the right of necessary way ;(i) and (3) the right of lateral support.

The natural right of lateral support has been very fully discussed in the cases of :—

The London and South African Exploration Company v. Rouliot.(k)

Hall v. Compagnie Française des Mines de Diamants du Cap (1 G. 464).

Leo and Others v. Ramsbottom (1 A. 40).

McFarlane v. De Beers Mining Board.(l)

Murtha v. Von Beek.(m)

Griqualand West Diamond Mining Company Limited v. The London and South African Exploration Company Limited.(n)

The *Exploration Company v. Rouliot* is the most recent case on this interesting subject. The whole doctrine of the natural rights of owners of land to lateral support is there reviewed and discussed. The conclusions arrived at by the court were : (1) That according to Roman-Dutch law and the customs of the Colony, the owner of land is entitled to lateral support from adjacent land (see also *McFarlane v. De Beers Mining Board*) ;(l) (2) That, in the absence of regulations, stipulations, or special mining customs to the

(f) Van Forell in Oehbrich Nov. Thes. Jurid., Disp. 3, 2, p. 302, de servitute naturaliter constituta. Hertius, Opuscula, 2, 3, 2, de servitute naturaliter constituta.

(g) Digest, 8, 5, 8, § 5 ; 39, 2, 24, § 2, 3, 4 ; 39, 3, 2, § 2.

(h) Ludolph and Others v. Wegner and Others, 6 J. 193.

(i) Breda's Executors and Another v. Mills, 2 J. 189. Peacock v. Hodges, Buc. 1876, 65. See also Voet, 8, 3, 4.

(k) 8 Juta, 74.

(l) 1 G. 398.

(m) 1 Appeal C. 121.

(n) 1 Appeal C. 239 and 263.

contrary, the owner who leases a portion of land for mining purposes is entitled to lateral support for the unleased as against the leased portion, unless it is clear from the terms of the lease that this right has been specially abandoned. The mere fact that the lessor has given the lessee the right to remove the soil from the claims or mine is not evidence of a waiver of the right of necessary support for adjacent ground.

Claim-holders *inter se* are not entitled to lateral support. It is, however, the duty of each claim-holder to work his claim with reasonable diligence, and a claim-holder will be liable in damages for negligence in working his claim where such negligence obstructs a neighbouring claim-holder in his work.

7. The seventh division of servitudes is into *qualified* and *non-qualified*—*servitus qualificata et servitus non-qualificata*.

A qualified servitude is one which depends for its enjoyment upon a work done by the hand of man.

A non-qualified servitude is one which does *not* require for its enjoyment a work done by human hand.

Instances of the former are *servitus aquæductus*, *servitus tignis immittendi*, and of the latter are *servitus viæ*, *pas-cendi*, &c.

This distinction runs very close to No. 4—continuous and discontinuous servitudes, with which it must not be confounded.

#### *Constitution and Extinction of Servitudes.*

The *constitution* or establishment of servitudes and their extinction are fully discussed in the authorities quoted at the outset.

At this stage it will, however, be necessary to add a few remarks in connection with the prescription, merger, and non-user of servitudes.

Affirmative or positive servitudes are considered to have been duly constituted by prescription when they have been

enjoyed and used since "time immemorial," *i.e.*, for the period of a third of a century, otherwise known as the period of prescription.(o) In South Africa "time immemorial" signifies a period of thirty years with reference to prescription.(p)

Negative servitudes, on the other hand, cannot be acquired by prescription unless there has intervened some act by which the person claiming the servitude has asserted his rights to such servitude, and the owner of the *res serviens* has yielded thereto for the required period.(q)

There must be a continuous user during the period of prescription.(r)

When acts naturally and necessarily repugnant to a servitude have been allowed, the servitude will be lost, and the owner of the servient tenement will not be liable for damages.(s)

The owner of a dominant tenement can also lose his right to a servitude by "waiver." If another trespasses *bona fide* upon his rights, and he does not take immediate steps to remove the trespass or obstruction, the court will not order the removal if such could only be done at considerable loss, but will award damages only; and if the owner of the dominant tenement allows the building or such other obstruction to proceed, leaving the owner of the servient tenement under the impression that the servitude had been abandoned, nominal damages will be given.(t)

"Merger" does not always involve a loss of the servitude. Thus in the case of *Scheepers and Others v. Municipality of*

(o) Grotius, 2, 36, 4, and Opinion No. 59 (Holl. Cons. 3 (b.) 142).

(p) *Peacock v. Hodges*, Buc. 1876, p. 65. *Ludolph and Others v. Wegner and Others*, 6 J. 193. *Myburgh v. Van der Bijl*, 1 J. 360. *Rossouw v. Burgers and Others*, 1 J. 119. *Dobie v. Schickerling*, 2 S. 95.

(q) *Jordaan and Others v. Winkelman and Others and the Colonial Government*, Buc. 1879, 79. See also Schorer, Notes ad Grot. 2, 34, 20. *Van Leeuwen*, R. H. R. 2, 20, 18.

(r) *Dobie v. Schickerling*, 2 S. 95.

(s) *Edmeades v. Scheepers and Edmeades v. Mostert*, 1 J. 334. Distinguish this case from *Edmeades v. Reitz* (Dec. 1880).

(t) *Loxton v. Staples*, 1 A. 381. *Myburgh v. Jamison*, 4 S. 8.

*Oudlshoorn*,<sup>(u)</sup> it was held that where the owner of a dominant tenement having certain water-rights over a servient tenement acquired such servient tenement, the union did not cause a loss of the right to water by subsequent purchasers of the dominant tenement. This judgment is of great legal importance.

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(u) 2 Ros. 73.

## OPINION No. 60.

HOLL. CONS. III. B. 300.\*

[GROTIUS II. 41, 7 & 8.]

Feuds—Succession—Restitution.

1. FEUDS, according to the general law of Holland, descend upon the eldest in lineage, and males were preferred to females.

2. Where a disposition speaks of the first succession, it cannot be extended to subsequent ones.

3. No restitution need be made with regard to feuds, excepting such as were afterwards acquired by purchase, and then only at the first succession. (See also Opinion No. 54.)

I have seen a certain declaration made by Gheen Dirks in 1536, wherein he stipulated that certain feudal property, given to him and his wife at the time of their marriage, should be equally shared by his four children. To this arrangement Steven, his eldest son, and the feudal lord, consented. I have also been informed that in consequence thereof the

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\* I have consulted various editions of the Holl. Cons., and find that in all of them a leap is at once made from Cons. 199 (cxix.) to Cons. 300 (ccc.). This is evidently an error, curiously repeated in all editions.—[TR.]

feudal property came into the hands of the four sons, Steven, Pieter, Dirk, and Luyt, and that Steven left a son, Cornelius, and Pieter a daughter, Maritge. Cornelius and Maritge are both living, but the children of Luyt and Dirk had died without leaving any descendants.

In consequence of this I have been asked whether the portions of the aforesaid feud which had belonged to the children who left no descendants must go to Cornelius Stevensz alone, or also to Maritge Pieters; and also whether any restitution should be made to the widow of the aforesaid Pieter Gheen.

(1) I am of opinion that, according to the general law of Holland, the afore-mentioned portions must go to the said Cornelius Stevensz alone, since no nearer relative of the deceased existed, and that he, as a male successor, must be preferred to the said Maritge Pieters. (2) The afore-mentioned disposition of 1536 is not contradictory to this, for it only refers to one succession, namely, after the decease of the said Gheen Dirks, and does not lay down any subsequent line of succession, as clearly indicated by the words there used, nor could such be done. (3) Restitution need not be made in the present case; for no restitution need be made with regard to feuds except such as were subsequently purchased, and then only at the first succession.

ROTTERDAM,

*Date uncertain.*

## OPINION No. 61.

HOLL. CONS. III. B. 170.

[GROTIUS II. 41, 32.]

Who has to pay the rent on feudal property—How if secured by property specially hypothecated—A mortgage is accessory to a principal debt.

1. THE full amount of rent due on a feud must be paid yearly by the successor to the feud, but the heirs of the deceased are not liable for any part thereof. If such rent is secured by other landed property, the owner of this property can be sued for the rent, as owner and possessor of the hypothecated property. The owner has recourse against the possessor of the feud. (*Vide* No. 3.)

2. Hypothecation is merely an accessory of a principal debt.

I have seen a certain title of investiture made by Nicolas, Lord of Assendelft, in favour of Gerrit van Soelen on the 10th of August 1541, and also a testament of Jasper van Soelen, son of Gerrit, dated 15th September 1590.

Gerrit van Soelen, eldest son of the said Jasper, took, as his portion of the inheritance on the death



of his father, the feudal land situate in Cralingen, as mentioned in the investiture, paying in consideration thereof the sum of twelve guildens to his sisters, as stated in the testament of his father. Gerrit died, and the afore-mentioned feuds devolved on his brother, Gijsbert van Soelen, who for some time continued to pay the rent. *Quæritur*, whether Gijsbert can rightly maintain that the said rent due after his brother's death, paid or unpaid, is not to be met by him alone, but only *pro rata* in respect of his share as heir to his brother?

(1) I am of opinion that the contention of Gijsbert van Soelen cannot be upheld, for the rent was not simply imposed as a burden on Gerrit van Soelen, but specially in consideration of the feud. This was done with good reason, for the said feud was allodial property, in the first instance, which belonged to Gerrit van Soelen the elder, but was converted into feudal property for certain considerations, but with special reservation of the right to impose a rent on the property, and to have free disposition thereof by testament. Whence it may be inferred that it was not his intention, at the time he imposed the rent, to confer greater benefits on one child than on another, but rather to preserve a certain equality amongst them; and Jasper van Soelen abided by this intention, as appears from his testament, wherein are found the words, "in consideration of the aforesaid feud." It is therefore clear that not the heirs of Gerrit van Soelen, as heirs, but the possessor of the feud, as possessor, are liable for the rents, as understood by

the said Gijsbert van Soelen himself, for after the death of his brother he paid the stipulated rents alone.

The words of the testament of Jasper van Soelen are not inconsistent with this, where it is stated, "The said Gerrit van Soelen is bound to have the said rent secured on his other landed property, inherited from the testator." His landed property was divided and shared by the sisters and Gijsbert van Soelen. (2) And since the hypothecation was merely accessory to the principal debt, which was incurred with respect to the said feudal property, and not to the allodial as well, (3) this burden is of such a nature that, even if the said Gerrit van Soelen had disposed of his other property to strangers, either during his lifetime or by testament, these strangers, when sued for the rent as owners of the hypothecated property, will have their recourse against the possessor of the feud.

ROTTERDAM, 1618.

## MORTGAGES.

OPINIONS Nos. 62, 63, 64, 65.

The next four Opinions treat of mortgages in special cases.

The subject is one of the utmost legal importance, for in one form or another it pervades most branches of law. A special chapter would have been devoted to it at this stage, especially with reference to South African case law upon the subject. The whole matter has, however, been gone into by Mr. Van Zijl in his very recently published "Theory of Judicial Practice," where the law-student and practitioner will find a scholarly, correct, and detailed revision of the whole law in relation to mortgages. It has on that account been deemed advisable not to insert a fresh and lengthy commentary here; for very little fresh matter could be imported into the discussion, and in other respects it would necessarily be a repetition of the various decisions there referred to.

MORTGAGES.

OPINION No. 62.

HOLL. CONS. V. 133.

[GROTIUS II. 48, 6 & 16, II. 11, 17, I. 7, 11, & I. 9, 12.]

Hypothecs—Ante-nuptial contract—Writ of execution against property of the wife—Insolvency—Vigilant creditor—Undue preference—Tacit hypothec of children on father's estate for maternal portion—*Witkoop*—Security to be given by guardians—Liability of Orphan Masters in default.

1. THE property of the wife, declared by ante-nuptial contract to be not liable to execution for the debts of the husband, cannot be taken in execution for such debts.

2. Any security given by an insolvent debtor for the benefit of his creditor, who knew of the insolvency, is void.

3. The children have a legal hypothec on the property of their father for their maternal portions, but not for the amount due to them by their father by virtue of the purchase of the estate (*witkoop*).

I have seen a certain ante-nuptial contract entered into between Christiaan Belly and Maike Ruischer-

hout, and have considered the questions asked in connection therewith, as well as other matters.

I am of opinion that the creditors of the said Belly before the marriage was contracted cannot attach under a writ of execution' the property of Maike Ruischerhout, brought by her into the estate at the time of the marriage, in order to satisfy their claims ; for the said property was expressly exempted from such execution by ante-nuptial contract. This is also the case in respect of those creditors whose names, with the amounts due to them, respectively appear in an inventory drawn up by Belly. As regards such property as was brought into the estate at the time of the marriage by Maike Ruischerhout, but subsequently alienated (*stante matrimonio*), she cannot be preferred before the other creditors for the value thereof, nor can she rank as a concurrent creditor, for she has no action as yet for such amount, but she or her heirs will only be entitled to claim it upon the dissolution of the marriage.

I am further of opinion that although a creditor has every right to be vigilant in order to secure payment of or security for any debts that are or may become due to him, nevertheless such security, if obtained after the debtor and the person demanding the security knew of the insolvency, may be challenged and set aside by the Judge as being *in fraudem creditorum*, according to the universal opinion of juriconsults, especially if other creditors have also claimed payment or security. It is, therefore, to be feared that the hypothec obtained by the

said Maike Ruischerhout from her husband for the restitution of her property will be of no effect.

(3) I am also of opinion that if the said Belly, in his capacity as guardian or administrator over the maternal property of his children by his first wife, is still indebted to them in any amount, they are entitled to a tacit hypothec over the whole estate of the said Belly, and must be preferred before other creditors. But if he is merely indebted to them on the purchase of the estate (by *witkoop*), the said children, if they have no general or special mortgage, must rank concurrently with other creditors. The right is, however, reserved to the children, in case of any deficiency, to proceed against their guardians, or even eventually against the Orphan-Masters, since they have allowed the said Belly to get possession of their (the said children's) mother's estate without taking any security from him for the money he promised as consideration.

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#### UITKOOP.

This is an agreement whereby a surviving parent buys out the inheritances of the children due to them from the estate of their deceased parent. In this manner the surviving spouse to a certain extent remains in possession of the "*boedel*" or estate.

When objection is taken to the sale of the estate by the heirs, a voluntary partition may take place, unless prohibited by the will of the deceased.(a)

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(a) See Grotius, 2, 21, 6, and 3, 28, 6.

In Tennant's *Notary's Manual*, chap. 6, will be found a form for the execution of a deed of *witkoop*.

The court will order partition of the property where such is clearly for the benefit of the minor heirs. Formerly this order could not be obtained merely upon application, and an action had to be instituted for that purpose.(b) This method of procedure has now been altered, and the court will grant the necessary order, the partition to be approved of by the Master of the court.(c)

This subject has already been incidentally referred to when the partition of the estate of a deceased parent was considered, p. 51.

§ 2 of the present Opinion refers to the *undue preference of creditors*. This matter will be fully dealt with in the commentary on Opinion No. 66.

The *tacit hypothec of minors* is referred to in the two succeeding Opinions as well. A short note thereon is appended to the next Opinion, No. 63.

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(b) *Re Minors*, Van der Walt, Buc. 1869, 290.

(c) *Re Campher*, *Ex parte* Marnitz and Campher, 5 J. 75.

## OPINION No. 63.

HOLL. CONS. III. B. 302.

[GROTIUS II. 48, 16; I. 7, 11; I. 9, 12.]

Insolvency of guardian—Appointment of another—Preference of ward—Rights and liabilities in case no security had been given by guardian.

1. UPON the insolvency of a guardian, the nearest relations of the ward must petition the court for another competent guardian. The ward has preference before all other creditors, whether secured by a general or special bond, after the commencement of the guardianship.

2. Those who neglected to see that the guardian gave security to the court for his proper administration, in consequence whereof the ward could not recover from the guardian the debts due to him, will be liable for the loss.

Cornelis Heyndriks died in Direxland, leaving an orphan named Magdalena Cornelis. Jan Wouters, who had married the widow of the said Cornelis Heyndriks, mother of the orphan, was appointed guardian by the Schout and Schepenen of Direxland, but he did not give proper security for his



administration. It is now ascertained that the said Jan Wouters is insolvent, and that large sums of money are owing to the orphan. I have been asked what the maternal grandfather of the orphan (there being no relatives from the father's side) is to do in order to preserve the rights of the child.

(1) I think that the afore-mentioned grandfather should petition the Schout and Schepenen that another competent guardian be appointed in the place of Jan Wouters, and that such guardian should proceed against the estate of the said Jan Wouters, and maintain the preference of the orphan before all creditors, whether they were secured by general hypothec or not, and also before all who were secured by special mortgage, after the commencement of the guardianship. This contention is in accordance with law and the rights of the ward.(a) (2) Should the ward be unable to recover the debts due to her from the estate of the said Jan Wouters, she, or her guardian for her, can proceed against and recover the deficiency from those officers of the court who did not see that the said Jan Wouters gave security for his administration.(b)

ROTTERDAM,  
*July 1616.*

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(a) C. 5, 37, 20.

(b) D. 27, 8, 1, 11.

## REMOVAL OF GUARDIANS.

Under the Insolvent Ordinance an insolvent guardian is not *ipso facto* deprived of office. He may be removed upon application, but when he has been rehabilitated he cannot be removed on the ground of prior insolvency.(c)

A guardian is liable to privation of office for misconduct, such as habitual intoxication.(d)

SECURITY GIVEN BY GUARDIANS AND THE TACIT  
HYPOTHEC OF MINORS.

Under Roman law the assumption of office by a tutor was obligatory, and in the administration of the estate of his ward he was held directly responsible. For this purpose several remedies were afforded.

1. *Actio tutelæ directæ*.(e)
2. *Actio utilis tutelæ directæ* (f)
3. *Actio de rationibus distrahendis*.(g)
4. Special actions for damages, *condictio furtiva*, *damni injuria*, &c.(h)

These actions are fully discussed by Hunter in his treatise on Roman Law.(i)

In addition to these remedies, the ward was entitled to a legal hypothec or *pignus ex lege*.(k)

The Roman-Dutch law followed the same legal principles.(l) The ward under Dutch jurisprudence was allowed

(c) De Villiers' Tutor v. Stukeris, 1 Menz. 378, and Heydenreich v. Curator of Sandenberg—*In re Wicht*, there quoted.

(d) Nettleton v. Kilpatrick, 1 Ros. 190.

(e) Digest, 27, 3, 4; D. 27, 3, 1, 16; D. 26, 1, 7; D. 27, 3, 4, 1; D. 27, 3, 6; D. 26, 7, 7, 10; D. 26, 7, 7, 4, and C. 5, 56, 1; D. 29, 7, 7, 7-10.

(f) Digest, 46, 6, 4, 3.

(g) Digest, 27, 3, 2; D. 27, 3, 1, 24; D. 27, 3, 1, 21.

(h) Digest, 27, 3, 9, 7.

(i) Pages 543-544.

(k) Code, 5, 37, 20; Digest, 26, 7, 5, 4, and 9, 1.

(l) Grotius, 2, 48, 16; Holl. Cons. i. 299, 300.

a tacit hypothec over the estate of his guardian, and such hypothec dated from the assumption of the guardianship.(*m*) It ranked in order of date in competition with other legal or conventional hypothecs, except *kusting-brieven*.(*n*) This hypothec is extended to the debts due by the guardian even before he assumed office,(*o*) and the rights of the guardian are transmitted to his heirs, and do not necessarily terminate immediately upon the termination of tutelage.(*q*) This also applies to a parent guardian.(*r*)

Security must be given by the guardian, and it was the duty of the proper officers to see that the amount administered was sufficiently secured in surety bonds if the property of the guardian was insufficient for that purpose.(*s*)

At the Cape of Good Hope the hypothecary action or claim of a minor is prescribed after three years from the time of the termination of the tutelage or after majority. If the ward was absent at that time from the Colony, he is allowed a period of three years, dating from the time of his return, but in no case is the period of prescription to be extended beyond five years from the time of majority.(*t*)

The minor's hypothec upon the estate of his pro-tutors, agents of tutors, and assumed, substituted, or surrogated tutors is repealed, but he retains his full legal rights upon the estate of his surviving parent.(*u*)

Tutors testamentary at the Cape can be ordered by the court to give proper security, *rem pupilli salvam fore*.(*v*) Tutors dative and curators dative must give proper security

(*m*) Schorer ad Grot. 2, 48, 37.

(*n*) Schorer, *ib.* Van der Keessel, Thes. Sel. 437. Opinion No. 64, Holl. Cons. 3 (b.) 174. *Vide In re Blommestein*, 2 M. 378.

(*o*) Voet, 20, 2, 7. Holl. Cons. i. 18. Van der Keessel, Thes. 421.

(*q*) Van der Keessel, Thes. 421. Schorer ad Grot. 2, 48, 16. Voet, 20, 2, 18 and 19. Holl. Cons. 4, c. 382.

(*r*) Holl. Cons. Vervolg. d. ii. Cons. 21.

(*s*) Schorer ad Grot. 2, 48, 16. Schomaker, Cons. et Resp. Jur. p. 4, C. 16, n. 20, 21. Opinions No. 62 and 63 (Holl. Cons. 5, 133, and 3 (b.) 302).

(*t*) § 3, Act No. 5 of 1861.

(*u*) § 8 (3) Act No. 5 of 1861.

(*v*) § 5, Ord. 105 of 1833.

to the Master of the Supreme Court before they can assume office,<sup>(x)</sup> and provision is made for a proper registry of these securities.<sup>(y)</sup>

The guardians must act under letters of confirmation of their appointment; if they acted without such letters of administration, they are pro-tutors and not tutors, and consequently the heirs, in terms of Act 5 of 1861, § 8 (3), will have no tacit hypothec upon their estates.<sup>(z)</sup> The appointment of guardians for minor heirs does not include minor legatees, who have therefore no preference on the estate of the guardian.<sup>(a)</sup>

When the guardianship of a minor is undertaken by several co-guardians, but one only administers the minor's property, they are all liable, but the hypothec of the ward over the estate of the co-guardians is postponed until after the excussion of the administering guardian.<sup>(b)</sup> And in order to be considered as an administering guardian, the law will require any act of administration, however slight, *e.g.*, signing the liquidation account.<sup>(c)</sup>

If some of the co-guardians are insolvent at the date of majority, the minors can recover in full from the solvent guardians; but not if insolvency has ensued after the date of majority.<sup>(c)</sup>

The co-guardians may arrange among themselves for the chief administration by one of their number, he to be first excused for any damages accruing from acts of commission; but for the consequences of his omission all will be equally liable *in solidum*, with the benefit of division, but not of excussion.<sup>(d)</sup> A co-guardian who has paid out of his own funds to his ward an amount misappropriated by his co-

(x) § 14, Ord. 105 of 1833.

(y) § 41, Ord. 105 of 1833.

(z) *Redelinghuys v. Watermeyer*, Buc. 1870, p. 57. *Barry's Trustee v. Hodgson*, 3 J. 249.

(a) *In re Dusing*, 1 Menz. 480.

(b) *In re Liesching*, 2 Menz. 353.

(c) *Niekerk v. Niekerk*, 1 Menz. 452.

(d) See *In re Liesching*, 2 Menz. 347; *Van Niekerk v. Van Niekerk*, 1 Menz. 452.

tutor, has a good action against such co-tutor, but he does not acquire the minor's tacit legal hypothec against the co-tutor without cession.(e)

Over the estates of persons who have granted bonds in favour of minors, but who were not their guardians, they have no tacit legal hypothec.(f)

On the estates of executors, heirs or legatees who are minors have no tacit legal hypothec for losses incurred in their administration, and whilst acting in their capacity as executors.(g)

Children in a foreign country, who, according to the laws of that country as well as of the Cape Colony are minors, are entitled equally as minors in the Colony to a tacit hypothec on the estate of their guardians in connection with property within the Colony.(h)

The tacit hypothec of children on the estate of their guardian parent is lost by a deed of *kinderbewijs*. Where such *kinderbewijs* contained only the "general clause," and no special hypothecation, it will be postponed in the ranking of creditors to the general clause, contained in a special conventional hypothec of anterior date.(i)

The guardian cannot dispose of or otherwise burden the immovable property of his ward without leave of the court; and if no beneficiary results for the minors accrue from any such transaction entered into without leave of the court having been previously obtained, the court will cancel the same,(k) and the guardian will be personally responsible for any damage.(l)

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(e) *Wolmerans v. Cloete*, 3 Menz. 74.

(f) *Blanckenberg v. Lond's Executors*, 1 Menz. 483.

(g) *Voet*, 20, 2, 14. *In re Minnaar*, 3 Menz. 71.

(h) *In re Sandenbergh—Mathyssen et Curatores Filiorum v. Sandenbergh's Trustees*, 2 Menz. 353.

(i) *Naude v. Naude's Trustee*, Buc. 1869, 166.

(k) *Trollip v. Harper*, 3 E. D. C. 240, *In re Roselt and Inglis*, 1 *Kotze*, (S. A. R.), 13. *Assue v. Curator Assue*, 1 Menz. 148.

(l) *Munnik v. Neethling*, 3 Menz. 80. See *Liquidators of Cape Commercial Bank v. Porter*, 3 J. 65, for duties of guardians in respect of investments of funds belonging to wards.

Guardians are liable for everything done in the execution of their trust, and they must give proper account of their administration. They are, however, not liable for accumulated interest exceeding the capital amount due to the minors.<sup>(m)</sup>

A guardian entering into litigation on behalf of his wards must first obtain authority from the court in order to protect himself. If he neglects to do so, and is eventually unsuccessful, he will be personally liable for the costs incurred, and has no recourse against the minors.<sup>(n)</sup>

A person who acts and describes himself as guardian, (pro-tutor) is liable for all actions done by him as such.<sup>(o)</sup>

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<sup>(m)</sup> Niekerk v. Niekerk, 1 Menz. 452.

<sup>(n)</sup> Prince q.q. Dieleman v. Berrange, 1 Menz. 435.

<sup>(o)</sup> Voet, 20, 2, 17, and 27, 5, 1. *In re Hoffman*, 1 Menz. 534.

## OPINION No. 64.

HOLL. CONS. III. B. 174.

[GROTIUS II. 48, 16, 28, 29.]

Mortgage—Pledge,—general, legal, and special—What is effect of general bond when delivery has not taken place—Collusive and colourable delivery—“Meubele heeft geen vervolg van hypotheek”—Interpretation of a custom which abrogates or is contrary to the common law—The legal hypothec of wards.

1. NOT only in Amsterdam, but also throughout Holland and in other countries, it was observed as a fixed and established rule, law, and custom that a general mortgage bond, whether passed before the Schepenen or the Orphan-Master, or as a legal hypothec or otherwise, whereby wares and other movable property, including obligations, bonds, actions, and similar property are mortgaged, is extinguished when the property is alienated by the debtor under an onerous title, and also when the said property has been transferred and delivered to a third party in security for a debt due to him, in the presence of a notary and witnesses or otherwise. The holder of such general mortgage bond is postponed to him who is in possession of the property

and has obtained transfer as security for debts due to him until such debts have been fully satisfied.

2. This practice also obtains when the goods nominally transferred remain *precario* in the hands of the transferor, if the deed of transfer states that the transferee can at all times take possession of the property on his own authority. If, under these circumstances, the transferor alienates the property to another, and transfers it to him by delivery, such deliverer has a preferent claim.

3. Movables cannot be followed in case of mortgage.

4. *Consuetudo recedens a jure communi* must be interpreted *in strictis terminis*.

5. When the owner of goods is said to use them *precario*, or until prohibited by the person to whom they have been pledged as security, there cannot be any delivery, but, on the contrary, such stipulation conveys a suspicion that the transaction is colourable and collusive.

6. The legal hypothec in favour of orphans over the property of their guardians is, according to our law, of the same force as a special mortgage. Such hypothec begins with the commencement of the curatorship, and gives a preferent right over all mortgages and securities of a later date.

7. A ward has a preferent right over unsatisfied debts which do not arise from a public document, acknowledgment of debt, or bill of exchange, but are dependent on certain lawsuits to be decided, or exist in mutual accounts and are incapable of delivery.



He also has a preferent right in respect of public documents, acknowledgment of debts, or bills of exchange not yet delivered to third parties.

8. Should a creditor have obtained transfer and mortgage of the movable property of his debtor, knowing that the debtor's immovable property will most likely not cover the debts due by the guardian (the debtor) to his wards, the wards can revoke and have set aside such transfers and mortgages of movable property and acknowledgments of debts delivered to such creditor, and still in existence. If the *actio revocatoria* is not instituted within a year, relief can be obtained subsequently.

On May 31, 1613, appeared before the Schepenen of the city of Amsterdam Messrs. Jan de Witte, Pieter Kloek, Jan Ingels, and Dirk Buys, advocates, Salomon Hendriks and Daniel Mostaart, doctors of law and secretaries of the city; Hendrik Boelis, Hugo van Groenewegen, R. Jes, Jan van Braay, J. W. Swart, J. Pieters, B. and G. Wolff, attorneys practising in the city; F. Ijsbrandts, J. Meerhout, N. Jacobs, J. Westhusius, S. and P. Ruttens, S. Cornelis, B. Badel, and Jan Derhey, notaries of the city, all summoned at the instance of Jacob Jacobs, also a notary of Amsterdam. (1) These men, as a crowd of witnesses (*by forme van turbe*), gave evidence under oath, and deposed that they were acquainted with the fact that it had been observed as a fixed and established rule, law, or custom within the city of Amsterdam, and obtained as such for as long as

they can remember, that a general mortgage bond or hypothec which exists over the goods of a debtor by virtue of a bond passed before the Schepenen or the Orphan-Master, or arising from a legal hypothec or otherwise, cannot be taken to affect the wares and other movable property, including bonds, acknowledgments of debts, and rights of action, other than such as are still found to be unalienated and belong to the debtor or his estate at the time when the hypothecary action was instituted. This general bond is immediately extinguished in respect of the said property as soon as it is alienated by the debtor under an onerous title and delivered to a third person, and also whenever such property has been transferred and delivered to a third party in security for a debt due to him, in the presence of a notary and witnesses or otherwise. And the holder of the general bond or hypothec cannot claim the said property for payment of his bond before the debts of those who have possession by delivery for their greater security have been fully paid.

(2) This law is also followed when the nominally transferred property remains *precario* in possession of the transferor and the deed of transfer states that the transferee can at all times take possession of the property on his own authority. And if the transferor who is in precarious possession alienates or transfers the property by delivery, a person who obtains *bona fide* possession thereof is also preferred to the mortgagee. All this is deducible from the maxim or saying in use amongst us, that movables

cannot be followed in case of mortgage—*dat meuble geen vervolg van hypotheecq heeft*.

(3) They also declare that, for the same reasons, this rule was also observed in respect of those having a special hypothec over property still in possession of the debtor. Should any one, therefore, after the passing of such special bond, obtain *bona fide* possession of such property of the mortgagor, whether through sale, exchange, assignation, delivery as security for debt, or any other onerous title, he will be preferred to the holder of such special mortgage over the same property; for it must be taken for granted that the holder of a special mortgage over movable and similar property puts great faith in the mortgagor when he leaves him in possession without interdicting the property. From the evidence it appears that they are all practitioners of long standing, some having practised in Amsterdam for over thirty years, and many for over twenty years.

I have seen the documents in a certain suit pending before several arbitrators between Johan de Laat, as guardian of the minor children and heirs of the late Anthony van Surch, and Anthony van Surch, son of the deceased, who has obtained *venia aetatis*, assisted by the said De Laat, plautiffs, and Guillaume Bartelotti, merchant of Amsterdam, defendant. I have considered these documents, and especially certain evidence given by a crowd of witnesses before the Schepenen of Amsterdam in May 1631 to prove a custom therein mentioned.

I am of opinion that, considered with reference to its extensive interpretation, this custom, which was alleged by the defendant to be of legal effect, and was partly proved by the evidence adduced, goes farther than the common written law; (a) and that when taken in its widest sense, it would be very detrimental to many wards who have a legal hypothec on the property of their guardians. (4) It must therefore be interpreted *in strictis terminis*, tanquam recedens a jure communi et in illa extensione minime favorabilis. In the first place, the plaintiffs have for this reason a preferent right in respect of the movable property of Emanuel, which remained in his possession and under his control, and was not at once actually delivered to the said Bartelotti, and, moreover, the afore-mentioned custom, which obtains not only in Amsterdam, but also over the whole of Holland and in other countries, refers to goods which have been delivered, and delivery cannot be said to have taken place where the property is left in the house of the owner. (5) The allegation of the owner, that he was merely using the property *precario* or until prohibited by the person to whom they have been pledged as security, need not be considered, for this is not delivery; but, on the contrary, such stipulation conveys a suspicion that the transaction is colourable and collusive. (b)

(6) Secondly, The said legal hypothec has, according to our law, the same effect as a special mortgage;

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(a) *Vide* D. 20, 5, 1.

(b) D. 20, 6, 8, 7.

and since the said legal hypothec is of earlier date than the transfers and securities obtained by the defendant, *cum hypotheca hæc censenda sit incepisse, cum incepta tutela*, which occurred in 1616, it must be held to exist, and to give the plaintiffs a preferent right over all the debts due to the aforementioned Emanuel van Surch, (7) which have not yet been settled, and do not arise from public deeds, acknowledgments of debts, and bills of exchange, but from pending suits in which judgment has not yet been given, or from mutual accounts; for these assets are not of such a nature that they can be actually delivered, *quod non convenit nisi rei corporali*. This is applicable also to debts due to Van Surch on public deeds, acknowledgments of debt, and bills of exchange, if such bills, &c., are not in possession of the defendant (Bartelotti).

(8) Thirdly, If the plaintiffs can prove the defendant knew, at the time that he obtained the transfers and securities, that Emanuel van Surch was indebted to the orphans, the plaintiffs in the present action, in a greater amount than could be recovered from his immovable property, they will be entitled to revoke and cancel the said transfers and pledges of the movable property, and the acknowledgments of debt, &c., which were delivered to the defendant and are still in his possession, to the extent to which they have been prejudiced thereby.(c) Under these circumstances the orphans are entitled to relief

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(c) D. 42, 8, 1 and 22. *Quæ leges tam de alienationibus agunt, quam de oppignorationibus.*

although the *actio revocatoria* had not been instituted within a year.

*February 26, 1632.*

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MOBILIA NON HABENT SEQUELAM—MEUBELE HEEFT  
GEEN VERVOLG VAN HYPOTEEK.

This rule of law must be strictly interpreted and is not to be extended.(d) Where movables have been left in the hands of the pledgor or mortgagor, and have been subsequently alienated by him, they cannot be recovered by the pledgee or mortgagee from a *bona fide* possessor.(e)

Under Roman law movables could be followed everywhere, but the vindicatory action in respect of such chattels was not allowed under Roman-Dutch law.

Movables can be attached, and the effect of such attachment is that a *pignus prætorium* or *pignus judiciale*, which is equivalent to a *pignus mobilium*, is constituted.

(*In re Lond*, 3 Menz. 102. *In re Woeke*, 1 Menz. 554. *Cloete v. Colonial Government*, 2 Menz. 312. *Diering v. Furney*, 1 G. 112.)

## DELIVERY—TRADITIO.

The doctrine of delivery occupies a unique position in the Roman-Dutch jurisprudence, as will be seen when the decisions in connection therewith are discussed. It constitutes a characteristic and essential feature of very many legal transactions. In all contracts made *re* (by acts), in opposition to those made *verbis, litteris aut consensu*.(f) delivery is absolutely essential. These contracts are usually considered as four in number, *depositum, mutuum, commoda-*

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(d) Voet, 6, 1, 12. See also Van der Merwe *v. Webb*, 3 E. D. C. 97.

(e) Schorer *ad Grot.* 3, 9, 7. Grotius, 2, 48, 29. Opinion No. 63 (*supra*), and Holl. Cons. 1, 196. O'Callaghan's Trustees *v. Cavanagh*, 2 J. 122. Guest *v. Trustee of Le Roux*, 5 J. 119.

(f) Justinian, 3, 13, 2. Gaius, 3, 89.

*tum*, and *pignus*. In addition to these, delivery also plays a most important part in the transfer of personal and real rights.

Alienation of ownership under Roman law was effected sometimes by the *jus naturale*, as by delivery, and sometimes by the *jus civile*, as by *cessio*, *usucapio*, and *mancipatio*.(g) In like manner the acquisition of ownership was rendered possible by means of tradition, and Justinian lays it down that corporeal things of whatever kind can be delivered, and by delivery be alienated.(h) Incorporeal things could not admit of delivery. It must, however, be noted that although the aggregate or totality of rights constituting *dominium* is quite as much incorporeal as only certain portions of this plenary ownership, such as servitudes or usufructus, yet the Roman jurists were satisfied to hold that delivery was unnecessary for the conveyance of qualified rights, whereas for the conveyance of the full rights of ownership delivery was necessary.(i)

The further remarks in this article will be confined to delivery as an essential in the conveyance (1) of movable and (2) of immovable property.

Real rights, or *jura in re*, can only be validly transferred to another.

A. By the owner of the property.

B. When there is an intention to transfer ownership.

C. Where change of possession by delivery according to law has taken place.

A. None but the real owner can give and transfer full ownership.(k) A delivery by the transferor can never give the transferee any greater right than was vested in such transferee at the time of delivery (l)—*nemo plus juris ad alium transferre potest quam ipse haberet*.(m) For this

(g) Gaius, 2, 65.

(h) Instit. 2, 1, 40.

(i) See Hunter's Roman Law, p. 142.

(k) Van der Merwe v. Webb, 3 E. D. C. 97, and Daniels v. Cooper, 1 E. D. C. 174.

(l) Digest, 41, 1, 20, pr.

(m) Digest, 50, 17, 54. Current coin, bank-notes, &c., are, however, excluded from the operation of this rule. Woodhead, Plant & Co. v. Gunn (Sup. C. Feb. 1894).

reason land subject to a servitude passes to the transferee burdened with the servitude, and the transferor cannot give a clear title.<sup>(n)</sup>

*B.* There must be an intention to transfer the rights in question. This intention must be indicated by some consideration *justa causa*, which was either *causa onerosa* (valuable consideration) or *causa lucrativa*—e.g., *pro dote*, *pro legato*, &c., such *causa* being one of the facts which conclusively proved the intention to transfer, whilst delivery is a method of unequivocally attesting the change of possession and the transference of physical control.

This intention must exist at the time delivery is effected.<sup>(o)</sup> If the intention is wanting, the delivery will be considered incomplete and of no effect,<sup>(p)</sup> and very often all the circumstances of the case must be taken into careful consideration in order to come to a correct decision as to the real intention of the transferor.<sup>(q)</sup>

Fraud vitiates delivery, and a fraudulent intention is, of course, of no avail.<sup>(r)</sup>

Suspensive and resolute conditions in delivery will be treated of when we come to discuss direct or real delivery.

*C.* Delivery, as above stated, is used as a method of unequivocally attesting the change of physical control. Without it transference of *jura in re* is impossible. *Non pactis aut obligationibus sed traditione dominia transferuntur.*<sup>(s)</sup>

The foregoing remarks, as well as the definitions of delivery given below, are applicable to movable and immovable property alike. The rest of the remarks on the different kinds of delivery are strictly applicable to the conveyance of movables. The transfer of immovable property will be discussed later under a separate heading.

<sup>(n)</sup> Digest, 40, 1, 20, 1.

<sup>(o)</sup> Digest, 41, 3, 44, 1.

<sup>(p)</sup> *Fazi Booy v. Short*, 2 E. D. C. 301. *Daniels v. Cooper*, 1 E. D. C. 174.

<sup>(q)</sup> *Rens v. Bam's Trustee*, 2 Menz. 87. *Long v. Randall*, 1 E. D. C. 62.

<sup>(r)</sup> See footnote <sup>(q)</sup>, and *Lean's Trustee v. Cerruti*, Buc. 1879, 313.

<sup>(s)</sup> Opinion No. 66 (Holl. Cons. 3 (b.) 176).



“Delivery,” says Boey, “is the transfer of the possession of a chattel, whereby the transferee becomes the possessor or owner.”(t)

According to Voet, “Delivery constitutes a third mode for the acquisition of ownership, and is *de manu in manum datio*; seu *translatio possessionis*. It is divided into real and constructive delivery (*vera et ficta*). It is *real* when the corporeal chattel, movable or immovable, is transferred, ordinarily by delivery from hand into hand, or by establishment in possession.(u) *Constructive*, when the delivery, which has not actually occurred, is understood.

“This (constructive) again consists of three kinds: the first is *traditio brevis manus*, the next *symbolic*, and the last *longæ manus*. That is called delivery *brevis manus* by which a thing, previously delivered under one consideration, is again understood to be delivered under a new consideration, so much so, that by the quickness of the operation either the single or double act of delivery is hidden. *Symbolic* is that which is made by external symbol or sign in place of tradition, in which manner, when the keys of a store have been delivered near the store itself, the wares in the store are considered delivered. Delivery is said to be *longæ manus* when the chattel to be acquired by me is placed in view before me.”

The following table shows concisely the various kinds of delivery. It is inserted here for convenience of reference previous to entering into a detailed discussion.

I. Actual or real or direct delivery.

	{	1. <i>Brevis manus</i> .	{	1. Ordinary.
				2. <i>Constitutum possessorium</i> .
				3. By testamentary bequest and upon insolvency.
II. Constructive delivery.	{	2. <i>Symbolic</i> .	{	1. Ordinary, by means of marks, keys, &c.
				2. Cession of right of action.
				3. By title-deeds.
	{	3. <i>Longæ manus</i> .	{	1. Ordinary
				2. Quasi-delivery of servitudes.

(t) Boey's Woordentolk, *sub voce* “*Traditie*.”

(u) Voet, 41, 1, 34.

I. *Real delivery* takes place when actual possession is given to the transferee or his agent, who is to exercise the future control, by the transferor or his agent, or according to Voet, when there is a *tradition naturaliter* from hand to hand.

Delivery must be made by the owner or his agent, for, as already stated, no one but the owner can give valid and effectual delivery.(v)

Likewise it is necessary that the tradition should be made to the person who is to exercise the future physical control, or to his agent.(x)

It would be useless to go over all the cases connected with this subject. The case of *Rens v. Bam's Trustee* (y) is one of the leading cases, and serves as an excellent illustration of incomplete and colourable delivery. The facts as reported were as follows:—Rens had bought and got delivery of a cart, horses, waggonette, dray, and harness from Bam, and subsequently let them to Bam. Bam then became insolvent, and his trustee got possession of the articles, whereupon Rens sued him for re-delivery. It was proved in evidence that a man Lotz had been called in to witness the sale to Rens, and Rens said to him in the presence of Bam, "There stand eight horses with their harness, and a covered waggonette standing before the door, and a cart which has gone out into the country, and these I have bought from Mr. Bam, but have let them to him again." Bam then added, "This is the case; I have sold them to Mr. Rens, and I have hired them from him." Bam further informed Lotz that he had sent for him to witness the sale to Rens, in case of the death of either the purchaser or himself. This was held by the court not to have been a *bona fide* sale, lacking, as it did, real and *bona fide* delivery, which is essential to the transfer of *dominium*. The court refused, under the circumstances, to consider the

(v) See too *Van der Merwe v. Webb*, 3 E. D. C. 97.

(x) *Long v. Randall*, 1 E. D. C. 62. *Fenton v. Boyle & Co.*, 2 G. 575.

(y) 2 Menz. 89. See also *Orson v. Reynolds*, 3 G. 219. *Trustees of Corbridge v. Haybittel*, N. O. 3 G. 259.

transfer effected *brevi manu*, evidently on the ground that such was never contemplated by the parties, but that they had intended to effect real delivery and had failed.(z) It must, however, be remarked that in all transactions of this kind the court will demand the clearest and strongest proof, for, especially when insolvency supervenes, they must always be tinged with a suspicion of *mala fides*.

“When,” says Grotius in Opinion No. 64, “the owner of the goods is said to use them *precario*, or until prohibited by the person to whom they have been pledged as security, there cannot be any delivery, but, on the contrary, such stipulation conveys a suspicion that the transaction is colourable and collusive.”

See also *Fivaz v. Boswell*, 1 S. 235. There the respondent in appeal, an auctioneer, had sold to one Samson certain property at twelve months' credit. On the expiration of that term Samson was unable to pay, and he brought a waggon and oxen to Boswell in satisfaction of his debt. Boswell marked the waggon and branded the oxen, and lent them to Samson for a month. Four months afterwards a judgment creditor of Samson arrested the waggon and oxen in Samson's possession. *Held* that the seizure was good and effectual, for the circumstances gave rise to a strong presumption of fraud. (*Et vide Le Riche v. Van der Hewel*, 4 G. 395.)

Delivery in the case of sale will only vest the *dominium* at such time as it was intended to transfer ownership. For although as a rule *dominium* will vest in the purchaser immediately upon payment of the purchase price and delivery, if for cash, or upon delivery only, if for credit, the seller may stipulate that the *dominium* shall not vest until the whole of the purchase price is paid; in other words, the sale is entered into under a *suspensive condition*. Thus in the

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(z) See also *Lean's Trustee v. Cerruti* (Buc. 1879, p. 313). L. sold certain furniture, not pointed out at the time, to C., who immediately let the articles again to L. Subsequently C. ascertained that the sequestration of L.'s estate was impending, and he thereupon took delivery and removed the furniture. *Held* that there never had been a legal and complete delivery to C.

case of *Quirk's Trustees v. Assignees of Liddle & Co.* (3 J. 322), Quirk bought certain chattels from the assignees of Liddle & Co. for £650, upon condition that Quirk was to give bills at three, six, nine, and twelve months, and that the property in the goods was only to pass to Quirk upon the payment of the last instalment. The goods were delivered to Quirk, who became insolvent before payment. Thereupon it was held that the *dominium* had not been transferred to Quirk, but remained vested in the assignees. Likewise it was held that ownership had not passed when a horse had been sold and delivered to the vendee under the condition that it should remain the vendor's property until paid for. (*Fazi Booy v. Short*, 2 E. D. C. 301, *et vide Daniels v. Cooper*, 1 E. D. C. 174.)

A converse illustration, *i.e.*, of a sale under a *resolutive condition*, is afforded by the case of *Keyter v. Barry's Executor* (Buc. 1879, 175). There goods were sold on credit, with a condition that if the purchase price be not paid, the vendor shall have the right of reclaiming the goods, and the purchaser shall not be able in any way to dispose of the goods, but they shall remain as security for the debt; and it was decided that the *dominium* in the goods passed to the vendee.

A case deserving to be specially mentioned is that of *Dunell, Ebden & Co. v. Colonial Government* (4 G. 48). There Firbank & Co. made a contract with the Colonial Government for the construction of a railway, which contained a covenant that all plant, material, &c., brought by them on to the site of the railway works for the purposes of construction should become the property of the Government, but the Government was not to be liable for any loss or damage, and on completion of the railway and due performance of the contract, the plant undisposed of was to be returned to Firbank & Co., subject to a right of pre-emption on the part of the Government. Under this agreement certain goods were brought on to the railway works, and were there attached by the appellants, Dunell, Ebden, & Co., judgment creditors of Firbank & Co. *Held* by the court

that the goods were not liable to attachment, since, under the contract, there had been sufficient delivery to vest the *dominium* in the Government. The delivery and covenant being open and notorious, there could be no presumption of fraud. Had it been otherwise, there would have been no reason to take this case out of the category of colourable and incomplete deliveries, as laid down in the cases of *Rens v. Bam's Trustee*, *Fivaz v. Boswell*, and many others.

Recently (Feb. 1892) this case (*Dunell, Ebdon, & Co. v. Col. Gov.*) was followed in the South African Republic in the case of *Verwey N. O. v. Malcomess & Co.* (9 C. L. J. p. 178), where the contract and circumstances were precisely similar.

Having considered the full meaning and legal effect of "real" delivery, the second division must be briefly described.

II. *Constructive delivery* takes place where transfer is effected not by actual delivery from hand to hand, but in either an indirect or tacit manner.

In accordance with the tabulated division given on page 485, the first kind of constructive delivery is—

1. *Brevis manus*, or short-hand delivery. This refers to the cases where a person possesses or holds an article in one capacity, and then changes his capacity and holds or retains the same article in another. No delivery by outward signs or indications is necessary in such a case. It is sufficient if there be a clear and *bona fide* intention to hold and lawfully possess the property in such changed position. Thus where an agent is placed in possession of certain property *qua* agent, and he then buys the property from the owner, no fresh delivery is necessary, and he acquires the ownership *qua* owner. Or take a stronger case, a sharebroker, as agent for A., holds certain scrip which B. subsequently purchases from A. through the same sharebroker, who is also B.'s agent. No actual delivery has been effected, but the constructive delivery *brevi manu* from A.'s agent to B.'s agent will be sufficient to transfer the ownership. The case of *O'Callaghan's Assignees v. Cavanagh* serves as an

excellent illustration.(a) Cavanagh was the manager of a restaurant for O'Callaghan, and in such capacity he had complete control and possession of everything in connection with the business. In consideration and as security for certain advances made and liabilities incurred by Cavanagh for and on behalf of O'Callaghan, the latter agreed to pledge certain furniture and movables in the place to the former. These articles were in possession of Cavanagh at the time, and his wife thereafter took charge of them for him. Under these circumstances the court held that there was delivery *brevi manu* sufficient to constitute a valid pledge. De Villiers, C.J., said, "It is quite clear that by Roman-Dutch law delivery in certain cases is of a fictitious kind. It is not necessary in every case that there should be actual delivery for the purpose of passing property. Cases have been before this court of goods being deposited with a person and afterwards being purchased by the depository. It is not necessary in those cases for the depositor to effect a fresh delivery to the depository, delivery having once been made. According to Voet (12, 1, 5), the original delivery serves for the second transaction between the parties. Everything done at the time of the first delivery is to be considered to be done again at the time the second transaction is entered into."

Justinian in his Institutes (b) says that property can sometimes be transferred without actual delivery, and merely through the bare wish of the owner, as when a man lends or lets or deposits such property with any one, and then sells it to that person; for although it was not for that purpose lent, let, or deposited, yet the very fact that he allows the pledgee or depository to become the owner is sufficient to vest the ownership anew, just as if the property had originally been delivered on that account.

The change of capacity in all cases of delivery *brevi manus* fulfils the requirements and takes the place of a second actual delivery.

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(a) 2 Juta, 125.

(b) Instit. 2, 1, 44.

(2.) Delivery by *constitutum possessorium* is another kind of short-hand delivery. This occurs in those cases where a person who is the owner of the property or thing cedes and transfers the ownership to another, but does not part with the property, retaining it as agent for and on behalf of the cessionary.

Delivery *constitutum possessorium* can only take place (1) when there is a definite agreement that tradition is to be effected in that manner; (2) when its existence is a necessary consequence, delivery is to be presumed.(c) *Si rem meam possideas, et eam vellim tuam esse, fiet tua, quamvis possessio apud me non fuerit.*

Therefore a person who already has lawful possession of a thing may effect delivery merely by virtue of his own intention, express or implied, to hold it in future as agent for another, but the *dominium* does not pass if the possessor intends to perfect the transfer by real or physical delivery.(d)

It is for this reason that the delivery in the case of *Rens v. Bam's Trustee*, previously referred to, was held incomplete, for there could have been no intention, express or implied, to effect constructive delivery, since the parties contemplated real or physical delivery.

This subject has been fully discussed in the cases of *Mills & Sons v. Trustees of Benjamin Bros.*,(d) and *Orson v. Reynolds*,(d) and *Jefferson, Executor of Stewart v. De Morgan*.(e)

In the latter case De Morgan had passed a mortgage bond in favour of one Powrie, as executor of Stewart, who then agreed to act as her (De Morgan's) agent in the collection of certain rents due to her, on the understanding that the rents thus collected were to be set off in part payment of the bond. Powrie then collected first £161, 10s., and he informed De Morgan that this

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(c) Von Savigny on Possession.

(d) *Mills & Sons v. Trustees of Benjamin Bros.*, Buc. 1876, 115. *Orson v. Reynolds*, 2 A. 102, and 3 G. 219.

(e) 2 E. D. C. 205.

amount had been applied in part payment of her liability on the bond; but no endorsement to that effect was made on the bond. Subsequently he collected a further sum of £58, 10s., which amount he placed to the credit of De Morgan in his books, but he did not inform her of any special appropriation, nor was there any endorsement on the bond to the effect that this amount had been appropriated in payment of the liability thereon. Powrie then died, and Jefferson became Stewart's executor. Under these circumstances it was held that, as regards the £161, 10s., the delivery (*constitutum possessorium*) was complete, and that De Morgan was therefore entitled to be credited with that amount in Stewart's estate; not so, however, as regards the further sum of £58, 10s., for in that case there was no intention of such appropriation manifested.

(3.) The third kind of delivery *brevis manus* occurs in the case of *testamentary bequests and insolvency*. Immediately upon the death of the testator the *dominium* of the article or property bequeathed vests in the legatee. Likewise upon insolvency the ownership is at once transferred from the original owner, the insolvent, to his trustee, who then represents the *persona* of the person *civilitate mortuus*.

2. *Symbolic Delivery*.—We now pass on to consider briefly the second kind of constructive delivery.

(1.) *Ordinary symbolic* delivery takes place when the deliverer obtains possession of, and is placed in physical control over, the property intended to be delivered by means of some act which renders this possible; for instance, when the keys of a house, cellar, or store are delivered with the intention of conferring physical control on the person to whom the keys are handed over. (*f*)

(2.) The next kind of symbolic delivery takes place in the *cession of the right of action*. As a rule, rights of action may be ceded in any way decided upon by the parties, and it could be done either in writing or verbally. In case of

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(*f*) This kind of delivery, as well as constructive delivery generally, will be found discussed in *Friis v. British United Diamond Mining Co.*, 7 J. 17.



verbal cession, the strictest and most convincing proof must be tendered, and, as a safeguard, the courts will frequently demand some accompanying act to substantiate the allegation as to the intention of the parties, such act to be somewhat analogous to delivery of movables. Most cessions are, however, in writing, in which case delivery is effected by an endorsement upon the documents setting forth the rights, to the effect that the rights have been ceded to the indorsee or cessionary. The delivery, in order to be complete, must proceed a step further, and the cession and document must be placed under the physical control of the cessionary.(g)

The cession of real rights, with the exception of ceded mortgage bonds, must be registered in order to be valid. (*Elliott's Trustees v. Sutherland*, 2 Menz. 349. *Laing v. Zastron's Executrix*, 1 Menz. 229.)

In the case of *Morkel v. Holm*,(h) a life-policy was ceded by ante-nuptial contract by A. to his wife, and was put by him among his wife's papers, but no endorsement of the cession was made on the policy itself, nor was notice thereof given to the insurance company. It was held by the court that the cession to the wife was valid on the ground that the cession by the ante-nuptial contract together with the constructive delivery was sufficient. Another case of similar nature was that of *Laing v. Zastron's Executrix*.(i) There, Zastron gave a written cession in favour of Laing of a bond belonging to his wife, to whom he was married out of community of property. Zastron at that time was acting as the agent both of Laing and of his wife, and he took the ceded bond and placed it among Laing's papers which he had in his possession, and the court decided that the delivery was sufficient to establish a valid cession.

(3.) Symbolic delivery by *title-deeds* is instanced in a constitution of Severus and Antoninus (Code 8, 54, 1), where

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(g) *Mills & Sons v. Trustees of Benjamin Bros.*, Buc. 1876, p. 115, and *Smuts v. Stack and Others*, 1 Menz. 297.

(h) 2 *Juta*, 57.

(i) 1 Menz. 229.

it is laid down that delivery of the title-deeds of slaves is equivalent to delivery of the slaves themselves.

Such bare delivery of title-deeds can hardly exist at the present day. The nearest approach to it is the delivery of scrip from hand to hand without transfer, or the delivery of a negotiable instrument endorsed in blank. The law merchant has, however, made ample provision in ordinary cases for the proper indication of the intention of the parties to the cession by endorsement of negotiable instruments, bills of lading, &c., and by registration, *e.g.* of shares, whilst the Common Law requires transfer *coram lege loci* in the case of immovables.

The mere delivery of title-deeds is insufficient, as delivery, to transfer ownership, and they cannot be delivered in security for a debt so as to constitute an equitable mortgage and to give the mortgagee a preferent right.<sup>(k)</sup>

3. *Delivery Longæ Manus*.—This constitutes the third kind of constructive delivery, and takes place when the transferor places the goods to be delivered within reach or control of the deliverer and points them out to him. As far as the deliverer, at all events, is concerned, we find traces of *real* delivery, for he must make physical delivery up to a certain point; it is delivery *de manu*, but not *in manum*. The references in Roman law are Digest 41, 2, 3; 41, 2, 18; 41, 2, 51, and 46, 3, 79.<sup>(l)</sup>

Thus far as regards the transfer of *dominium* in movables.

Before proceeding to discuss the transfer of immovable property, a few remarks on delivery in the case of pledges may conveniently be inserted here.

The pledge of movables without delivery to the pledgee is of daily occurrence, for almost every special deed of hypothecation of immovable property contains the "general clause" whereby the debtor's movables are also pledged, but no delivery is effected. When delivery has not taken

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(k) *Chapman v. Trustee of Braham & Shilling*, 2 G. 423.

(l) See *Goosen's Trustee v. Goosen*, 1 A. 414, and 3 E. D. C. 368, and *Coaton v. Alexander*, Buc. 1879, 19.

place, the pledgor retains the control and disposition over the goods pledged, and if he alienates or specially pledges and delivers them to another, the pledgee loses his right,<sup>(m)</sup> or is postponed till the subsequent pledgee has been satisfied. This is very clearly set out by Grotius in Opinion No. 64.<sup>(n)</sup> Therefore a prior general hypothec is preferred to a subsequent special pledge of movables unaccompanied by delivery.<sup>(o)</sup> Likewise is such a pledge postponed to the rights of the holder of a prior special mortgage bond containing the general clause.<sup>(p)</sup>

*Transfer of immovable property.*—No difficulty or ambiguity, as in the delivery of movables, bars the way here. Delivery of real property in order to vest *dominium* is only completed by registration *coram lege loci*. Legislating for Holland and West Friesland, the Emperor Charles V., on the 9th May 1529, enacted that the transfer of immovable property, in order to be complete and valid, had to be made before the court of place *rei sitæ*. This was followed by a supplementary edict in 1560, which made provision for the registration of all transfers of landed property, imposing at the same time a duty of 2½ per cent., commonly known as the impost of “the fortieth penny.” About that time a register of debts on immovable property was also commenced, and the registration of mortgages became compulsory.<sup>(q)</sup>

Before 1828 transfer of immovable property was effected in South Africa before two members of the Court of Justice. After Ordinance 39 of 1828 became law, these transfers were passed in the Registry of Deeds, and there enregistered.

Since immovables are hardly capable of real delivery, symbolic delivery being usually employed for the transfer of such property when registration was not required, it was

(m) *Smuts v. Stack and Others*, 1 Menz. 297.

(n) See also Grotius, *Introd.* 2, 48, 27. Voet, 20, 1, 12. Matthæus de *Auctionibus*, 1, 19, 74.

(o) *In re Russouw*, 1 Menz. 479.

(p) *Hare v. Heath's Trustee*, 3 Menz. 32. *Guest v. Le Roex's Trustee*, 5 J. 119.

(q) See Edict, May 9, 1529, and December 22, 1598 (Ordinance).

thought expedient to demand a decisive overt act to substantiate the fact of delivery, and for that purpose registration or transfer *coram lege loci* was deemed the best.

Without such transfer the delivery was void, and the *dominium* did not vest in the vendee.<sup>(r)</sup>

Registration did not, however, absolutely vest the *dominium* in the person in whose name the property is registered if there is strong and conclusive proof, to be gathered from the circumstances of the case, showing that the intention to transfer to such person was wanting.<sup>(s)</sup>

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<sup>(r)</sup> See Grotius, 2, 5, 13. Van der Keessel, Thes. 202. Voet, 18, 6, 6. Harris v. Buissinne's Trustee, 2 Menz. 105.

<sup>(s)</sup> Preston & Dixon v. Biden's Trustee, 1 A. 322. Saayman v. Le Grange, Buc. 1879, 10.

## OPINION No. 65.

HOLL. CONS. III. B. 173.

[GROTIUS II. 48, 30.]

Mortgage bonds, how passed—What is the full force of—Date of—When passed during absence of the Schout.

1. MORTGAGE bonds must be passed before the judicial officers of the place where the property is situate, and the register must be signed by the officer and two clerks of the court.

2. This registration and grant of bonds is not *substantia actus*, but is required *ad faciliorem probationem*.

3. When the officer is away and a mortgage bond was passed before two Schepenen as judges, the Schout is bound, on the declaration of the Schepenen, to sign the deed in the register, dating it at the time that the bond was actually passed.

On the 13th April (1616), A., in the absence of the Schout, passed a certain mortgage bond before two Schepenen of the place, specially hypothecating his house and garden as security for a certain sum

due to B.; but registration could not at the time be effected, nor the impost of the "fortieth penny" paid. Afterwards, on the 24th of April, A. hypothecated the same house and garden and had the mortgage bond registered. On the 3rd May the Schout was informed of the said bond, and was fully instructed by the declarations of the Schepenen in whose presence it was passed, and the "fortieth penny" was deposited. The question now is, whether the Schout is not bound to register the mortgage and to date the bond as passed on the 13th April.

(1) The Placaat of 1529 sets forth no other requirements for the validity of mortgages than that they should be passed before the judicial officers of the place where the property is situated. No alteration was made on this point by the Political Ordinance or by the Placaat of the "fortieth penny." It was enacted, however, that the deed in the register and the bond were to be signed by the officer and two other clerks of the court. It is accepted law that the registration and passing of the bond does not constitute a *substantia actus*, but was required *ad faciliorem probationem*, so that if the register and bonds were accidentally lost, the mortgage could be proved by other means. The mortgage in favour of B. must therefore be considered to have been legally passed and completed on 13th April, in the presence of two Schepenen as judges, and the Schout is bound to sign the register and bond upon the declarations of the said Schepenen, who are public officials worthy of credence. This bond and

the register must be dated 13th April, when the mortgage was virtually passed.

ROTTERDAM,  
6th May 1616.

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#### DATING OF REGISTERED BONDS.

If two bonds over the same property are lodged for registration in the Deeds Registry at the same time, and are passed simultaneously, one is not to be preferred before another, but the bonds will rank concurrently. (*Tredgold's Executors v. Colonial Orphan Chamber.*)(a)

The facts were briefly as follows:—Olivier, the mortgagor, passed two mortgage bonds upon his property, each containing the usual "general clause." The one bond, for £750, specially hypothecated land A., and the other, for £500, specially hypothecated land B., and also land A. as a "second mortgage." These bonds were registered simultaneously in the Deeds Registry. As to land A., it had been specially arranged that the one bond should be postponed to the other, and therefore the words "second mortgage" were inserted therein, but nothing further was arranged. No notice was taken in the Deeds Office of the time when the bonds were lodged. These bonds were registered two days later, the bond for £750 being registered and entered first.

Upon assignation of the mortgagor's estate, it was found that the property specially hypothecated was insufficient to pay the amount of the respective bonds. The court thereupon held that the two bonds must rank concurrently upon the property covered by the general clauses in the bonds.

As a general rule, the bond takes effect from the date of registration. There may, however, be circumstances which clearly indicate that it was the intention of the parties that interest should run from a different date, in which case the

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(a) 6 J. 358.

date intended by the parties, and not the date of execution or registration, will constitute the period from which interest will run against the mortgagor (*McKerry v. Francis*).<sup>(b)</sup> The facts in this case are briefly reported as follows:—In March 1888 McKerry signed a power of attorney to pass a bond for the sum of £162, together with interest thereon from the 1st January 1888, the interest to be paid half-yearly on the 30th June and 31st December in each year, the capital to be called up on three months' notice being given, or to become payable if the interest was not duly paid. The bond itself was passed in January 1889. In March 1889 the mortgagee, Francis, sued McKerry, the mortgagor, upon the bond for the interest due from January to December 1888. McKerry contended that the mortgagee was only entitled to sue upon the bond for interest due after the said bond had been passed; but it was held by the court that it clearly was the intention of the parties that the mortgagee should be in the same position with regard to interest as if the bond had been passed in January 1888, that the contract was virtually entered into in March 1888, and that the interest was payable on the 30th of June and 31st of December 1888.

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(b) 7 J. 42.



INSOLVENCY.

OPINION No. 66.

HOLL. CONS. III. B. 176.

[GROTIUS III. 1, 27, & II. 5, 3.]

Insolvency—Transfer—*Traditio*—Undue preference.  
(See also Opinion No. 62.)

1. ALL transfers passed after insolvency are void, although the memorandum of sale and the power to pass transfer were given before the departure of the insolvent.

2. Non pactis, aut obligationibus, sed traditione dominia transferuntur.

I have seen a certain memorandum of sale of eleven-sixteenths of the ship *The Promised Land*, and of one-twelfth of the ship *St. John*,\* entered into between Joost Willem van Niekerk, seller, and Sr. Jan van der Wouweren, acting for himself, and Sr.

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\* See also Opinion No. 74 (Holl. Cons. 3 (b.) 177), with reference to the pledging of these ships.—[ED.]

Jan Outgerts, purchasers, on the 27th November 1629. I also saw a power of attorney, bearing the same date, from Van Niekerk to Jan Warnaarts, notary, to pass transfer of the above-mentioned portions of the ship before the Schepenen of the place where they are to be found ; and a certificate of two Schepenen and a secretary of the *Ban* of the *Vrije-Veer*, dated 1st September 1630, and also declarations made before the Court of Amsterdam by Adriaanje and Hester Willems, Fobberichje Cornelis, Ijtge Seruts, and Sus Bouwens on the 12th March 1631 ; by Jan Willems on 3rd December 1630 ; and by Willemetje Adriaans and Jannetje Cornelis on 12th March 1631. Having been asked whether the said Jan van der Wouweren became the owner of the afore-mentioned parts of the ships by virtue of the transfer passed before the Schepenen of the *Ban* of the *Vrije-Veer*, or whether these parts must be considered as remaining in the estate of the said Joost W. van Niekerk for the benefit of all his creditors :

(1) I am of opinion that the said contract is null and void by virtue of the terms of the Placaat of the Emperor Charles treating of this matter ; for it appears from the various certificates when taken together, that the said Joost W. van Niekerk left Amsterdam for fear of his creditors before transfer was passed. The fact that the memorandum of sale and the power to pass transfer were signed a few hours before the departure of Van Niekerk from Amsterdam is not inconsistent with this contention, for according to

our law quod non pactis aut obligationibus, sed traditione dominia transferuntur.(a)

AMSTERDAM,  
February 21, 1632.

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UNDUE PREFERENCE.

The preference of creditors by an insolvent debtor was put down as a species of fraud even by the Roman jurists. The *lex Ælia Sentia* declared the manumission and enfranchisement of slaves in fraud of creditors null and void.(b) This was amplified later on by the *actio Pauliana in rem*,(c) and the *actio Pauliana in personam*,(d) the former being an *actio fictitia in jus concepta*. The remedies nullified every alienation or transaction in fraud of creditors.

These legal principles became incorporated in the Dutch jurisprudence.(e) Voet treats of this subject in his Commentaries on the Digest (42, 8), and Grotius mentions it in his *Introduction* in three different places.(f) It has been forbidden, says Grotius, to all insolvents or bankrupts to make any alienation of their property whereby their creditors might in any way be prejudiced; and further, all contracts entered into by insolvents in fraud of creditors are void.

The Placaat of October 4, 1540, and the local statutes of Antwerp, Leyden, Amsterdam, &c., also contained certain provisions which, however, made no material alteration in the common law.

These provisions of the common law have been largely extended to suit the wants and requirements of the commercial community. At the Cape, the Insolvent Ordinance

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(a) C. 2, 3, 20. D. 44, 7, 3. Instit. 2, 1, 40.

(b) Justinian, 1, 6.

(c) Justinian, 4, 6, 6.

(d) Digest, 22, 1, 38, pr. and 4, and 42, 8, 6, 8, 9, 11.

(e) Voet, 42, 8, 20. Schorer ad Grot. 2, 5, 3. Van Leeuwen, Cens. Forensis, 2, 12, 12.

(f) Grotius, 2, 5, 3 and 4; 2, 48, 6; 3, 1, 27.

No. 6 of 1843, amended by Acts 38 of 1884 and 17 of 1886, has introduced certain alterations and changes in the common law, and the provisions of this Ordinance, with slight immaterial alterations, have been adopted throughout South Africa.

Secs. 82–93 of the Insolvent Ordinance deal with the subject under discussion. The enactments may be briefly summarised as follows:—

1. Every alienation, transfer, or payment made by a person at a time when his liabilities, fairly calculated, exceed his assets, shall be void, unless *bona fide* made for valuable and just considerations.

2. Every such alienation, &c., shall also be void if the necessary and immediate effect thereof is to cause an excess of liabilities over assets, at all events to the extent of such excess.

3. Every alienation, payment, &c., by a person contemplating the sequestration of his estate, made with the intention to prefer any creditor, either directly or indirectly, through others, is null and void.

The contemplation will be presumed when the alienation, &c., took place within six months before sequestration and at a time when the liabilities exceeded the assets.

4. Every such alienation, &c., to a person not a creditor, but who would have become liable to third parties for the amount so paid or secured if such alienation, &c., had not taken place, made by a deliveror or payor who contemplates sequestration with the intention to prefer, will be void.

5. Every alienation in the ordinary course of business, or for cash and without collusion, is valid. To invalidate such transaction, the trustee, on whom the *onus* is cast, must prove collusion.

6. Every collusive payment under cover of a writ of execution is deemed an undue preference.

7. Likewise fraudulent and collusive acquittances, and discharges of just debts and securities by any one contemplating the sequestration of his estate, are null and void, being prejudicial to the just claims of the creditors.

8. The subjects of undue preference *bona fide* purchased by third parties remain the rightful property of the purchaser, but the unduly preferred alienee must pay the amount of the purchase into the estate.

9. The unduly preferred alienee or payee under 3, 4, and 6, must restore the fraudulently alienated property, and in addition he forfeits the amount of his claim.

From the foregoing it will be seen that three questions must be put and answered satisfactorily before we can arrive at a definite conclusion as to whether any such transaction amounts to an undue preference or not.

Was the transaction made—

1. In contemplation of sequestration ?
2. With an intention to prefer ?
3. In the ordinary course of business ?

1. *Contemplation of Sequestration.*—The full import and meaning of this phrase must be accurately grasped before we can decide that the requirements of the law to constitute an undue preference have been fulfilled. At first sight it would seem that where the financial position of a person is such that sequestration is impending and inevitable and that he is hopelessly insolvent, there is a *presumptio juris et facti*, nay more, a *presumptio juris et de jure* that he contemplated insolvency throughout such period, without reference to what may have been going on in his own mind. (*Daneel's Trustees v. Van der Bijl & Co.*) (g)

It is here submitted that, for the sake of preventing fraudulent transactions between debtor and creditors, to the prejudice of other creditors and to the detriment of free commerce, it seems a great pity that the rule as laid down in the above case was not followed in later decisions, but that the courts of law have allowed the passing fancies or *animus* of insolvents, of which these insolvents, of course, are supposed to be the best and *naturaliter* the most reliable exponents, to intervene in questions of contemplation of sequestration. Very few men, if any, will plead guilty to the crime of

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(g) 1 Roscoe, 18. This was also the opinion of Mr. Justice Jorissen in the case of *Kirton's Trustee v. Rogers* (S. A. R.), reported 10 C. L. J. p. 56.

fraudulent insolvency by admitting in the first instance the grant of an undue preference. Then there is the further inducement of direct gain, either to the insolvent himself or to his relations or friends, if, upon his showing that insolvency (although inevitable) was never dreamed of by him, the court should be persuaded into the belief that insolvency was never contemplated, and that therefore the alienation was not an undue preferment.

The case of *Smith v. Carpenter*(*h*) may be considered the leading case on this subject. It certainly is remarkable that that case is claimed as a precedent in *Daneel's Trustees v. Van der Bijl & Co.*, on the one hand, and *Trustees of Wilson and Glym v. Wilson and the Standard Bank*(*i*) on the other. In the latter case, the insolvent Wilson had passed large bonds to his sister about three weeks before his insolvency; nevertheless the transaction was held unimpeachable, on the ground that, under all the circumstances disclosed, the court was inclined to believe the evidence of the insolvent that he did not at the date of passing the bonds contemplate the sequestration of his estate.

For all practical purposes these cases are contradictory.(*k*) The breach has no doubt widened, owing to the method of deductive reasoning from the "circumstances" of the case. In *Daneel's* case, the "circumstances" were taken to be such as related to the financial position of the insolvent, and when it appeared to the court that sequestration was inevitable, it was taken for granted that the insolvent must have contemplated it; and this certainly seems the most logical position, bearing in mind the common law doctrine that every man is presumed to have contemplated the result of his own action.(*l*)

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(*h*) Buc. 1869, 206, and 12 Moore P. C. C. 101.

(*i*) Supreme Court, December 1886. This case is not reported. The facts are taken from a statement of the case by Mr. Sampson in his excellent "study" of this subject in the *Cape Law Journal*, vol. iii.

(*k*) See the judgment of Morice, J., in *Kirton's Trustee v. Rogers* (10 C. L. J. p. 59), where he contends that *Daneel's* case has been *overruled* by later decisions.

(*l*) *De Wet's Trustees v. Krynauw & Co.*, per De Villiers, C.J., Buc. 1879, 177.

This consideration of the attendant "circumstances" has been extended until the courts allowed the insolvent to give evidence as to the contemplation of sequestration by him.

Upon analysing the various judgments, it becomes clear that the evidence of the insolvent will always receive consideration from the courts, and upon the credibility or otherwise of his evidence, as found by the court sitting as a jury, will to a very great extent depend the decision as to contemplation or non-contemplation of sequestration.

For this purpose the courts will, generally speaking, consider the following facts, either in corroboration or refutation of the evidence:—

1. The financial position of the debtor and the probabilities of insolvency.

2. The knowledge of the insolvent as to the true state of his affairs.

3. The nature of the alienation, &c., and its effect upon the position of the insolvent.

4. The chances of the insolvent to tide over his financial difficulties, and his expectation to avoid sequestration, together with the grounds for such expectation or belief.<sup>(m)</sup>

2. *Intention to Prefer*.—Contemplation of sequestration by itself is not sufficient to render the transaction called into question an undue preference; there must also be an intention to prefer. This is essential, and if wanting, the alienation does not amount to an undue preference. The intention to prefer must be gathered from all the circumstances of the case.<sup>(n)</sup> There can be no undue preference unless there is an intention to prefer the creditor, as well as a contemplation of sequestration. In *Thurburn v. Steward*,<sup>(o)</sup> it was stated that the phrase "contemplation of sequestration" has received so wide a meaning as almost necessarily to include an intention to prefer, but the

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(m) Undue preference by Sampson (*supra*).

(n) Daneel's Trustees *v.* Van der Bijl & Co.

(o) 3 L. R. P. C. and 7 P. C. (N.S.) 333.

judgment does not go so far as to state that conclusive proof of such contemplation entirely dispenses with the proof of an intention to prefer.<sup>(p)</sup> In practice, the intention to prefer was frequently inferred, when it was found that there existed a contemplation of sequestration.<sup>(q)</sup>

It often happens that a creditor presses for payment at the time of impending insolvency. If the debtor, thereupon, in the ordinary course of business, pays such creditor, there is no intention to prefer, and therefore no undue preference.<sup>(r)</sup> If the payment is, however, made under pressure, but not in the ordinary course of business, it will be set aside as an undue preference. "The whole policy of the insolvent law," says De Villiers, C.J., in *Trustees of De Wet v. Krynauw & Co.*,<sup>(s)</sup> "is to secure a fair *pro rata* distribution of the assets among the creditors. If, however, there be a vigilant creditor who has secured himself in the due course of business, without taking an undue advantage of the other creditors, he is protected by the Ordinance. But this is not a case of the kind. If the creditor takes a bond or receives payment of his claim when the debtor is clearly on the verge of insolvency, and the insolvent contemplates that the giving of the security or the payment will inevitably result in sequestration, as the insolvent distinctly stated to be the case here, then the law steps in and says, not that it is necessarily a fraudulent act, but that it is an undue preference. The contemplation of sequestration and the intention to prefer are questions of fact, and not of law, and one on which there may be a difference of opinion. In this case, if an undue preference has not been clearly proved, then I do not know any case in which it could be said to have been given. The effect of the act was to give the defendants a preference above the other creditors, and it is quite correct to argue that an insolvent must be taken to con-

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(p) Per De Villiers, C.J., in *Du Plooy's Trustee v. Plewman*, 7 J. 334.

(q) Per Buchanan, J., *ibid.*

(r) *Redelinghuys' Trustees v. Morkel and De Villiers. Smith v. Carpenter*, Buc. 1869, p. 214.

(s) Buc. 1879, 177.



template what must be the result of the act done, even though the insolvent may say he had no such intention."

Briefly stated it comes to this, that payment to a vigilant creditor is valid, a vigilant creditor in the eye of the law being one who secures himself in the ordinary course of business, dealing, or custom when sequestration was not contemplated.\*

The intention to prefer, like contemplation of sequestration, is a question of fact, and the court sitting as a jury may believe the insolvent that no preference was intended, and that consequently no undue preference was given, in spite of strong adverse circumstances.(t)

3. *Transactions in the ordinary course of business.*—As above set forth, if an alienation, payment, or other similar transaction is made or entered into in the ordinary course of business, it is not an undue preference. The 86th section of the Insolvent Ordinance enacts that every alienation, transfer, cession, delivery, mortgage, pledge, or payment made in the usual and ordinary course of business shall *prima facie* be taken to have been made or given *bona fide*, and without any intention to prefer, although sequestration was contemplated, and the *onus probandi* of any illegal collusive agreement lies upon the party challenging such transaction.

The article as it stands, and especially when read in connection with section 84 of the same Ordinance, seems illogical and ambiguous. In the recent case of *Du Plooy's Trustees v. Plewman & Draper*,(u) the court, after mature consideration, gave a clear and intelligible interpretation of the doubtful wording. De Villiers, C.J., said in that case: "Counsel for the appellant contends that the words *prima facie* show that the 86th section was not intended to afford any protection to an impeached transaction, in respect of which sufficient proof of an intention to prefer has been established to satisfy the 84th section, and counsel for the

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\* Cf. Opinions Nos. 62 and 64.

(t) See *Du Plooy's Trustee v. Plewman*, and the finding of the court on the facts therein, 7 J. 332, and Grotius, 3, 39, 12.

(u) 7 Juta, 332.

respondent seems to acquiesce in this contention. I must confess, however, that although I was at first inclined to hold the same view, a careful reperusal of both sections has led me to modify my opinion. The words *prima facie* must be read in connection with the sentence which follows, and the true meaning of the 86th section seems to me to be, that the fact of payment having been made in the usual and ordinary course of business affords a protection, even if there is sufficient proof of an intention to prefer, to satisfy the requirements of the 84th section, unless the existence of a collusive arrangement is also proved. The question is not free from difficulty, but a different construction of the 86th section would imply that there can be undue preference under the 84th section without proof, whether actual or presumptive, of an intention to prefer. This being my view, I consider it the more imperative that the protection afforded by the 86th section should not be extended except to cases to which it was clearly intended to apply. When once contemplation of sequestration and an intention to prefer have been proved, it lies upon the creditor who seeks the protection afforded by the 86th section to establish beyond any doubt that the transaction sought to be impeached took place in the usual and ordinary course of trade or business. It is not enough to show that in the village in which the parties carried on their business such transactions were common, or that, as between themselves, they had had similar dealings before. The creditor must show that the usual or ordinary course of trade or business among men of business and repute in the commercial world has been followed, and if it appears that there has been a departure from the course followed by reputable men of business under similar circumstances, the protection of the 86th section cannot be invoked."

The last two sentences of the decision just quoted are worthy of special attention, for they contain a clear and definite definition of the phrase "usual or ordinary course of trade or business."

In the same case, Buchanan, J., states, with reference to

this matter: "I think we are bound to hold that the usual and ordinary course of trade or business must be taken to mean transactions in the usual and ordinary every-day course of mercantile dealing, not any special course of dealing between individuals, or even the practice of trades in some small country community."

A less decisive and satisfactory definition of the phrase was given by Connor, J., in *Tucker v. Austen's Trustee*.(v) He states that "it is that which is suitable to the nature of the particular business, and might reasonably and probably and in the ordinary course have taken place without reference to a contemplated sequestration."

For further reference to this subject, in order to see under what circumstances the court will hold a certain transaction to be protected, as having been made in the ordinary course of business or otherwise, the following cases may be consulted:—

Hiddingh, Manual's Trustee *v.* Norden.(x)

Sunley's Trustees *v.* De Wet.(y)

Redelinghuys' Trustees *v.* Russouw's Trustees.(z)

Redelinghuys' Trustees *v.* Morkel and De Villiers.(a)

*In re* Carter.(b)

Daneel's Trustee *v.* Van der Bijl & Co.(c)

Smuts, Trustee of Neethling *v.* Neethling.(d)

Read, Trustee of Allen *v.* Crooks.(e)

Goosen's Trustee *v.* Froneman.(f)

(v) Buc. 1868, p. 135; see p. 167.

(x) 3 Menz. 288.

(z) 3 Menz. 317.

(b) 2 Menz. 335.

(d) 3 Menz. 287.

(y) 3 Menz. 311.

(a) 3 Menz. 324.

(c) 1 Ros. 18.

(e) 1 S. 87.

(f) 1 A. 458.

## OPINION No. 67.

HOLL. CONS. III. B. 144; VI. PART II. 55.

[GROTIUS III. 10, 7.]

Payment when value of coinage changes.

IF regard is had to a fixed value of the coinage when an annuity is granted, payment must be made according to the value of the coinage stipulated in the annuity.

I have seen a certain annuity bond passed before and in the Ambracht of Bleiswijk by Job Maartens, Maarten Jans, and Klaas Floris in favour of the orphans of Jan Jakobs Trompet, and have been asked whether the payments fixed therein can be paid in money at the present valuation or not.

Although this matter has, on the whole, formed the subject of a good deal of controversy among lawyers, and the several courts have not been unanimous in their judgments, I am nevertheless of opinion that the definite contention of the majority is that when, from the tenor of a document, it appears that at the time it was drawn up regard was had not to the coinage according to its fluctuation in value, but to

certain denominations and to their fixed value, payment must then be made in such denominations and at such valuation. And since in this case it was not only stated that payment should be made in sterling coin of the proper value with the Keurvorster gulden for 56 groot, one Philips gulden for one pound groot, one Karolus gulden for 40 grooten, one Vierijzer for 5½ groot, one Stuiver for two Flemish groot, and all other coins in payment to be of proper weight and standard according to their value, but also that the capital was paid in such coinage, the payments must be made in such coinage as was current at the time the deed was drawn up and at the stated valuation, or otherwise in other money according to calculation.

#### ROTTERDAM.

Schorer in his "Aanmerkingen" on Grotius, 3, 10, 7, enters fully into a discussion of the subject, a matter of great controversy among the Dutch jurists, as Grotius says in the present Opinion.

The value of very many of these old coins is given by Van Leeuwen in his Commentaries on the Roman-Dutch Law (Bk. ii. chap. 13).

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## USURY.

(Ad Opinions Nos. 68, 69, 70.)

By the law of the Twelve Tables interest was limited to 12 per cent. in Rome (*unciarium fenus*). This was later on reduced to 6 per cent. per annum (*semiunciarium fenus*). A few years later interest was altogether prohibited by the

*Lex Genucia*, which, however, does not seem to have been strictly enforced.

Justinian fixed the following rates of interest in order to counteract the demands for exorbitant interest which prevailed at that time (a):—

1. Maritime loans (*pecunia trajectitia*), maximum 12 per cent. per annum.
2. For merchants, &c., maximum 8 per cent. per annum.
3. For ordinary non-business people, maximum 6 per cent. per annum.
4. For the nobles, maximum 4 per cent. per annum.
5. For agriculturists,(b) maximum 4 per cent. per annum.

The law referred to the internal police and constitution of the Roman empire, and it was not incorporated in the laws of Holland and the other States. In 1540 Charles V. legalised the taking of interest in the case of merchants lending money for mercantile purposes, but he did not extend it universally. Another Ordinance was passed in 1571 to the effect that interest, in order not to be usurious, must be reasonable, according to the customs of the place.

In his "Opinions" (c) Grotius says as regards usury, "Since no universal practice has been observed on this point, the rate of interest allowed by the customs of the place must be taken into consideration."

It will be unnecessary to go into the history of this once important subject here. The whole matter will be found fully set forth in the arguments and judgments delivered in the case of *Dyason v. Ruthven*.(d)

Matthæus doubts very much whether usury is a crime. The same author defines usury as "the taking of interest upon interest, or interest beyond the rate allowed by law."(e)

"Anatocismus" was the calculation of interest upon in-

(a) Code, 4, 32, 26, 1.

(b) Novel 32.

(c) Opinion No. 68 (Holl. Cons. 3 (b.) 147).

(d) 3 S. 282.

(e) De Criminibus, Bk. 47, tit. 4, ch. 4, § 6, and Bk. 47, last tit. ch. 6, § 1.

terest, or compound interest. This was not allowed, according to many Dutch jurists.(*f*)

The accumulation of interest so that it exceeded the capital was not allowed.(*g*)

The following authorities may be consulted:—

Dyason *v.* Ruthven, 3 S. 282.

Maynard *v.* Malan, widow of Morkel, 1 Menz. 299.

Mechau *v.* Jaarsveld (Van), 1 Menz. 113.

Rens *v.* Horak, 1 Menz. 40.

Muller *v.* Redelinghuys and Van Reenen, 1 Menz. 41.

Sutherland *v.* Elliot Brothers, 1 Menz. 99, and note the remarks of Menzies, J., thereon.

Grotius, Opinions Nos. 68, 69, and 70 (Holl. Cons. 3 (b.) 147, 3 (b.) 171, and 3 (b.) 169; Introd. 3, 10, 9, and 10).

Van der Keessel, Thes. Sel. 544–549.

Schorer *ad* Grot., 1, 9, 10, note 43; *ad* Grot., 3, 10, 10; Notes 337, 338.

Voet, 22, 1, 3; 22, 1, 20.

Van Leeuwen, R. H. R. 4, 7.

Matthæus de Criminibus, lib. 47, tit. ult. cap. 6.

Decisien van den Hove, No. 166, 248, 311.

Christinæus, Decis., lib. 1, decis. 293.

Regtsgeleerde Observatien *ad* Grot., 3, 10, 9, and 10.

Van der Linden, 1, 15, 3.

(*f*) See also the case of Maynard *v.* Malan, 1 Menz. 299.

(*g*) Niekerk *v.* Niekerk, 1 Menz. 454. It is there stated that the Dutch law is clear on this point. This is not the case. Schorer (*ad* Grot. 3, 10, 10, note 338) says, "It must be observed that by our customs the interest may exceed the principal," and he quotes Stokmans, Finkelthaus, and Carpvovius as authorities.

USURY—PACTUM ANTICHRESIOS.

OPINION No. 68.

HOLL. CONS. III. B. 147.

[GROTIUS III. 10, 10, and II. 48, 41.]

Interpretation of a contract, whether it is a pledge or hypothecation—*Pactum antichresios*—What is excessive and usurious interest.

1. THE words “pledges,” “pledge,” “security,” occur in a certain contract, as well as the words “to place in the hands of, and to secure,” and “to pay the amount and release the pledge.” Such a contract cannot be considered otherwise than as a pledge, notwithstanding that it also contains the words “delivery, and also of the fortieth penny.”

2. A contract “antichresios” is one whereby certain yearly profits are allowed to any one in lieu of interest on his money.

3. A stipulation whereby the amount to be paid for the redemption of the pledge is fixed at a higher figure than the amount of the borrowed and advanced money is null and void as far as such excess is concerned, and must be held as not written.



4. Local customs must be taken into consideration in the payment of interest ; and when more has been received than a reasonable interest, the excess must go towards diminution of the capital.

Having seen a certain contract dated the 28th of April 1600, passed before the Schepenen of the Briel between Jan Joosten and Cornelis Jacobs Breeman, and having been asked what the nature of the said contract is, and what would be the most advantageous manner for Jan Joosten, as pledgor in the contract, to redeem the debt and interest :

I am of opinion that although mention is made of "delivery or tradition, and also of the fortieth penny," in the said contract, which seems to infer a transfer of ownership, yet the contract is in reality nothing more than a pledge, not only because the words "pledges," "pledge," and "security," appear therein, but all the more because such is clearly set out by the words "to place in the hands of, and to secure;" and also because Jan Joosten was allowed to redeem and pay the pledge.

(2) From this, and from the whole tenor of the document, it appears to be a *pactum antichresios*—that is, one whereby a yearly revenue is allowed to a creditor instead of interest on his money.

(3) It appears from the contract that the money lent by Breeman to Joosten did not exceed the amount of four hundred Flemish pounds, or at most increased by the impost of the fortieth penny. Four hundred and ten pounds were, however, paid in error

of law. Hence it follows that Jan Joosten, or Pieter Philips as his mandatarius, agent, or cessionary, can release the said pledge by payment of the said four hundred Flemish pounds, without regard being had to the clause appearing in the said contract whereby it is agreed that the pledge should be released on payment of four hundred and sixty-two pounds; for this stipulation, as far as the sum fixed by it as payment exceeds the borrowed and advanced money, is null and void in law, and must be considered as not written (D. 12, 1, 11).

(4) With reference to the interest received during the existence of the pledge, if the old laws and ordinances treating of usury still obtained, it could be contended that whatever amount Breeman received in excess of a reasonable interest ought to go in reduction of the capital sum. Yet since no universal practice has been observed on this point, the rate of interest allowed by the custom of the place must be taken into consideration. The last ordinance of 1571 bears on this point.

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#### PLEDGE—CONSTRUCTION OF AGREEMENTS.

A pledge is an agreement whereby a debtor places property in the hands of his creditor as security for his debt.(a)

When thus set forth, the terms "pledge" and "hypothecation" seem convertible. This is, however, not the case. In strict law the term "pledge" refers only to movable property, and the term "hypothecation" (the word "mortgage" is foreign to Roman-Dutch jurisprudence)

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(a) Grotius, 3, 7, 1.

refers only to immovable property.(b) *Hypotheca quæ proprie consistit in immobilibus et pignus quod circa mobilia versatur.*

Agreements are to be construed according to the intention of the parties indicated in and by them, and not by what they choose for the sake of convenience to call the agreement,(c) *plus valet quod agitur quam quod simulate concipitur.*(d) Therefore if a written agreement is entered into purporting to be a sale, when in reality a pledge was intended, the real transaction must prevail over the feigned one.(c) "We must," says Chief-Justice De Villiers in *Guest v. Trustees of Le Roex* (5 J. 121), "look at the real substance of the transactions, and not at the fictitious forms which the parties have adopted for certain reasons."

The *pactum antichresios* was a contract of pledge whereby it was stipulated that the pledgee should have the use of the pledge, or the fruits to be derived therefrom, in lieu of interest on the money lent by him, or, as stated in the Roman law, *Ut creditor pro pecuniæ debitæ usuris, fructus rei pignoratæ habeat.*(e)

In treating of this matter Voet says, "Præcipue vero probatum in pignoribus pactum antichresios, quo id agitur, ut creditor utatur pignore in vicem usurarum, donec debitum solutum fuerit, sive ipse ædes inhabitando fundove colendo, percipere fructum aut utilitatem velit, sive aliis elocare; adeo ut si ante exsolutum debitum possessionem amiserit, vel hypothecaria actione ex communi hypothecarum natura rem obligatam persequi possit, vel ad recuperandum antichresin, seu mutuum pignoris usum pro credito, in factum actione uti.(f)

This *pactum antichresios* or "*pandgenot*" is either express or tacit, as where a fruit-bearing thing is pledged to the

(b) Van Leeuwen, R. H. R. 4, 13, 24 *in notis*.

(c) See *Cholwich v. Penny* and *Simpkins v. Penny*, 5 E. D. C. 270. *Solomon v. Cumming*, 2 G. 311.

(d) Per De Villiers, C.J., in *Treasurer General v. Lippert*, 1 J. 303 (Code, 4, 22, and Perezius *ad ibid.*).

(e) Digest, 20, 1, 11, 1, and Digest, 13, 7, 35.

(f) *Ad Pand.* 20, 1, 23; see also 21 and 22 *ib.*

creditor for the money advanced, and no interest is stipulated for.(g)

Another *pactum adjectum* or subsidiary agreement of a similar nature is the *pactum commissorium*. This agreement between the pledgor or mortgagor and pledgee or mortgagee was to the effect that if the debt was not paid at the proper time, the pledged or mortgaged property was to become the absolute property of the pledgee or mortgagee in payment of the arrear debt.

Grotius disapproves of this agreement as being *contra bonos mores*. Voet, Lauterbach, and Matthæus on the other hand, support the agreement, if the price or debt is reasonable.(h) Decker in his notes on Van Leeuwen's Roman-Dutch Law (i) writes to the same effect. He says, "Grotius says this is not allowed, and this is undoubtedly so far true, that if the property pledged is worth more than the debt (which can be proved by the valuation of impartial and competent men), or realises in case of sale more than the debt, the surplus will not go to the creditor, but must be handed to the debtor, as belonging to him, and therefore, the abuse being removed, I do not see why the beneficial use should cease."

It is sometimes stipulated in a contract of pledge that the creditor shall be entitled to sell the pledged property without an order of court in default of payment by the debtor on the due date. Such a stipulation for *parate executie* is held to be invalid by Grotius,(k) Van Alphen,(l) Merula,(m) Voet,(n) Groenewegen,(o) and others. Van der Keessel,(p) Bynkershoek,(q) Decker,(r) and Van der

(g) Van Leeuwen, R. H. R. *in notis*, 4, 12, 4.

(h) Voet, 20, 1, 25, 28. Matthæus de Auctionibus, l. i. c. 3, 11. Lauterbach, D. 13, 7, 9, 10, 11.

(i) Van Leeuwen, R. H. R. 4, 12, 4; Kotze's trans. ii. 86.

(k) Grotius, 2, 48, 41.

(l) Van Alphen Papegaai, 1, c. 32, p. 507.

(m) Merula Manier van Procedeeren, l. 4, tit. 100, c. 1, § 10.

(n) Voet, 20, 5, 6, and 42, 1, 48.

(o) Groenewegen de Legibus Abrogatis, Instit. 2, 8, 1.

(p) Van der Keessel, Thes. Sel. 439, where he quotes Digest, 13, 7, 5; see also 13, 7, 4, and Sande, 3, 12, 20, and Thes. Sel. 480.

(q) Bynkershoek, Quæstiones Juris Privati, ii. cap. 13.

(r) Decker *in notis ad* Van Leeuwen's Com, 4, 12, 4, and 5, 26, 19.

Linden,<sup>(s)</sup> are of opinion that movables pledged under a stipulation of *parate executie* can be sold without a previous order from the court; the latter, however, adds, "It is more prudent before proceeding to the sale to obtain the sanction of the court." The more modern writers, Van der Keessel and Van der Linden, therefore, seem to favour the stipulation for immediate execution under the jurisdiction and sanction of the court.

In his notes to his translation of Van Leeuwen's Commentaries, Chief-Justice Kotze says, "It is possible that in South Africa the courts of law may sanction a private sale by the creditor of a chattel, *e.g.*, a horse, a watch given in pledge, where such has been agreed upon; but they will not favour such a practice, and will certainly not extend it to immovable property or movable property of considerable value," <sup>(t)</sup> thus accepting the law as laid down by the two last-mentioned writers with a limitation as to movable property of considerable value. This *dictum* as to movable property of considerable value is in conformity with the law as stated by Paul Voet (*Mobilium et Immobilium Natura*, chap. 6, § 5), where he says that *res pretiosa* is on the same footing as immovable property.

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<sup>(s)</sup> Van der Linden, *Institutes*, 1, 12, 5, and *Merkwaardige Gewijsden*, p. 161.

<sup>(t)</sup> P. 408 *in notis*.

## OPINION No. 69.

HOLL. CONS. III. B. 171.\*

[GROTIUS III. 10, 10, II. 31, 4, & II. 41, 21.]

Customs dues—Permits for one year—Post-dating permits—  
Usury-wares sold at a price stipulated to be less than the  
market value—Usury can take place in all contracts—  
Usury, punishment of—Fisc can succeed under security  
—Purging accidental homicide—*Lis pendens*, effect of †—  
Feudal succession—Full sister and half brother.

1. ACCORDING to the Ordinance regulating the customs dues in Holland, a permit only lasts for one year, and any one post-dating it perpetrates a fraud on the Treasury, and is liable to punishment *ad relegationem usque temporarium*.

2. When wares are sold to be delivered on a certain day, not at a fixed purchase price, but at a certain amount less than the then market value, the contract is usurious.

3. In omni contractu usura locum habere potest.

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\* The next Opinion (3, b. 172) in the *Consultation* is wanting, or rather, it seems that it has been wrongly numbered 173.

† *Lis pendens*, a case pending *coram curia*. This could be pleaded as a declinatory persistent exception. See Van Leeuwen, R. H. R. 5, 17, 6. Voet, 5, 1, 144–149. *Queen v. Robertson*, 4 E. D. C. 186. *Laubscher v. Vigors and Fryer*, Buc. 1873, 20. *Vyfer v. Ubsdell*, 3 G. 454. *Queen v. Nkalayi and Others*, 1 A. 175.

4. The punishment of usury is arbitrary. The practice in many places is to confiscate one-fifth of the capital amount.

5. The Fisc can succeed to a vacant share of an estate under security in the same way as the relatives of the deceased succeed to the other shares.

6. A man may purge himself in *casualibus homicidiis*, but it is more advisable to obtain a pardon or license of non-molestation (*Landwinning*), which, in such a case, is never refused.

7. On the termination of a *lis pendens* the owner can at once eject the trespasser and sue him for interest and damages sustained by reason of such wrongful detention.

A public officer may sue in addition for a discretionary punishment.

8. According to the law of Holland, a full sister was preferred to a half-brother of the deceased from the father's side, in succession to a feud coming from the mother.

According to feudal custom, succession is confined to the descendants of the original feudatory, as long as any are left.

(1) Regarding the first point, I am of opinion, since the Customs Ordinance of Holland expressly states that a permit shall not last for a longer period than one year, and post-dating it is therefore a fraud on the Treasury, that Marinus Jans can be summoned to answer the charge, and is liable to a punishment,

*ad relegationem usque temporarium*; (a) but reliable information must first be obtained.

(2) Regarding the second, I think, if wares were sold to be delivered on a certain day, not at a fixed purchase price, but for a certain amount less than the then market value, such a contract is usurious; (3) *cum certum sit in omni contractu usuram locum habere posse, et hic vere lucrum captetur ex tempore*. We must therefore inquire whether Harnikman\* received a greater return for his money than the customary law of Zuid-Beveland allows, for the latest Plaacat of the year 1571 specially refers to customary law. If every one could transgress in this matter *sine fine et modo*, licenses for market tables would be useless. (4) *Pæna usuræ est arbitraria*, the practice in many parts being to confiscate one-fifth part of the capital amount.

(5) *Re* the third, I see no reason why the Fisc should not succeed to a vacant share of the estate, under proper security, in the same way as the relatives succeed to the other portions.

(6) *Re* the fourth, I think that although the young man mentioned therein can purge himself, it is more advisable for him to request a pardon or license of non-molestation (*Landwinning*) from the Government of Zeeland, which, as a rule, is never refused *in casualibus homicidiis*.

(7) *Re* the fifth, on the termination of a *lis*

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(a) D. 48, 10, 13, and 21.

\* Harnikman here mentioned is evidently the same personage who appears in Cons. III. B. 169, p. 527, *infra*, which was given a year later than the present one.—[Ed.]



*pendens coram curia* the owner can at once eject the trespasser, and sue him in addition for interest and damages sustained through the wrongful detention.(b) A public officer is further entitled to demand a discretionary punishment.

(8) Regarding the sixth point, I am of opinion that according to the law of Holland (which I think obtains in Zeeland as well), a full sister is preferred to a half-brother, related to the deceased from the father's side only, in succession to a feud coming from the mother; for according to feudal custom, succession is confined to the descendants of the original feudatory, as long as there are any left.

ROTTERDAM,  
May 1615.

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#### LANDWINNING.

Grotius in his Introduction, 3, 32, 7, discusses the mode of procedure to obtain a pardon, or to compensate manslaughter, wounding, &c.

Speaking of pardon or remission, Van Leeuwen says,(c) "If the offence has been committed out of necessary self-defence, or if attended by such slight negligence that it ought not to be punished, and the offender seeks to escape the disgrace and suspicion which might otherwise attach to him, he may pray *abolition* thereof—that is, a wiping out and destroying of the fact just as if it had not happened, which requires no confirmation or license of non-molestation (*landwinning*). So that he is thereby meanwhile rendered secure for always as to his person, if the act admits of com-

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(b) D. 19, 2, 48.

(c) Van Leeuwen's Commen., by Kotze, 4, 43, 2 and 3.

position—that is, that it is not publicly punishable, otherwise for a certain time, and generally for half a year, in order to obtain pardon or remission in the meantime.”

The effect of this kind of pardon is that the person who has killed another in self-defence is allowed to remain undisturbed in the country.<sup>(d)</sup>

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<sup>(d)</sup> Van der Linden, Instit. 2, 9, 3, (4), and Judicieel Practyk, ii. p. 272, 274.

## OPINION No. 70.

HOLL. CONS. III. B. 169.

[GROTIUS III. 10, 10.]

Usury—A delict—How committed—How punished—How if the debtor consents to the usury—Punishment of a repetition of similar offences.

1. USURY was committed particularly in contracts of loan, *mutuum* and *commodatum*, but as a delict the word received a more extensive interpretation, and was applied to all contracts whereby unjustifiable profit was made through extortion from needy persons.

2. *Fraudem legi dat, qui, salvis verbis legis, sententiam ejus circumvenit, imo qui palam facit levius, qui clam gravius puniendus est.*

3. The punishment of usury is left to the discretion of the judge, and the delict was referred *ad crimen stellionatus*.

4. *In contractibus fœneratoriis versatur dolus et puniendus est, etiam si debitor sciens et volens usuram persolvat.*

5. *Jure imperii pœna usurarii contractus est amissio quartæ partis ipsius fortis.*

6. An excuse, that a certain action had been

committed before, may have some weight in *rebus toto jure prohibitis, non autem in iis, quæ per se sunt turpes*.

7. He who has frequently committed crimes of the same nature should receive all the heavier punishment.

My advice having been asked with regard to a certain claim made by the Sheriff of the town of Goes against Cornelis Harnikman, which, together with Harnikman's plea, has been submitted to me :

(1) I am of opinion, assuming that the facts, or the major portion of them, as alleged in the declaration, can be substantiated (seeing too that some have not been denied in the plea), that the said Harnikman is guilty of having committed most exorbitant usury. The fact that usury is really committed in contracts of loan, *mutuum* and *commodatum*, and that Harnikman seems to have traded by way of purchase and sale, is no excuse ; for as a delict the word *usury* received a more extensive interpretation, and was applied to all contracts whereby any one made unjustifiable profit through extortion from needy persons.<sup>(a)</sup> There is less excuse for Harnikman in the present case since the facts show that it was his intention from the very commencement to lend his money at a highly usurious interest, and that the pretext of sale was merely used to conceal the usury. (2) *Fraudem autem legi*

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(a) Panorm. in c. *naviganti de usuris* ; Can. c. in *civitate et c. fin. eo tit. et in C. ad nostram et empt. et vend* ; Bart. ad rubr. C. de *usur.*

dat, qui salvis verbis legis, sententiam ejus circumvenit, (b) imo qui palam facit levius, qui clam, gravius puniendus est. (c)

(3) As to the punishment to be inflicted, this is left to the discretion of the judge, for this delict is referred ad crimen stellionatus, cujus pœna est arbitraria. (d) (4) Ubi etiam ostendit in fœneratoriis contractibus versari dolum et puniendum esse, etiamsi debitor sciens et volens usuram persolvat. (5) Jure Imperii pœna usurarii contractus est amissio quartæ partis ipsius fortis. (e) (6) It is no excuse for the said Harnikman that contracts of a similar nature were frequently entered into before; for this excuse may hold in rebus toto jure civili prohibitis: non autem in iis, quæ per se sunt turpes: quia in istis locum habet quod dicitur, D. 28, 19, 16, 10; exacerbanda esse supplicia, quoties multis personis grassantibus, exemplo opus est.

(7) Lastly, it remains to be noted that Harnikman ought to receive all the heavier punishment because he has frequently committed the same kind of delict, and has shown thereby an *animus delinquendi*. Nam propter iterationem delictorum aut consuetudinem delinquendi, reus gravius puniendus est. (f)

ROTTERDAM,  
23rd May 1616.

(b) D. 1, 3, 29.

(c) D. 23, 2, 68.

(d) Menoch. de arb. jud. quæst. cas. 348.

(e) Gail, l. 2, obs. 4, num. 1.

(f) In l. Clarus tract. crim. quæst. 84, num. 6.

## OPINION No. 71.

HOLL. CONS. III. B. 179.

[GROTIUS III. 12.]

### Arbitration.

1. ARBITRATORS who have accepted a deed of submission are bound to act in the matter up to its conclusion and to give their award.

2. When an injunction has been obtained in order to bring the submitted case before a judge, arbitrators are not bound to enter into the case.

3. Arbitrators cannot give a partial award or separate doubtful points, but must decide the whole matter in dispute at once, and cannot depart from the method in which the award is to be made, as prescribed by the deed of submission.

4. Arbitrators are bound to receive all evidence and documents which the parties on either side desire to hand in, in justification of their contentions and in refutation of the allegations of the other side.

I have seen (1) a certain verbal accord\* held before Mr. Peter Blois van Gouwenburg, commissioner of the High Court of Holland, between Adriaan Jacobs van Noort, of the one side, and Meyntsge Simons, widow of Jacob Jacobsz, sen., of the other side, the said verbal accord containing a compromise of the estate of Meyntsge Simons and her consent to judgment (*willige condemnatie*) before the High Court; (2) an injunction or penal interdict (*mandament penaal*) obtained by Adriaan Jacobsz on the 28th October 1631; (3) a list of the documents handed in by the said Adriaan Jacobsz to the arbitrators mentioned in the deed; (4) a certain memorandum and statement of claim made by Adriaan Jacobsz, together with other documents.

In connection therewith I have been asked, firstly, whether the arbitrators are bound to give their award, notwithstanding that a penal injunction has been obtained?

Secondly, whether they can decide on separate doubtful points, or whether they must decide the whole matter in dispute at one and the same time?

And thirdly, whether they ought to accept the documents which Adriaan Jacobsz intended to hand in, in justification of his claim and in refutation of the allegations of the afore-mentioned Meyntsge Simons?

(1) In answer to the first question, I am of opinion that the arbitrators, presuming that they

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\* For the meaning of the term "verbal accord," see Van der Linden, *Instit.* iii. p. 1, c. 2, § 7, and his *Judicieel Practyk*, 2, 1, § 1-6.

had agreed to act under the deed of submission, are bound to act in the matter up to its conclusion and to give their award. *Nemo quidem cogitur arbitrium recipere, sed officium arbitrii qui recepit, implere debet.*(*a*) (2) The penal injunction obtained does not do away with this duty, for it was not obtained to bring the principal case before a judge, in which case the arbitrators would not be bound to go into the matter.(*b*) (3) With the exception that a certain extension of time was granted, the matter remains as it was before, and is subject to the decision of the arbitrators.

As regards the second question, it is an accepted principle of law *quod si de pluribus rebus sit arbitrium receptum, nisi omnes controversias finierit arbiter, non videtur dicta sententia;*(*c*) but further, the manner in which the award is to be given is specially stipulated in the deed, viz., all accounts and counter-claims up to the very last must be scrutinised, examined, and gone into, and after the witnesses have been fully heard the accounts are to be closed and the award given. This method is not to be departed from by the arbitrators.(*d*)

(4) Concerning the third point, I think that the arbitrators would do well to accept the said documents and to give them due consideration; for although the deed of submission speaks only of the

(*a*) D. 4, 8, 3, 1.

(*b*) D. 4, 8, 9, § 5, cum legibus sequentibus.

(*c*) D. 4, 8, 19.

(*d*) D. 4, 8, 21, and 3, in pr.



oral testimony of witnesses, yet the accounts are to be scrutinised and examined previously, and for this purpose it is necessary to inspect the receipts and vouchers in proof of the claims filed. And if the said Meyntsge Simons handed in any documents to contest the said accounts, Adriaan Jacobsz van Noort must be allowed to file counter-affidavits and documents which he may deem necessary to contradict the documents of Meyntsge Simons, for the present case affects not only his ordinary interests, but also his character, and the arbitrators should accept all possible information in order to give a conscientious and equitable award.

28th February 1632.

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Voet in his Commentaries, 4, 8, treats very fully of the laws on arbitration which obtained in his day.

This subject is also mentioned by Van Leeuwen in his *Censura Forensis*, ii. 1, 17, and Damhouder, "*Praxis Civil.*" c. 203.

When the arbitrators cannot agree, and an umpire (*eindbeslisser*) has been appointed, the decision of the latter is binding. But how if one of two arbitrators refuses to proceed to the final determination of the disputed points? His refusal in such a case is considered as equivalent to non-agreement, and the umpire must then intervene in order to bring the proceedings to a final issue.(e)

Unless anything appears to the contrary in the deed of submission, the arbitrators, and not the parties, must fix the time and place of meeting of the arbitrators.(f)

The award given by arbitrators can be set aside, when

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(e) *Hawes & Co. v. Meintjes & Dixon*, 3 S. 62.

(f) *Bull, Sons, & Co. v. The Colonial Government*, 6 J. 283.

the circumstances under which it was given afford sufficient ground for sustaining an *exceptio judicis suspecti*.

Thus where two parties agreed to submit certain disputes pending between them to an arbitrator, but before the award had been given, the one party died, and the other party was appointed his executor, and the award was subsequently made a rule of court, the other party *qua* executor consenting: *Held* that the award could be set aside three years afterwards, on the application of minors interested in the estate of the deceased; Bell, J., stating, "The whole complexion of the case shows that the defendant was the acting executor; he should not have acted as executor in such a case."*(g)*

The award must be final and definite. Ambiguity and want of finality are good grounds for refusing to confirm the award.*(h)*

The deed of submission cannot be revoked by one of the parties *invito altero*.*(i)*

*Ad 2.* If the contracting parties stipulate in the contract between them that any disputes or differences under the contract should be submitted to arbitration, such stipulation is a condition precedent, and the complainant can only come to court when submission to arbitration has been rendered impossible, owing to the acts of the other contracting party.*(k)*

An agreement to submit all future disputes to the arbitration of uncertain persons cannot be enforced by the court unless the parties have themselves in the agreement assessed the amount of damages for non-performance, by stipulating a certain penalty.*(l)*

*Ad 3.* When no special directions, to the effect that an award can be made in part, are contained in a deed of

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*(g)* Evans *v.* Van der Plank & Cleghorn, 1 S. 252.

*(h)* Lippert & Co. *v.* Town Council of Port Elizabeth, 3 E. D. C. 189. Wynberg Valley Railway Company *v.* Eksteen, 1 R. 70.

*(i)* Twentyman *v.* Chisholm, 3 Menz. 161.

*(k)* Davies *v.* The South British Insurance Company, 3 J. 416.

*(l)* Schmidt *v.* Francke, 1 Menz. 334.

submission or order of reference, it is not competent for the arbitrator to make such an award.<sup>(m)</sup>

When, however, certain clauses of an award which are bad are not so closely connected with the rest as to affect the validity of the whole award, but are so clearly separable that they may be rejected, such clauses may be expunged, and the rest of the award confirmed as valid.<sup>(n)</sup>

If the arbitration takes place in terms of certain statutory provisions, the award must be in strict conformity with the terms of the Act.<sup>(o)</sup>

*Ad 4.* Both parties must be present during the conduct of the arbitration. To examine witnesses in the presence of one party only is improper, and the award will be set aside, although no actual injustice has been done thereby.<sup>(p)</sup>

If it is alleged that certain irregularities had taken place, but the complainant had nevertheless proceeded with the arbitration, and had thus chanced an award in his favour, he will be taken to have waived his objections to the irregularities (*e.g.*, evidence heard *ex parte*,<sup>(q)</sup> or evidence taken not on oath).<sup>(r)</sup>

If the umpire commits certain irregularities, such as not giving notice to one party,<sup>(s)</sup> or founding his decision on notes taken by the arbitrators, without himself hearing the witnesses,<sup>(t)</sup> the award will be set aside.

When the parties, by a clause in the deed of submission, have bound themselves to attend and produce such books as may be in their possession, touching the matters in dispute, only such books need be produced as are required by the arbitrators.<sup>(u)</sup>

<sup>(m)</sup> *Blatchford v. Blatchford*, 1 R. 86.

<sup>(n)</sup> *Beneke v. Schoeman*, Buc. 1876, 137; see also *Twentyman v. Chisholm*, 3 Menz. 161.

<sup>(o)</sup> *The Wynberg Valley Railway Company v. Eksteen*, 1 R. 70.

<sup>(p)</sup> *Dietz v. Pohl*, 1 Menz. 397. *Macdonald & Co. v. Gordon & Co.*, 1 R. 251. *Croll q.q. Kerr v. Brehm*, 2 S. 227.

<sup>(q)</sup> *Chabaud & Son v. Mackie, Dunn, & Co.*, Buc. 1876, 190.

<sup>(r)</sup> *Viljoen v. Snyman* (S. A. R. 1893).

<sup>(s)</sup> *Fryer and Others v. King*, 3 Menz. 160.

<sup>(t)</sup> *Groenewald v. Smith*, 3 Menz. 158. *Wood v. Gilmour*, 3 Menz. 158.

<sup>(u)</sup> *Twentyman v. Chisholm*, 3 Menz. 161.

MANDATE.

OPINION No. 72.

HOLL. CONS. III. B. 180.

[GROTIUS III. 12, 8.]

Mandate—Acceptance—Liability—Amount of diligence  
required—*Dolus*.

1. WHEN any one has received a written request to act in a certain matter, and has not refused it per letter or otherwise, he is understood to have accepted the mandate in terms of the request, and is bound to execute the charge fully. If he neglects or delays to do this, he is liable to make compensation for all damages, costs, and interest suffered or incurred by the mandator. Et No. 4.

2. A mandatarius in discharge of his mandate is bound to exercise such diligence as every person uses in the transaction of his own business.

3. *Dolus esse dicitur si quis nolit persequi, quod persequi potest.*

In the year 1629 Balthazar de Moucheron loaded a certain cargo at Archangel in the ship of Peter

Rutgers under the custody of Arnout Wouters, to be carried to St. Lucas in Spain, where Wouters was to realise the said cargo for account and benefit of Jacques Budier, junior, but with this restriction, that the cargo was pledged to Budier under the following circumstances :—David Ruts at Archangel had advanced Moucheron a sum of 2000 roubles; Moucheron gave him a bill of exchange drawn on Budier; Arnout Wouters entered into the following agreement on the bill of lading :—“ I, Arnout Wouters, acknowledge to have received the above-mentioned goods loaded in the ship of Peter Rutgers from Balthazar de Moucheron for Jacques Budier; and since Moucheron has drawn on Budier in connection with the goods for the sum of 2000 roubles at seven marks eight schellings per rouble, advanced by David Ruts for account of Gabriel Marcellis, I hereby promise and bind myself, in case Budier should refuse acceptance or payment of the bill, to pay the said 2000 roubles to Gabriel Marcellis or his duly appointed agent when I have realised the goods, God granting me a safe voyage. Thus done without guile or deceit at Archangel, on the 4th day of September 1629.”

The said Arnout Wouters having arrived at Seville, remitted 3500 ducats (as acknowledged by Budier) to Hans de Koning at Antwerp to await the order of Ferdinand Vuyst. At the same time Wouters wrote to Vuyst informing him of the said remittance, and instructing him not to let a single penny pass out of his hands until he, Wouters, had been released from all liability. Ferdinand Vuyst received the mandate

and accepted it, as shown by his letters and acknowledgment, but he took no steps to obtain possession of the money. Hans de Koning neglected to hand it over, and Vuyst did not advise Wouters of the fact, nor did he exercise proper diligence to protect the latter's interests, or to compel De Koning to hand over the money on his order. Furthermore, Vuyst, per letter of 15th of February 1631, advised Wouters that the afore-mentioned Marcelis had no further claim against him, which in reality was not the case. In consequence of this, Wouters relying on the diligence of Vuyst and his subsequent advice, took no other steps to obtain his release, and the aforesaid 3500 ducats were left with Hans de Koning to do with as he liked, and Wouters lost that amount, having had to pay the said Marcelis under his original agreement the aforesaid 2000 roubles with interest. The question now is whether the said Ferdinand Vuyst is liable to indemnify Arnout Wouters under the afore-mentioned agreement for damages and costs sustained or likely to be sustained.

(1) I am of opinion that Ferdinand Vuyst is bound to do this; since he received the letter of Arnout Wouters and did not decline the request, he must be held to have accepted the mandate in terms of the letter,<sup>(a)</sup> and he is therefore bound to execute the charge in every respect. *Sicut enim liberum est mandatum non suscipere, ita susceptum consummari oportere, nisi renuntiatum sit.*<sup>(b)</sup>

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(a) D. 16, 6, 16.

(b) D. 17, 1, 22, 11.

(2) He was, moreover, bound to exercise, in the discharge of his mandate, such diligence as every person uses in the transaction of his own business. *Aliena enim negotia exacto officio reguntur, nec quicquam in eorum administratione neglectum ac declinatum culpa vacuum est.*(c) (3) Imo dolus esse dicitur, si quis nolit persequi quod persequi potest.(d) Cicero's speech in defence of Sextus Roscius is in accordance with this doctrine where he says, "Quid recipis mandatum, si aut neglecturus, aut ad commodum tuum conversurus es? Cur mihi te offers ac meis commodis officio simulato officis et obstas? Recede de medio, per alium transigam." And since the said Vuyst did not accomplish what he was legally bound to do, he must be held liable to compensate Arnout Wouters for any damage sustained by reason of his negligence or fault, qui mandatum suscepit, si potest id explere, deferere promissum officium nec debet, alioqui quanti mandatoris intersit, damnabitur: si vero intelligit explere se id officium non posse, id ipsum cum primum poterit, debet mandatori nunciare ut is, si velit, alterius opera utatur. Quod si cum posset, nunciare, cessaverit, quanti mandatoris intersit, tenebitur.(e)

HAMBURG,

21st May 1633.

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(c) C. 4, 35, 21.

(d) D. 17, 1, 44.

(e) D. 17, 1, 27, 2.

## OPINION No. 73.

HOLL. CONS. III. B. 27; and see III. A. 38.

[GROTIUS III. 12, 8.]

Agent—Principal—Instructions—Responsibility—*Dolus*—*Negligentia*—Reference to oath.

1. AN agent must follow the instructions of his principals, without departing therefrom in the least; failing which, he will have to hold them harmless.

Mandatarius non tantum ex dolo, sed etiam ex lata culpa tenetur.

Dissoluta negligentia prope dolum est.

Dolus est, si quis non exigerit, quod exigere debet.

2. Non fatetur, qui errat.

Debitor non liberatur apocha, nisi pecunia vere fit soluta.

Condici potest apocha, si vera causa non subsit.

3. According to law, a matter cannot be referred to the oath of the party who has the legal presumption against him.

4. Ignorance which existed is presumed to continue.

5. Administrator non tenetur locupletem debitorem præstare, sed debitorem esse.



He must hand over the vouchers and other documents.

He must advise his principal of the insolvency of the debtors; failing which, he will be personally responsible for the debts of the said insolvents.

6. Relief will not be refused, quoties æquitas restitutionem suggerit.

In bonæ-fidei contractibus etiam majoribus subvenitur, maxime si fraus ab adversario intervenerit.

7. No one is allowed to charge for what he has done in the house of the deceased, if he is heir to half the estate, and if the whole has not taken up more of his time or involved more labour than he would have had to bestow on his half.

Administrators, executors, and agents, their powers of lending money belonging to the estate to third parties. [Holl. Cons. 3 (a.) 38.]

Having seen a certain suit pending before the arbitrators Dirk Vlack and Elebert Spiegel, advocates, together with Andries Ryckarts and Frans van Loon, merchants, between the heirs of Maria van Solt, plaintiffs, and Hans van Solt, sen., defendant, and also a short account of the circumstances of the case, and four questions asked in connection therewith :

(1) Concerning the first, I am of opinion that the plaintiffs have a good ground of action to claim from the defendant the moneys belonging to Francina van Solt, and advanced by the defendant to his son, Hans van Solt, jun., and brought up in the account in the names of Pieter van Peenen and the Francfoorder

account as debtors. For Francina van Solt, whose property was administered by the defendant, had not only no knowledge that the defendant had advanced the money to his own son, nor did she consent thereto, as is set forth in the 29th and 30th articles of the answer to the defendant's plea, but, on the contrary, she believed that the amounts were in circulation among diverse persons. Moreover, it appears from all the circumstances of the case that the said Francina van Solt was unwilling that the defendant should advance the money to any of his sons; for when she got notice that the defendant had advanced some money belonging to her to some of his sons under the names of Gio and Giulielmo, she refused to ratify it, and informed the defendant that he would be personally responsible, as appears from the 33rd article of the statement of the case. To this must be added that a sum of £530 Flemish was lent to the same Hans van Solt, jun., by the defendant, and his name appears on the acknowledgment of debt rendered to the said Francina van Solt. In like manner the defendant should have placed the other sums advanced to his son openly upon his name, if the advance had been made in conformity with the will and intention of Francina van Solt. On the contrary, the use of fictitious names, where the sums had been advanced not to strangers, but to the defendant's own son, necessarily gives rise to a presumption that such has been done against her will, more especially since a good administrator or agent would not advance so large a sum to one merchant

alone, even if he had large credit, but would rather divide it amongst several, so as to reduce the risk.

It is a well-known legal principle that an administrator must conform in every respect to the wishes of his principal, and must do nothing contrary thereto, otherwise he must hold his principal harmless and will be personally liable. *Tenetur enim mandatarius, non tantum ex dolo, qui inter conjunctas personas facile præsumitur sed etiam ex lata culpa (D. 17, 1, 8, 1). Et in hac materia, dissoluta negligentia prope dolum est (D. 17, 1, 29). Imo, dolus est, si quis non exegerit, quod exigere debet (D. 17, 1, 44).*

(2) With regard to the second question, I am of opinion that the receipt and suppositious approval of Francina van Solt, or of Maria van Solt, her heiress, to half the estate cannot bar the plaintiffs. On the contrary, the exceptional diligence displayed by the defendant to obtain the receipt renders the whole transaction more suspicious; for as regards Francina van Solt, it amply appears from the 28th, 29th, and 30th articles of the statement of the case that she was unaware, at the date of giving the receipt, of the fact that the said moneys had been advanced by the defendant to his son, and that she never consented thereto. As regards Maria van Solt, although the defendant contends that she had notice at the date of her receipt, yet he has failed to establish this as required by law, for the presumption arising from the fictitious names employed is against him. There is clear proof that she had no notice,

and this receipt cannot be admitted as proving the contrary. It constitutes part of the plan of the defendant's son to release himself and his father from all liability. This scheme in the handwriting of the son, prepared for the signature of Maria van Solt, was handed in during the hearing of the case, and was allowed by the defendant, as appears from the 13th article of the statement drawn up in his behalf. It can be easily gathered from the full statement that this project was devised a short time before the death of the said Maria van Solt, and after the date of the receipt; all of which would not have occurred had the said Maria van Solt known that the sums in question had been advanced by the defendant to his son. It is a well-established legal principle, *quod non fatetur qui errat* (D. 42, 2, 2); *neque apocha liberatur debitor, nisi pecunia vere soluta sit* (D. 46, 4, 19). *Imo condici potest apocha, si vera causa non subsit* (D. 12, 4, 4). And such general receipt and consent is null and void unless there be proof of special notice. This could occur if the defendant had indemnified the said Francina for the money advanced and brought up in the account under the names of Gio and Giulielmo.

And the question whether Maria van Solt had notice of these advances cannot be referred to the oath of the defendant; for according to law, a question cannot be referred to the oath of the party who has a *presumptio juris* against him, such as the present defendant; for, in the first place, he made use of fictitious names without any reasonable explana-

tion being given; and secondly, because ignorance which is once proved to exist is presumed to continue.(a)

But further, granted that the defendant had not concealed the truth, and had not used fictitious names, and that the account had been receipted without error, it would have been his duty to inform the said Francina and Maria that such sums were really payable by the Francfoorder merchants and Pieter van Peenen—*locupletem quidem debitorem non deberet præstare, sed debitorem esse* (D. 18, 4, 4), and would have to give up all the acknowledgments and other documents connected with these debts (D. 17, 1, 43), and, moreover, would have to advise his principal as to the insolvency of the said Pieter van Peenen and the Francfoorder merchants, in default whereof he would be liable for the sums advanced.

(3) Regarding the third question, I think that the plaintiffs do not require any relief, since the general words of the receipt cannot be extended to what the said Francina and Maria were ignorant of, for the reasons above given. To the extent, however, that any one thinks he requires relief in the case, it cannot be refused him. *Nam quoties æquitas restitutionem suggerit, eo erit descendendum* (D. 4, 6, 26); *et in contractibus, qui bonæ fidei sunt, qualis est contractus mandati, etiam majoribus officio judicis, causa cognita, publico jure subvenitur* (D. 4, 6);

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(a) See *Ross v. Page*, 2 A. 52. *Forbes, Still, & Co. v. Sutherland*, 2 S. 231.

maxime si fraus ab adversario intervenerit, succurri oportebit (D. 4, 1, 7, 1).

(4) Regarding the fourth question, I think that the defendant cannot claim any remuneration for what he did in the house of the deceased, whose heir he was to the extent of one-half, presuming that the whole of the estate did not cost him more time or trouble than his half (argumento, D. 10, 2, 39). Si idcirco amplius erogatum esset.

Dated, 16th February 1632.

This opinion is approved of by several other lawyers, viz., N. van Sorgen, Cornelis Bosch, W. de Groot and T. Graswinckel.—[ED.]

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#### MANDATUM—AGENCY

is one of the contracts *ex consensu*. At first it was essential that the mandatarius should give his services gratis,<sup>(b)</sup> and this rule still obtained in the time of Grotius. If any remuneration was stipulated for, the contract became one *locatio conductio* of services. Schorer in his "Notes"<sup>(c)</sup> says that in his time agents may claim remuneration at the discretion of the court, and that even under an uncertain promise, or without any promise at all, as long as such persons are advocates, attorneys, &c., who are accustomed to accept remuneration for their labour, and this rule is extended by our customs even to agents in *extra-judicial* matters. Van Leeuwen does not state decisively that it must be gratis, but says, "without stipu-

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(b) Digest, 17, 1. Code, 4, 35. Grotius, 3, 12.

(c) Ad Grot. 3, 12, 2.

lating for any remuneration ;” from which we might infer that the courts would fix the remuneration. *Et vide* Voet, 17, 1, 2.(d)

Agency is either express or implied. *Express*, when either verbal or written instructions are given by a mandant authorising the mandatary to act for and to represent him, *aut generaliter aut cum specialibus potestatibus*, and the latter accepts the *mandatum expresse*. *Implied*, when the circumstances of the case, *ex rebus et factis*, disclose the assumption of agency, there being no express instructions or acceptance—*e.g.*, where a person administers the affairs of another, without objection, and with the knowledge of such other, or when, under certain circumstances, a request has been directed to a person to undertake certain work on behalf of another, and he sends no reply.(e)

As a rule, however, the assumption of agency is not to be presumed, and the person alleging it must prove it.(f)

Unauthorised management is a kind of implied agency. The *negotiorum gestor* is, however, liable to a greater extent than the ordinary mandatary.(g) Want of consideration is no plea to a claim for damages against an unauthorised agent.(h) He will be liable for all his acts done in the administration assumed by him, and should he incur any unnecessary and unauthorised costs, he will be liable *bonis propriis*.(i)

The mandatary may delegate the execution and discharge of the business to another. If empowered to do so, his liability ceases upon delegation; and he will not be liable for the acts of the substituted agent, if he acts

(d) See also Groenewegen ad Code, 4, 35, 17. Van Leeuwen, *Censura Forensis*, i. 4, 24, 13.

(e) *Martin v. Rive*, 4 S. 225. Opinion of Grotius, No. 72 (Holl. Cons. 3 (b.) 180). Grotius, *Inst.* 3, 27, 3. Voet, 17, 1, 2, 3. Van Leeuwen, *Censura Forensis*, i. 4, 24, 2, and i. 4, 17, 17. Pothier cont. de Mand. 1, § 2 and 3, n. 22, 23, 28, 32, 33, 36. Burge on Col. and For. Laws.

(f) Voet, 17, 1, 3. *Queen v. Richards*, 2 G. 581. *Faure v. Louw*, 1 J. 3.

(g) Grotius, 3, 27, 3, and Schorer *ad ib.*

(h) *The Colonial Secretary v. Davidson*, Buc. 1876, p. 131.

(i) *Prince q.q. Dieleman v. Berrange alias Anderson*, 1 Menz. 435.

under a power of attorney granting him the right of substitution; (*k*) but if not, he alone, and not the delegated agent, is liable to the mandant, and no right of action is allowed the mandant against the delegated agent, or the latter against the former. (*l*)

The agency ceases immediately upon the death of the principal, (*m*) unless the mandatary is a procurator in *rem suam* and the agency is coupled with an interest. (*n*) A bond in favour of an agent or his administrators may be sued upon by the administrator of the agent even after the death of the principal. (*o*)

A procurator in *rem suam* is entitled to sue. (*p*) A procuration is either general or special; it is general when the mandatary is vested with authority to transact all the affairs of his constituent; it is special when the mandatary is vested *cum specialibus potestatibus* for the purpose of transacting some particular business.

The acts of the agent done *ultra vires* of the procuration cannot bind the constituent. (*q*) In an action against such constituent, *ultra vires* must be specially pleaded if the defendant wishes to rely on it. (*r*)

If a promissory note has been signed by A. "for B.," and B. has been summoned thereon and has been called upon to deny A.'s authority or signature, provisional sentence will be granted upon failure of such proof by B. (*s*)

The powers of a general agent do not extend to the borrowing of money for his principal without special authorisation. (*t*) He cannot sue in his own name as general or special agent for his principal; (*u*) nor can he be sum-

(*k*) *Cammack v. Murray*, 2 A. 3.

(*l*) *Voet*, 17, 1, 5.

(*m*) *Heartley v. Poupart*, 1 Menz. 400.

(*n*) *Story on Agency*, § 477 *et seq.* *Hunt v. Rousmaniere*, 8 *Wheaton*, 174. *Fick v. Bierman*, 2 *J.* 26.

(*o*) *De Waal, Executrix of Rowles v. Mostert*, 1 *Menz.* 534.

(*p*) *Neethling v. Taylor*, 1 *Menz.* 30.

(*q*) *Poppe, Russouw, & Co. v. Kitching and Others*, 6 *J.* 307.

(*r*) *Smith & Co. v. Standard Bank of B. S. A.*, *Buc.* 1868, p. 253.

(*s*) *Verwey v. Abo*, 2 *S.* 190, and compare *Levy & Co. v. Smith*, 3 *G.* 231.

(*t*) *Stenhouse v. Cressy*, 1 *R.* 35.

(*u*) *Willmot v. Schalkwijk*, *Buc.* 1879, 150.



moned for his absent principal, although he can accept service of summons.(v)

He cannot, however, be compelled to accept service (*Colonial Government v. Robb*, 5 G. 433). In strict practice the power of attorney of the agent entitling him to accept service ought to be exhibited to the court (*Guardians of Marcus v. Jacobsohn*, 2 C. L. J. 168 (Natal), et per Lawrence in *Robb's case*, *supra*).

The agent must hold himself aloof from any advantage to be derived from the agency except his commission.(x) "Therefore "tutor rem pupilli emere non potest; idemque porrigendum est ad similia velut curatores, procuratores et omnes alios quæ aliorum negotia gerunt."(y)

The utmost good faith is required from an agent towards his principal, and where an agent takes advantage of the confidence reposed in him by incurring a liability in the name and on behalf of his principal for the sole benefit of the agent, the court will not, at the suit of such agent, hold the principal liable. The agent, in order to succeed, must prove an unqualified ratification by the principal, and it is incumbent upon him to show that the ratification was effected after a full disclosure of all the facts which might, if known to the principal, have operated to prevent such ratification of the unauthorised act (*Page N. O. v. Ross*, 2 A. 52. See also Grotius, Opinion No. 73, Holl. Cons. 3 (b.) 27, which bears out fully the finding of the court, although not quoted in the report of the case).

The person dealing with an agent with a knowledge that the transaction must be to the disadvantage of the principal must bear the loss rather than the principal (*Buchanan v. Swemmer*, 2 S. 102).

Transfer passed in the name of an agent will not vest the *dominium* of the property in him for want of *justa causa*, and the principal will be entitled to re-transfer.(z)

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(v) *Dickinson v. Levy* q.q. Van der Chys, 2 Menz. 199.

(x) *Story's Equity Jurisprudence*, § 315.

(y) Per Watermeyer, J., in *Forbes, Still, & Co. v. Sutherland*, 2 S. 231, and *Buchanan v. Swemmer*, 2 S. 102.

(z) *Preston & Dixon v. Biden's Trustee*, 1 A. 322.

If certain disabilities attach to the principal, his agent will be likewise restricted. Thus alienations void under the insolvent law, if made by the insolvent, will be void if made by his agent.(a)

The principal is liable for all acts done by the agent within the scope of his authority.(b)

If, however, a person who is an agent for another enters into a contract on his own behalf with another, who knows that he is such agent, and believes that the contract is entered into on behalf of the principal, the principal is not bound thereby, there being no privity of contract between him and the other contracting party.(c)

During the continuation of the agency the principal is bound by admissions made by the mandatary in connection therewith, but admissions made by an agent after the termination of the agency cannot bind the principal.(d)

If several constituents have jointly given a mandate, the mandatary can sue each one separately, but they can claim the *beneficium divisionis* if all are solvent, thus resembling *fidejussors* (e)

When the circumstances disclose that the relations between mandant and mandatary depended on certain well-known customs, such customs will be taken into consideration in questions of liability.(f)

Two excellent illustrations of the liability of principals for the acts done by their agents in contracting with third parties, who ought to have made certain disclosures, but who did not do so, owing to the investigations of the agents, are afforded by the cases of *Drysdale v. Union Fire Insurance Co.*(g) and *Simon v. The Equitable Marine and Fire Assurance Co.*(h)

(a) *Brown v. Dyer & Dyer*, 3 E. D. C. 267.

(b) *Cornelissen v. Equitable Fire Insurance Co.*, 4 S. 35.

(c) *Kowie Boating Co. v. East London Landing and Shipping Co.*, 4 J. 465. See also *Consolidated Diamond Mining Co. v. Cape of Good Hope Diamond Mining Co. Ltd.*, 1 G. 438.

(d) *Wood v. Dersley*, 2 E. D. C. 200.

(e) *Voet*, 17, 1, 10. *Vide* *Chiappini v. George*, 1 Menz. 303.

(f) *Niebuhr and Another v. Joel*, 5 G. 335.

(g) 8 J. 63.

(h) 2 Shiel, 338.

In the former, the proposal for a fire insurance policy was prepared by the agent of the Company after a thorough inspection of the premises, and was signed by the plaintiff *bona fide*, without any intentional concealment, and in reliance upon the accuracy of the agent's investigations. The proposal stated that the walls were of brick and iron, whereas some were of wood, brick, and iron, and there were two canvas partitions. Under these circumstances the usual fire insurance policy was issued by the defendant company. *Held* that, if there was a material misdescription, the Company's agent was responsible, and that the Company could not, therefore, avail itself of the advantages of conditions in the policy relating to material misdescriptions.

In the case of *Simon v. The Equitable Marine and Fire Assurance Company*, the agent for the defendant Company carefully inspected the premises and goods, and thereupon drew up a proposal form for the insurance of the goods, which was signed by the plaintiff without fraud or collusion, and in the belief that accurate information was contained in the document. The proposal stated that the premises were detached, and that no hazardous goods were kept thereon, whereas they were not detached, and some hazardous goods were found on the premises. *Held* that the Company was liable for the damages sustained through fire, and that its agent was responsible for the material misdescription.

The agent is not personally liable where he unsuccessfully institutes or defends an action on behalf of his principal.(i)

An agent who was instructed to insure, but failed to do so, will not be entitled to charge the premium against his principal, although he may be liable in case of loss.(k)

The agent will be liable for a tortious conversion of his principal's goods administered by him,(l) and for negligence in the performance of his mandate.(m)

A person who enters into a contract, as agent for another from whom he had no authority, will be liable on the con-

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(i) Brink q.q. *Breda v. Voigt & Breda*, 1 Menz. 537.

(k) *Levy v. Calf and Others*, W. p. 1.

(l) *Buchanan v. Swemmer*, 2 S. 102.

(m) *De Villiers v. De Villiers*, 5 J. 369.

tract itself, and not by virtue of an implied warranty.<sup>(n)</sup> The agent will therefore be personally liable for all acts done *ultra vires*.

The goods left with an agent for sale do not belong to him, or to his trustee upon insolvency. The principal and owner can recover possession, and can claim the monies paid and due as purchase-price for goods sold by the agent.<sup>(o)</sup>

The insured is the *agent* of the insurer, and he must only incur such reasonable expenses for the protection of the property of his principal as are warranted by the circumstances of the case and the intrinsic value of the goods.<sup>(p)</sup>

If loss ensues through the negligence of the principal, he cannot hold the agent liable.<sup>(q)</sup>

Briefly stated, the duties of the *mandatarius* are :—

(1.) To do what he has undertaken.

(2.) To execute the commission in terms of his instructions; he must not exceed his powers, must leave nothing undone, and must do nothing wrong.

(3.) He must act with care and honesty, and in the best interests of his principal.

(4.) He must give an account of his agency, and must deliver up to his principal whatever he may have acquired in the execution of his agency.

The duties of the *mandator* are :—

(1.) To remunerate the services of the agent.

(2.) To repay the agent all expenses incurred by him in the execution of the mandate.

(3.) To see that the agent is indemnified against all obligations incurred for the purposes of the agency.

<sup>(n)</sup> Wright *v.* Williams, 8 J. 166.

<sup>(o)</sup> Chiappini & Co. *v.* Jaffray's Trustees, 2 Menz. 206.

<sup>(p)</sup> Grotius, Op. 82, p. 597, *infra*, and *cf.* Smith's Mercantile Law, p. 469 (10th ed.).

<sup>(q)</sup> Venter *v.* Green and Another, 1 R. 44.

## OPINION No. 74.

HOLL. CONS. III. B. 177.

[GROTIUS III. 14, 1 & 4.]

Sale—Doubtful contract of—When sale is presumed to be a pledge.

1. WHEN and under what circumstances a contract of sale followed by delivery must be considered as a pledge.

2. *Id prævalere debet quod agitur, ei, quod simulatur.*

Having seen a certain memorandum of purchase and sale of eleven-sixteenth parts of the ship *The Promised Land* and of a twelfth part of the ship *St. John*, entered into between Joost Willems van Niekerk, vendor, and Sr. Jan van de Wouweren, acting for himself and for Sr. Jan Outgers, vendees, on the 26th November 1629, also the power of attorney given by the said Van Niekerk to the notary Jan Warnarts to pass transfer of the above-mentioned parts of the ship, before the Schepenen of the place where they may be, affidavits of Anthony Mans, Dirk Wouters, Jeronimo Grion, Hans W. Elbeuk, and Pieter A. Moerbeek, mer-

chants, made before a notary on the 16th February 1630, a certificate made before the Court of Holland by the afore-mentioned Moerbeek on the 16th August 1630, and lastly the interrogatories and the deposition of the notary Jan Warnaarts dated 8th October 1630 :

(1) I am of opinion, after considering the points raised, that although the affidavits and certificates of the afore-mentioned persons, who are all said to be creditors of Joost Willems van Niekerk afore-mentioned, might be considered as evidence in their own favour, yet it is substantiated by the deposition of the afore-mentioned notary, where he refers to the 12th and 14th articles of the interrogatories, inasmuch as he declares that the said Van Niekerk had stated at the time the memo and power were drawn up, that although the transaction was done by way of sale and transfer, yet his intention was that "whatever amount more or less was realised from the ships would accrue to his profit or loss." From the affidavit it also appears that the afore-mentioned Jan van de Wouweren was informed of this, nor does it appear that he, Van de Wouweren, objected thereto.

All these considerations give rise to a certain presumption that it was the intention of the contracting parties not to transfer the ownership in the said parts of the ship, but merely that they should be pledged to Jan van de Wouweren as security for debts due to him. This presumption will at least have the effect that the *onus* is thrown on Van de Wouweren to purge himself by oath, and that in

default thereof the said contract cannot be otherwise considered than as a pledge: (2) cum prævalere debat id quod agitur, ei quod simulatur.\*

AMSTERDAM,

21st February 1632.

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The court is not bound by the feigned transactions between contracting parties. In order to arrive at a correct conclusion as to the nature of a doubtful transaction, both the circumstances which led up to the transaction and the insertion of unusual stipulations in the written agreement must be carefully examined.(a) The question in such cases is not what the object of the contracting parties was, but what was the real nature of the transaction.(b) Plus valet quod agitur quam quod simulate concipitur.(c) Agreements are to be construed by the intention of the parties indicated in and by them, and not by what they choose for the sake of convenience to call them (per Barry, J., Pres., in *Cholwick v. Penny*).(d) The facts in this case were as follows:—A., who was a creditor of B., wished to protect and secure himself. He thereupon wrote to B. that as he (B.) was in his (A.'s) debt for shop purchases, he (A.) had better let a sale be made of B.'s furniture, so that B. might consider the debt paid, adding: "I will hold the furniture one or two years, as long as you pay me 2s. 6d. per month for the same, and agree to send them up whenever I demand them. If this will suit, I will hand them over at once." To this B. replied: "I am quite willing to accede to your request, and hereby sell you the goods in payment of my debt owing to you; and further, I am quite agreeable to pay you hire for

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\* See also Opinion No. 66 (Holl. Cons. 3 (b.) 176), with reference to the sale of these ships.—[ED.]

(a) Perezus ad Cod. iv. 22.

(b) Per De Villiers, C.J., in *The Treasurer-General v. Lippert*, 1 J. 302.

(c) Code, 4, 22.

(d) 5 E. D. C. 270. See also *Civil Commissioner of Clanwilliam v. Low*, 3 Menz. 523.

use of furniture at rate of 2s. 6d. per month from date." In his evidence B. admitted that there was another arrangement; that he was to have the right to buy these things back at the same price, when he was in a position to do so. A. claimed the furniture as having been sold to him, but the court decided that the circumstances clearly indicated that the transaction in nature was not a sale, but a pledge. "We must look at the real substance of the transactions, and not at the fictitious forms which the parties have adopted for certain purposes."<sup>(e)</sup> So, too, although a document purports to be a donation, the court may find that it is really a testamentary writing.<sup>(f)</sup> The importance of the distinction lies in the fact that all testamentary writings must be properly attested.

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<sup>(e)</sup> *Guest v. Le Roex's Trustees*, per the Chief-Justice, 5 J. 121.

<sup>(f)</sup> *Van Wijk v. Van Wijk's Executor*, 5 J. 1.



## OPINION No. 75.

HOLL. CONS. VI. PART II. 56A.

[GROTIUS III. 14, 33 & 12.]

Sale of landed property—Extent.

THE word “about” (*plus minus—omtrent*), used in the sale of landed property *in expressione quantitatis*, must be restricted to less than a morgen.

Thonis Pieters Woel of Bleiswijk transferred, on the 16th of February 1607, to Jacob Willems Bis, a certain house, erf, out-houses, plantation, &c., together with about fifteen morgen of adjoining land situated in the ambacht of Bleiswijk, *en masse*, without measure and without warranty (“*met de voet gestooten*”), the land to be taken as it lies between the boundaries; if greater in extent, the purchaser to be entitled thereto, and if less, he is to be satisfied therewith.

The said buildings and lands, according to the survey of Mr. Floris Balthazaris, sworn land-surveyor, made on the 30th May last from the diagrams of the property, were found to be no larger in extent than 13 morgen, 280 roods, 6 feet. There was, therefore, a deficiency of 1 morgen, 317 roods, 6 feet.

Adriaan Gillis, *cum sociis*, contends that they have obtained the right and transfer of the said property from the heirs of the said Jacob Willems under similar conditions, and that the said deficiency, as compared with the estimate first given, must be made good, with interest at  $6\frac{1}{2}$  per cent (sixteenth penny), or that the purchase-price agreed upon must be reduced. They request legal advice on this point, since the said Jacob Willems or his heirs in a similar case had to compensate the children of Willem Jans in *den bonten Os*, *cum sociis*.

With reference to the question asked, I am of opinion that the heirs or successors of Jacob Willems are entitled to claim reduction of the purchase-price in proportion to the deficiency of the land adjoining the buildings below fifteen morgen; more especially since the deed of purchase and sale first mentions "about fifteen morgen," and afterwards the boundaries. The fact that the word "about" is contained in the deed proves nothing to the contrary; for, according to the custom of our country, it could not be extended to a full morgen, much less to more. Nor is the case affected by the clause in the said deed reading as follows:—"As in one lump, without measure and without warranty (*met de voet gestooten*'), the land to be taken as it lies between the boundaries; if greater in extent, the purchaser to be entitled thereto, and if less, to be satisfied therewith." For although this clause implies that if there were found to be an excess, this would also be included in the sale, which would not have been the case

*si venditio simpliciter esset facta ad mensuram,*(a) and, on the contrary, if there had been a deficiency,(b) the purchaser could not claim transfer of the full extent, which he could have done in the case just put; but it does not follow from this that the seller could not claim a higher price for the excess, or the purchaser a reduction for the deficiency.(c)

'S GRAVENHAGE.

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SALE OF LANDED PROPERTY BY EXTENT.

The sale of landed property by measurement is a species of warranty to which reference is made in the two succeeding Opinions.

If there is a material and substantial difference between the extent of land stated in the conditions of sale and the actual area, the court will set aside the sale on the ground of fraud, when such is proved. If fraud is wanting, the transaction cannot be cancelled. Thus, where land was purchased upon certain conditions of sale, which stated that the land was "in extent about 6000 morgen according to diagram," and that "the land was sold as now situated, as the vendor does not wish to take advantage of any greater extent nor to make good any deficiency in extent," and the purchaser repudiated the sale on the ground that the land tendered to him was only 5700 morgen in extent, the court held that the seller was entitled to provisional judgment.(d) "No order that the court may now make," says

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(a) Bart. in tot. si Titius.

(b) D. 18, 1.

(c) Secund. doctrinam. Baldi. C. 4, 38. Pinell ad C. 4, 44, 2. Ratio quia doctrina ut æquitati conveniens in judiciis servatur facit, D. 18, 1, 40, 2. Argumento a relatis: Julianus, § si Titius, D. 19, 1, et in simili etiamsi promissum sit ne quid quæstionis nomine præstitur, præmium tamen ibi evictæ venditor debet, D. 19, 1, 1, 1. Papon. tit. de Garendis arrest. 3.

(d) Van der Merwe v. Burgers, 4 J. 129.

De Villiers, C.J., "will be final, for it is still competent for the defendant to set up the case that he had been deceived. The conditions of sale are clear upon this point, that no fixed extent of land was sold; and the ninth condition seems to me to have been intended for the express purpose of preventing any such question as the present arising. No doubt a case may arise where the discrepancy in the extent of land sold is so great as to lead to an inference of fraud; but that is not the case here."

The "question as at present arising" was the *cancellation of the sale*. The similarity between this case and the "conditions of sale" referred to by Grotius in Opinion No. 75 is remarkable. On the authority of Grotius the above judgment is sound in law, to the effect that cancellation of sale cannot be decreed under those circumstances. (The Opinion itself was not quoted in the judgment.) The report of the judgment does not state definitely whether, in face of the conditions, the purchaser would have been entitled to compensation for the difference. A judgment to the effect that the conditions above-mentioned dispensed with compensation would, I submit, have been contrary to the common law as laid down by Grotius and practised in Holland (Van der Keessel, Thes. 638).(e)

Land is sometimes sold, and the situation, boundaries, and beacons accurately described at the date of sale. If it is subsequently found that there is a variance between the description and the diagram and title-deed, the sale will be governed by the description, and not by the diagram.(f) The effect of diagrams attached to title-deeds have been discussed *supra*, when treating of Servitudes, pp. 448, 449.

Treating of this, Van Leeuwen says that land is generally sold *voetstoots*, "when the precise measure is uncertain, in these words, *in a lump, without measure, as it is without being liable for under or over measure, or the like.*" In such

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(e) See also *Fry v. Reynold*, 2 Menz. 161.

(f) *Visser v. Du Toit*, 1 R. 415, and 5 J. 94. *Barrington and Others v. The Colonial Government*, 4 J. 408.

case no compensation is allowed. If, however, the vendor had referred to the measure using the words "*in extent about,*" or words of similar import, compensation must be made, according to customary law, for under or over measure, or if the vendor *knowingly* over-stated the extent.(g)

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(g) Van Leeuwen, R. H. R. 4, 18, 7 and 8.

## OPINION No. 76.

HOLL. CONS. III. B. 145.

[GROTIUS III. 15, 4, & III. 14, 12.]

Purchase and sale—Warranty by seller—Conditions of sale—  
Sale *Voetstoots*—Warranty of title.

1. A BURDEN created over property, subject to a condition that it may be used in an honourable and proper manner, is of no avail.

2. When the seller does not give a surety bond or some other form of guarantee, the purchaser is not bound to pay the seller the purchase-price.

3. Contracts of sale wherein it is stipulated that the seller *pushes it with his foot (met den voet stoot)* are held to apply only to the burdens and charges, and not to the ownership of the property.

Having seen certain conditions of sale entered into between Jan Daniels Kuig, seller, and Gert Cornelis Knol, purchaser, dated the 30th December 1615, together with a certain testament of the year 1562 made by Willem Pieters Jacobs and Alijdt Jacobs, whence it appears that the lands sold under the above-mentioned conditions belonged to the estate of the said testator; and having been asked

whether the purchaser can demand security from the seller on account of the burden to which the said lands are subject under the will, delivery of the lands not having been effected as yet :

(1) I am of opinion that the said Gert Cornelis Knol is entitled to compel the seller to give him security, unless the seller exhibits to him a deed from the Orphan-Masters of Gouda and all the blood-relations of the seller, stating that the grandchildren of the testator are qualified to use the property left to them in an honourable and proper manner; and that therefore the aforesaid burden (arising from this condition) is void. (2) And should such agreement, or security in lieu thereof, not be forthcoming, the purchaser is not bound to pay the seller the purchase-price.(a)

(3) And the stipulation in the conditions that the purchaser *pushes the land with his foot* (*het landt stoot met den voet*) does not conflict with this contention, since these words have reference merely to the burdens and charges on the property, and not to the ownership of the property, whereof the word "*thereto*" appearing in the conditions is ample proof, for it relates to the charges and burdens alone.

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(a) Code, 8, 45, 24. Digest, 18, 6, 9.

## OPINION No. 77.

HOLL. CONS. III. B. 150.

[GROTIUS III. 15, 4, 7.]

Sale—Delivery within certain time—Presumption as to good quality—Evidence.

1. WHEN it is stipulated in a contract of sale that delivery of the wares must be made within a certain time, say three or four days, it can be done before the end of the fourth day.

2. The good quality of merchandise is always presumed, even without evidence, and more credence is attached to the evidence of those who testify to such quality. This is especially the case when the said witnesses outnumber those to the contrary, and give better reasons for their contention.

A contract has been submitted to me, made between Jacques Hollard, as agent for Clement Wouters and Matthæus van der Welle. I have also seen a certain protest made by the said Jacques Hollard against the said Matthæus van der Welle on the 14th January 1616, and the reply of Van der Welle thereto, also a declaration of Mels Hendricks, Pieter Klaas Noordthoeck, the said Jacques Hollard,



Gijsbrecht Bourmans, Hendrik Serwouters, Jan Lucas, Jacob Jacobs, Cornelis A. van der Spis—Schout of Maasdam—Leonard Jacobsz—Stadhouder of Pietershoek—Jasper Adrians, Tonis Laurentsz Kloot, and Dirk Lambrechts, all supporting the contention of Clement Wouters. Further, I have seen the declarations of Isaac van Driel, Jacques de Hertoge, and Laurens Adrians supporting the said Van der Welle.

(1) I am of opinion that delivery of the beans was tendered in good time, since from the aforesaid first declaration it clearly appears that delivery was tendered on the 1st January, the time fixed in the contract; especially since the contract stipulates that delivery should be made, three or four days' grace being allowed, and the said Van der Welle was requested, by protest on the 4th January, to receive the said beans. As regards the quality of the beans, presuming that the beans to which the afore-mentioned Hendrik Serwouters and the other declarants refer are the beans in question, and that if necessary it could be proved that these beans had been loaded on board ship at Pietershoek and 'S Gravendeel, and had arrived at Middelburg, it must be held that they were of good quality, as stipulated in the contract, notwithstanding the aforesaid declarations of Isaac van Driel and his co-declarants; (2) for according to law, it is well known that good quality is always presumed, even without proof, and therefore more weight is attached to the evidence of those deposing to such good quality.

In the present case, therefore, *a fortiori* it must be held that the beans were of good quality, since the declarants to this fact outweigh the others, both in number and in the reasons on which they base their knowledge. It follows, therefore, that the said Van der Welle must be ordered to receive the said beans, and to pay the stipulated purchase-price with interest *a tempore moræ*.

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Delivery of the purchased wares must be made at the time stipulated, or, if no particular time is mentioned, then within reasonable time.

What is meant by "reasonable time" must be gathered from all the circumstances of the case, such as the nature of the transaction, the intention of the parties, the nature of the article sold, the prevailing customs regarding it, the distance, &c. See *Goldschmidt v. Adler*, 3 J. 117; *Stewart v. Sichel and Others*, 4 J. 435; *Lippert v. Adler*, 5 J. 389; *Barnato Brothers v. Munro*, 5 G. 161; *Stewart v. Ryall*, 5 J. 146.

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## WARRANTY.

(OPINIONS Nos. 75, 76, 77).

The English law doctrine of *caveat emptor*, to the effect that there is no implied warranty of quality by the vendor, and that he is not liable for any defect unless he expressly warrants the article sold, or unless he knew of any defects and yet represented it to be sound, or uses any artifice to conceal the defect, is not applicable *in toto* to Roman-Dutch law.

According to Dutch jurisprudence, there is an implied warranty of title (as in English law), and, moreover, an implied warranty of quality and quantity. Of course, if the

vendor specially warrants the article sold, he will in addition be liable if he has misrepresented the quality thereof, and the sale is voidable on the ground of fraud, likewise where he has purposely concealed defects.

As a general rule, it may be laid down that no relief will be afforded a vendee on account of *patent* defects in the article purchased, and of which he had knowledge, or the means of obtaining knowledge; but if the article suffered from any *latent* defect unknown to the purchaser, he will be entitled to the *actio redhibitoria*, to return the property and claim restitution of the purchase-price if the defect rendered the article unfit for the intended use, or to the *actio aestimatoria* or *quanti minoris* for reduction of the price *ad id quod interest* if the defect was not of so serious a nature.

By the implied warranty of title the vendee was guaranteed lawful possession and warranted against eviction. If evicted, the *justa causa* for the contract of sale failed, and the transaction could be repudiated and cancelled. If the cause of eviction arose subsequent to the date of sale, and was not attributable to the act of the vendor, the obligation of warrandice is not incurred. (a)

The vendor is bound to fulfil all engagements entered into by him with the vendee at the date of the sale, and he is liable for all representations made by him. (b)

If the quality is fraudulently misrepresented, the sale can be rescinded. (c)

(a) The following authorities may be consulted :—

Digest, 19, 1, 21, 1.

Grotius, Introduction, 3, 14, 6, 12, 33; 3, 15, 4, 5, 6, 7, 8, 9; 3, 17, 4. Opinions No. 75, 76, 77 (Holl. Cons.).

Van Leeuwen, Cens. For., 1, 4, 10, 10; 1, 4, 19, 15; and R. H. R. 4, 18.

Voet, 19, 1, 21, 1.

Christinæus, 3, decis. 97, and ad l. Mechlin. 3, 38, 19.

Van der Keessel, Thes. 638, 641, 642.

Schorer ad Grot. *supra*.

Van der Linden, 1, 15, 9, and 10; 3, 3, 6.

Pothier, Cont. de Vente.

Burge on Colonial and Foreign Laws, "Purchase and Sale."

(b) Attorney-General *q. q.* Colonial Government *v.* Hart, 3 Menz. 558.

(c) Vlotman *v.* Landsberg, 7 J. 301.

In the case of sales under written conditions, the court will require absolute and convincing proof of wilful misrepresentation and fraud, and in default thereof the sale will be considered to have been effected under the written conditions.(d)

Vendors will of course be liable for the representations contained in their advertisements,(e) and if these advertisements are misleading, and no other conditions of sale existed, the vendee will be entitled to relief. Not so, however, where the conditions of sale make no mention of the representations contained in the advertisements, and there is no clear proof that the vendee has been misled by the advertisement.(f)

Sale by sample is an implied warranty of quality that the bulk shall not be inferior to the sample. If, therefore, the vendor fails to supply the bulk as per sample, the vendee is entitled to an action *ex empto*, or to redhibition and damages.(g)

Where, however, the vendees had ordered articles by a certain maker *of the same quality* as sample, and such maker did not exist, it was held that the vendors could supply articles by another maker *of the same quality as ordered*, and that the order had been substantially carried out.(h) It must be noted that in this case the quality, and not the make, was specially referred to. Had it been the intention of the vendees to procure articles made specially by a particular tradesman, no substitution would, no doubt, have been allowed.

Before proceeding further, it must here be noted that the *remedies* afforded to the vendee vary according as delivery has been effected or not.

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(d) Durr v. Bam, 8 J. 22. Stellenbosch Municipality v. Lindenburg, 3 S. 345.

(e) Sande, Decis. Fris. 3, 4, 6.

(f) Stellenbosch Municipality v. Lindenburg, *supra*.

(g) Greenshields v. Chisholm, 3 J. 220. Murray v. De Villiers, 1 Menz. 366. Bouwer v. Ferguson, 4 E. D. C. 90. Waters & Herron v. Phillips & King, 2 Menz. 107.

(h) Hamilton, Ross, & Co. v. Bam & Co., 2 Menz. 152.

In case delivery has not been effected, the vendee is entitled to damages *actione ex empto*. When delivery has taken place, the purchaser is no longer entitled to the damages he may have suffered; but, *actione redhibitoria*, he may return the articles, or, *actione quanti minoris*, he may claim a reduction of the purchase-price.(i)

The vendee seems, therefore, to be in a better position before delivery than after.

As before stated, the vendor is liable for all latent defects and for all representations made by him.(k) The vendor will be liable only for defects existing at the date of sale; and if the vendee through his own actions renders it impossible to ascertain whether any damage was caused through defects existing at that date, he is estopped from claiming a reduction of the purchase-price.(l)

In cases of sale there is an implied warranty that the purchased article is of good quality.(m)

The vendor must deliver to the vendee an article of the same quality as that agreed upon;(n) and it is for the court to construe the real intention of the parties.(o)

In order to avoid the liabilities of an implied warranty, the vendor sometimes sells the article "as it stands" or "without warranty." In Roman-Dutch jurisprudence the method of sale was called "pushing with the foot" (*voetstoots*). In early times a sale *voetstoots* was almost entirely confined to immovable property put up by the lump without accurate measurement.(p) The practice has, however, gradually extended to movables, and at the present time a sale of real property *voetstoots* is of rare occurrence,

(i) *Irvine & Co. v. Berg*, Buc. 1879, p. 183. *Mostert v. Noach*, 3 J. 174.

(k) *Heatlie v. The Colonial Government*, 5 J. 353. *Commissioners of Municipality of Cape Town v. Truter*, 1 R. 412.

(l) *Brown v. Van Niekerk*, 2 S. 302. *Meintjes & Dixon v. Deare & Dietz*, 2 S. 294.

(m) *Fergusson v. Wood Bros.*, 4 J. 111. Cf. *Murtha v. Von Beek*.

(n) *Mitchell v. Howard, Farrer, & Co.*, 4 J. 475.

(o) *Cohen v. Wessels*, 4 J. 123. *Murray v. De Villiers*, 1 M. 366. *Hamilton, Ross, & Co. v. Bam & Co.*, 2 Menz. 152.

(p) *Van Leeuwen*, R. H. R. iv. 18, 7.

especially in surveyed parts, whereas sales of movable property, especially by auctioneers, frequently take place under those conditions.

Sales of this kind are not without some *causa* of consideration, for, as a rule, the stipulation that there is no implied warranty has the effect of reducing the purchase-price.

If the vendor knew of any serious defects, he could not protect himself by selling the article *voetstoots* without pointing out the defects.(*q*) If he uses any artifice to conceal the defects, a sale without warranty is of no avail, and the vendee can claim a cancellation on the ground of fraud.(*r*)

If the vendor is ignorant of any defect, the rescission of a sale without warranty cannot be allowed owing to defects subsequently discovered.(*s*)

The vendor is liable for all representations made at the time of the sale, provided such representations are intended to constitute part of the conditions of sale, and are, moreover, intended to induce the purchaser to buy. This is specially the case if the misrepresentation is fraudulent. Thus where the vender sold a cow "*as it is*," and falsely represented that the cow gave fourteen bottles of milk a day, whereupon the purchaser, induced by this representation, bought the cow, which only gave two bottles of milk a day: *Held* that the purchaser was entitled to a rescission of the sale, and to claim for the keep of the cow during the time it was in his possession.(*t*)

If the representation was not made as a warranty, or to vary the conditions of sale, but merely to express the vendor's opinion or belief, the vendee is not entitled to relief if such representation turns out to be erroneous.(*u*)

(*q*) Voet, 21, 1, 10, per Shippard, J., in *O'Brien v. Palmer*, 2 E. D. C. 349.

(*r*) Per Barry, J., Pres., *ibid.*

(*s*) *De Wet v. Manual*, 1 Menz. 501. *O'Brien v. Palmer*, 2 E. D. C. 344. *Von Ludwig v. Van Reenen*, Buc. 1868, 244. *Geard & Son v. Butler & Reddle*, 5 E. D. C. 109.

(*t*) *Vlotman v. Landsberg*, 7 J. 301.

(*u*) *Durr v. Bam*, 8 J. 22.

A sale without warranty "as it stands" only refers to the quality or quantity of the article sold, depending upon the circumstances of the sale, but it cannot be extended to refer to the title.<sup>(v)</sup>

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<sup>(v)</sup> Ward *v.* Bank of Africa, 4 G. 216. Grotius, Opinion No. 76 (Holl. Cons. 3 (b.) 145).

OPINION No. 78.

HOLL. CONS. III. B. 301.

[GROTIUS III. §16.]

*Jus retractus*—A local custom—Feudal property—Alienation—  
Allodial.

1. THE *jus retractus* (*nakoop*) is a right arising from the particular customs of each separate locality, and not from the common law or general customs of Holland. These particular customs must be applied *strictissimi juris*, especially in the case of taxes.

2. Feudal property is not subject to retraction.

3. Feudal property is considered *ad instar allodialium*; not generally, however, but only in certain cases.

4. Before the ordinance of the “fortieth penny” was passed, all alienations of feuds were not brought to the notice of the court within whose jurisdiction they were situated, but only before the feudal-chambers.

5. Feuds, at the present time, are not sold directly, since such is prohibited by law, but the *utile dominium* is given to the feudal lord, who again grants it to another.



6. There is no alienation *directi dominii* of feuds.

7. The practice with regard to feuds cannot be inferred from the practice respecting allodial property.

I have seen a certain letter of Deryl, dated the 21st of May 1612, whereby his Excellency, as feudal lord, granted to Jan Huygens a piece of land situated in Krimpen on the Ijssel, which was surrendered to his Excellency by Huybrecht Adriaanse in favour of the said Jan Huygens, and have been asked whether the Ambachts-Heer, at the time of such surrender, had any right of retraction in respect to the aforementioned land, assuming that in the said Ambacht such retraction had never been practised in respect of feuds, but only in respect of allodial property.

(1) I am of opinion that, since the *jus retractus* is a right which originated not under the common law or general customs of Holland, but from particular customs of divers localities, which particular customs are *strictissimi juris*, especially as regards taxes, (2) feuds cannot be considered subject to retraction. (3) Against this it might be contended that with us feuds are considered *ad instar allodialium*; yet this cannot be accepted in general, but only in certain cases. (4) A sure proof of this is the fact that, before the ordinance of the "fortieth penny," alienations of feuds were not brought to the notice of the courts within whose jurisdiction they were situated, but only before the feudal-chambers; (5) and further, feuds even at present are not sold directly, for such is prohibited by law, but the *utile dominium*

is handed over to the feudal lord, who again grants it to another feudatory. (6) To this must be added, that in the present case at all events there is no alienation *directi dominii*, as in the case of allodial property. (7) From this and other reasons it follows that in this country the practice as to feuds cannot be inferred from the practice regulating allodial property.

ROTTERDAM,

9th September 1613.

## OPINION No. 79.

HOLL. CONS. III. B. 148.

[GROTIUS III. 16, 3.]

*Retractus*—A local custom—Conflicts with free commerce—  
Strict interpretation.

1. THE right of “Naasting” (*jus retractus*) conflicts with free commerce and is contrary to the common law. He who bases his claims on this right must prove the custom of “Naasting.”

2. The right of “Naasting” was not introduced by general custom into any part of Holland and West Friesland.

3. If, by customary law, this right is allowed during the currency of three notices or offers, it will not be admitted after the lapse of that period, unless the contrary were customary from time immemorial and established by judgments of the court. *Vide* No. 5.

4. *Argumentum a contrario sensu facile admititur ad hunc effectum, ut ad jus commune redeatur.*

6. A custom granting the *jus retractus* in case of a sale to “brother or sister, or their children, or a nearer relation,” cannot be extended to children of the seller, but excludes them altogether, unless it were clearly proved that the contrary is the custom *et quare*.

Having seen a *keur* or custom of the district of Putten, reading as follows: "He who wishes to sell his immovable property, must offer it for three days for sale before the Schouten and Schepenen of the 'ban' where the property is situated; and should within that time a brother or sister, or their children, or a nearer relation appear, such relation can purchase the property by virtue of his right of 'Naasting,' and our Schout shall be paid three groats, and the Schepenen four groats;" and having been asked whether, in the case of certain land lying in the "ban" of Spyckenisse, in the district of Putten, which had been sold, and in connection with which the three usual publications had taken place, the son of the seller after that time is entitled to "Naasting."

(1) I am of opinion that since the right of "Naasting" (*jus retractus*) conflicts with free commerce and the common law (*vide* Code, 4, 38, 14), he who bases his claims on this right must prove the custom of "Naasting." (2) And, moreover, it is well known that the right of "Naasting" has not been introduced into any part of Holland or West Friesland by general custom. (3) It also appears from this custom, which allows the right of "Naasting" within the period of three public offers, that *tacite et a contrario sensu* this right will not be admitted after that time, (4) *quod genus argumentandi a contrario sensu facillime admittitur ad hunc effectum, ut ad jus commune redeatur (ut notat Præses loco a contrario sensu, num. 33).*

(5) For these reasons, therefore, the right of "Naasting" should not be conceded to any one in Putten after the above-mentioned public offers, unless it is specially proved that such a custom has obtained there from time immemorial and has been established by decisions of the courts.

(6) Jurists differ concerning the question whether in the case of "Naasting" the son should be admitted to exercise that right with reference to certain ground sold by his father (apud Henric. Boluc. in C. 2, 22). The custom above referred to does not allude to "children" at all. These would otherwise be mentioned first. The reference to brothers and sisters in the commencement, therefore, seems to indicate that the authors of this custom were of opinion that the children should be excluded from the right of "Naasting," unless a contrary custom could be clearly proved. Nor can the words "or a nearer relation" appearing in the said custom be properly applied to children of the seller, for the meaning appears to have been that brothers and sisters and their children should have this right. If the meaning had been otherwise, the nearer grades would have been mentioned first. The intention was that after the children of brothers and sisters others should be admitted to exercise this right "*who are nearer than the purchaser,*" which terms are generally used by all customs treating of "Naasting."

Since this is a question depending on customary law, reference must be had to prior usage, as I have stated before.

The *jus retractus* is either legal or conventional.

Retraction or "Naasting," as granted by law, is a purely local custom, and did not constitute part of the ordinary jurisprudence of the Netherlands. It was, therefore, not incorporated in South African law at the time the Dutch immigrants settled at the Cape.(a)

Conventional retraction arising from stipulations between vendor and vendee is allowed. In such case the conditions must be strictly complied with.

*Vide* Grotius, Introd. 3, 16; Opinions in Holl. Cons. 3 (b.) 301, and 3 (b.) 148 (Nos. 78 and 79 in this work).

Van Leeuwen, *Censura Forensis*, 1, 4, 20, and R. H. R. 4, 19. Schorer ad Grot. 3, 16.

Voet, 18, 3.

Van der Keessel, *Thes.* 643-664.

Another kind of retraction—that in the case of a cession of debts—must be noticed here. By the *lex Anastasiana* a debtor, when sued upon a ceded debt, was not obliged to pay the cessionary more than was paid for the cession of the debt. He could, for this purpose, demand from the cessionary that he disclose the full amount actually paid by him. A similar rule obtained in the Roman-Dutch law, and was treated as a kind of right of retraction.(b) This rule of law has, however, been abrogated by disuse, and is no longer in force in South Africa.(c)

(a) "The first settlers," says De Villiers, C.J., in the recent case of *Seaville v. Colley* (9 *Juta*, 42), "carried with them only those laws which were applicable to the circumstances of this country. The law of retraction, as applied to movable property, was not general throughout Holland, and I take it for granted that it was never introduced in this Colony."

(b) Voet, 18, 4, 18. Groenewegen ad C. 4, 35, 23.

(c) *Seaville v. Colley*, *supra*, which overruled the decision in *Deschamps v. Van Onselin*, 6 E. D. C. 22. See also *Keet v. Benjamin*, S. A. R. 1891. *Sivewright v. Green*, S. A. R. 1892.

## OPINION No. 80.

HOLL. CONS. III. B. 143.

[GROTIUS 3, 21.]

Partnership—Liability of partners—Presumption as to who is a partner—Beneficial management presumes mandate.

1. A PARTNER buys partnership goods for himself and his copartner, and a third party stands surety for them. Both are liable *in solidum*, and the surety can demand indemnification from either.

2. Si socius, qui non gessit, alterius gerentis factum ratum habuit, præsumitur socium præposuisse.

3. Idem iudicium est de accessoriis, quod de principali.

4. If the mandate is not sufficiently clear, it is sufficient that one has managed the affairs of another advantageously (*utiliter*).

Having seen the statement of a certain case and considered the questions put in connection therewith : A. offered his services at Dordrecht to assist in the purchase of wines, not for B. alone, but for B. and C. together as partners. B. comes to Rotterdam and requests the assistance of A. on behalf of himself

(B.) and C. as partners, which both A. and B. are prepared to declare under oath.

(1) I am of opinion that these facts are sufficient to warrant an inference that A., when he became surety for the purchase-price of the wines, did so not only on account of B., but also of C.

(2) It is unnecessary here to enter into the question, an et quando socii in dubio præsumantur se mutuo præposuisse; for this question lapses whenever quod socius qui non gessit, alterius gerentis factum ratum habuit, as was decided in *decisione* 15 *Rotæ Genuensis*. This appears to have been the case here, as indicated by C.'s writing, wherein he states, "We have bought at current prices," alluding to the wines in question; since the word "we" indicates that he was purchaser of the wines together with B. at the time, and that B. bought them *nomine societatis*. A. therefore became surety for B. *tanquam institore societatis, cum idem iudicium sit de accessoriis, quod de principali*. From this it is quite clear that C. is liable to A. *in solidum* to indemnify him with regard to his surety bond per ea quæ tradit (Bart. in D. 14, 1, 4, Stracha tract. de decoctoribus, parte 5, num. 13), especially since the partnership was benefited by the surety bond, and obtained the wines through it, which they afterwards disposed of to advantage (D. 17, 2, 82).

Supposing, however, that there was not sufficient proof of the existence of the partnership, even then, in any case, C.'s letter is evidence that B. had been commissioned by C. to purchase the wines also on



his behalf, and therefore B. could cede to A. the *actio ex mandati* which B. has against C. Should the mandate not appear sufficiently proved, it is sufficient quod B. negotium ipsius C. utiliter gessisset.

B. can then sue C. for payment of his portion of the purchase-price, which *in dubio* is supposed to be half, and this right he can cede to A.

## OPINION No. 81.

HOLL. CONS. III. B. 303.

[GROTIUS 3, 21.]

Partnerships—Shares of partners—Assurance—Ante-nuptial contract—Wife may secure her property—Leonine partnerships—What are profits—Marriages.

1. ALTHOUGH, according to civil law, *omnia æqualia intelligentur* between those who have entered into a partnership, this is not the case if otherwise stipulated.

2. Valet conventio, ut ad unum duæ partes et lucri et damni, ad alium tertia pertineat.

3. Ita coiri societas potest, ut alter nullius partem damni sentiat, lucrum vero commune sit, si tanti sit opera, quanti damnum est.

4. A contract of partnership and of assurance can exist together.

5. Contractus, in quo alter sociorum non tantum sortem salvam pactus est, sed et lucrum aliquod certum pro spe incerta, valet.

6. A wife by ante-nuptial contract can stipulate for the security of her capital.

7. It is against the nature of a partnership that one of the partners should not share in the

profits at all, whether the business is successful or otherwise.

8. In reckoning the profits, the losses must first be deducted.

9. *Regula correlativorum habet centum fallentias.*

10. *Unicuique liberum est rei suæ dicere legem,* quam vult, especially with regard to ante-nuptial contracts.

11. It is for the general good that the opportunity and means for entering into marriage should not only remain free and unencumbered, but should be specially favoured in every way.

I have seen the ante-nuptial contract and deed relating thereto which were submitted for consideration, and have been asked whether the property brought in by the wife should go to the children undiminished, or whether the loss should be deducted proportionately, since the joint estate resulted in a loss.

(1) I am of opinion that the property brought in by the wife should go to the children fully and without diminution, without considering the alleged loss. For although, according to the general principles of law, *omnia æqualia intelligantur* between those who have entered into a partnership, yet this is not the case when otherwise stipulated. *Nec enim unquam dubium fuit quin valeat conventio,* (2) *si duo inter se pacti sint, ut ad unum duæ partes et lucri et damni pertineant, ad alium tertia.*(*α*)

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(*α*) *Instit.* 3, 25, 1. *D.* 17, 2, 29, 1.

Coming to our own case, *ita coiri societatem posse, ut nullius partem damni alter sentiat, lucrum vero commune sit*, Cassius putat: idque approbat Ulpianus; (b) (3) for it was added: *id ita tantum valere, si tanti opera, quanti damnum est*. It was thus stated not as a precise definition, that such a stipulation can only occur in such a case, but to make it clear that there must be some inequality whereon such stipulation is based, *quæ inæqualitas operæ, exemplo tanquam tunc frequentiori illustratur*, there being certain lawyers who thought otherwise, not well understanding the nature of partnership transactions. (c) Without a doubt the capital put in by the one side can be so much larger that the profits of the business done therewith are more than that obtained from the diligence and work of the merchant, especially when the partner who has brought in the greater capital is satisfied to receive somewhat less profits than he would have received in proportion to his capital, and simply contents himself with half of the profits, if any. This has deceived some lawyers, as aforesaid, who did not understand the nature of partnership transactions, for they considered such a stipulation simply in the light of a contract of partnership, whereas there were really two contracts joined in one—one of partnership, whereby the profits, if any, would be equally divided, (4) and the other of assurance, whereby one of the partners secured the capital of

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(b) Ulpianus, D. 17, 2, 29.

(c) Ut Andr. Gail, lib. 2, observ. 34, No. 4 et 5.

his copartner. This method is not at all unreasonable, when the capital of the one was secured, that the other, the assurer, should receive more out of the profit than he would otherwise be entitled to. (*d*) Potest, ait, licite dari pecunia alteri, ut per eum adhibita industria, quaesturia ars exerceatur, ita contracta societate, ut pecunia salva sit, ejusque periculum ad mercatorem pertineat, lucrum tamen, quod alioquin æquis proportionibus commune foret majori ex parte ad subeuntem periculum pecuniæ spectet. (*e*) Licet contractum societatis inire, ac cum eodem socio contractum assecurationis capitalis. (*f*) Videmus locupletes pecuniam suam in societate ita conferre, ut aliquam lucri nullam damni partem sustineant; (*g*) quorum plerique allegant; (*h*) (5) aliqui etiam loquuntur in casu difficiliore, nempe ubi non tantum alter sociorum fortem salvam pactus est, sed et lucrum aliquod certum pro spe incerta, et dicunt valere etiam talem contractum.

To apply this to the case in question, it appears from all the provisions of the ante-nuptial contract that the capital sum brought in by the wife was very much greater than that of the husband, yea, even to

(*d*) Gouvarr. lib. 3, Variarum resolutionum, cap. 2, No. 3.

(*e*) Gregorius Valentia, disp. 5, quaest. 24, puncto 2.

(*f*) Wesembecius paratit. pro socio, No. 7.

(*g*) Allegans Pert. Ang. in § 1, Instit. eod. eandem sententiam tuentur Angelus in summa, verbo societas, No. 1, § 7; Gabriel in 4, d. 15, quaest. 11, dub. 10; Moncr. in 4, d. 15, quaest. 24; Bartholomeus Fumus in verbo societas; Navarr. c. 17, No. 255; Ludovicus Molin de justit. et jure, tract. 3, disp. 417; Franciscus Gar. de contractibus, p. 2, cap. 17; Ludovicus Lopez de contractibus, lib. 1, c. 65; Bart. Medin. in instructione, § 27; Franc. Toletus, lib. 5, cap. 41; Joseph. Angloz in floribus et sententiarum quaest. de societate.

(*h*) C. per vestras; Ext. de donat. inter virum et uxorem.

such an extent that his labour, which he would nevertheless have had to expend on his own business, cannot be compared with it. (6) The woman, even when unmarried, if she had placed her money with a merchant who had less capital, and if she had been satisfied with half the profits, instead of with a far greater amount in proportion to her capital, could, with every reason and right, have stipulated for security of her money. The rule *societatem talem coiri non posse, ut alter lucrum tantum, alter damnum sentiret*,<sup>(i)</sup> does not affect the case. This passage relates to what immediately precedes, and was above referred to, and applies only to such contracts whereby the one partner was debarred from receiving any profits at all, whatever might be the result of the business, which is contrary to the nature of a partnership. *Iniquissimum enim genus societatis est, ex qua quis damnum, non etiam lucrum spectet, ut ibidem dicitur*, (8) or if the partners were to reckon the profits without deducting the losses therefrom. *Nam illa conventio, ut quis lucri partem ferat, de damno non teneatur* (as in the present case), *ita intelligenda est, ut si in alia re lucrum, in alia damnum illatum sit, compensatione facta, solum quod superest, intelligatur lucro esse*.<sup>(k)</sup> This, however, does not affect the present issue, for had there been any profits, the husband would have shared in them largely, even to a greater extent than in proportion to his capital, and the wife in such case would not

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(i) D. 17, 2, 29, 2.

(k) Instit. 3, 25, 2.

have shared in the profits until the losses had first been deducted from the profits made. And since the present is a special convention, allowed both by law and the highest authorities, no notice need be taken of the arguments which others would like to infer, *ex natura relatorum, cum regula illa correlativorum habeat centum fallentias*, (9) *ut ostendit Blasius in tractatu singulari de correlatis. Et cuique liberum sit rei suæ dicere legem, quam velit*, (10) especially in the case of ante-nuptial contracts; for if the liberty of making these contracts with certain conditions were to be withdrawn, many marriages would not take place, whereas it is better for the common good that all opportunities and means for contracting marriages should not only remain free and unencumbered, but should be specially favoured. It is clear beyond doubt that it was the intention of both contracting parties, whatever might be the result of the business, that the property brought in or afterwards inherited by the wife should go to her or her children, as clearly shown by the said contract. For, in the first place, it was stated that, upon dissolution of marriage, whether there be children or not, the property brought in by the wife or afterwards inherited by her *stante matrimonio* should first of all be deducted from the general estate to go either to her or her children, whether there are any profits or not. Regarding the husband, it was stated that he or his heirs should succeed to his property, not unqualifiedly, but to the extent of the indebtedness of the estate to him, and no more. It was also

further stated that the husband should keep and leave the property in good condition, and that he could not alienate, encumber, sell, or transfer the same. This was explained by the subsequent deed to the effect that he could use the property as he used his own in so far as it would be profitable, but that, nevertheless, the relations or heirs, upon the dissolution of marriage, should be compensated out of the property of the husband which was most available, so that they or their heirs might sustain no loss or damage.

PARIS,  
21st January 1631.

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## PARTNERSHIP.

Ad Opinions Nos. 80, 81.

Partnership is an agreement whereby two or more persons combine their property, or their property and services, to derive profit therefrom for the common benefit.<sup>(l)</sup>

*Societas est contractus juris gentium, bonæ fide, consensu constans, super re honesta de lucri et damni comunione.*<sup>(m)</sup>

It is the relationship which subsists between persons who have agreed to share the profits of a business carried on by all or any of them on behalf of them all.<sup>(n)</sup>

Every agreement for a share in the profits does not amount to a partnership (Van der Keessel, Thes. 698). Thus an agreement whereunder Z. was to manage K.'s business as a clerk at a salary of £30 per month, with a further

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<sup>(l)</sup> Grotius, Introd. 3, 21, 1. Digest, 17, 2, 3, 3. Code, 4, 37, 1.

<sup>(m)</sup> Voet, 17, 2, 1.

<sup>(n)</sup> Pollock on the Law of Partnership, p. 1.



condition that if the profits amounted to more, Z. was entitled to one-fourth of the profits instead, held not to be a partnership (*Keete v. Zeiler*, S. A. R. 1892).

Under Roman law partnerships were of five kinds:—

I. *Societas universorum bonorum*—a partnership which extended over all the property of all the partners. This, according to Grotius, never obtained in Holland, and was prohibited by common law, except in the case of the *communio bonorum, ex lege* subsisting between spouses.

II. *Societas universorum quæ ex quæstu veniunt*—a trade or professional partnership, the usual relationship between partners unless otherwise specially agreed upon.(o)

III. *Societas negotiationis alicujus*—when the partnership is restricted to a single transaction.(p)

IV. *Societas rei unius vel certarum rerum*—joint ownership.(q)

V. *Societas vectigalis*—for the collection of taxes, treated as a separate kind of partnership in the Digest.(r)

Partnership, as obtaining under Roman-Dutch law, is divided by Grotius into *General*, of all profits; *Special*, of certain profits; and *Universal*, of community of goods between spouses only.

The different kinds of partnerships are briefly mentioned by Van der Linden, 4, 1, 12.

The following kinds of partnerships must be specially noted.

*Leonine partnership* — *Societas leonina*, an agreement whereby one of the partners is liable for a share in the losses but is not entitled to a share in the profits. This was at all times forbidden, as being *contra bonos mores*.(s) Van Leeuwen (t) says that a leonine partnership is one in which a share in the profits without a share in the loss is

(o) Digest, 17, 2, 7.

(p) Digest, 17, 2, 52, 5.

(q) Digest, 17, 2, 31.

(r) Digest, 17, 2, 35 and 59.

(s) Grotius, Opinion No. 80 (Holl. Cons. 3 (b.) 303), and Intro. 3, 21, 5. Digest, 17, 2, 29, 1.

(t) Van Leeuwen, R. H. R. 4, 23, 1, and Decker's Note thereon.

stipulated for. This is, however, an error. The name is derived from the well-known fable of Æsop about the lion, the ass, and the fox.

*An anonymous partnership, i.e.*, where several persons agree to participate in the profits of a certain business which is to be executed or carried on by one of the partners in his own name.(u)

*A partnership en commendite* is one whereby some particular person engages with a trader to supply the latter with a certain amount of capital, and stipulates that the trade is to be carried on in the name of such trader alone, that he is to participate in the profits, and that he is not to be liable for any losses in excess of the capital advanced by him.(v)

Both an anonymous and *en commendite* partnership are agreements strictly *inter partes*, and the undisclosed principals are not liable to third parties contracting with the trader. Where the terms of the partnership have not been made public or brought to the notice of persons contracting with the firm, it is essential, in order to obviate liability, that the names of the other partners do not appear in the name of the firm, and that these partners do not hold themselves out as such.(x)

These two kinds of partnerships were fully discussed in *Watermeyer v. Kerdel's Trustees*,(y) *Lamb Brothers' Executors v. Brenner & Co.*,(z) and the *Guardian Insurance and Trust Company v. Lovemore's Executors*.

The fact that all the partners openly take part in the transaction of the partnership business is sufficient to disprove the existence of an *anonymous partnership* or a *societas en commendite*.(a)

In an action by a partnership, only the names of all the partners who hold themselves out as such to, and are dealt

(u) Van der Linden, 4, 1, 12. Pothier on Partnership, § 61.

(v) Van der Linden, 4, 1, 12. Pothier on Partnership, § 60.

(x) Van der Keessel, Thes. 704.

(y) 3 Menz. 424.

(z) 5 E. D. C. 152, and 5 J. 205 (Lovemore's case).

(a) *Lamb Bros. v. Brenner & Co.*, 5 E. D. C. 152.

with as such by, the public, and with whom, as such, the debt was incurred, need be set out in the summons; the insertion of the names of sleeping partners is not necessary.(b)

As to what is sufficient proof of the existence of a partnership, see *Onkruyd v. Haupt*,(c) *Weinert & Meyer v. Kohl*,(d) *R. v. Thesen & Co.*,(e) and *Henwood & Co. v. Westlake & Coles*.(f)

When the deed of partnership provides for the continuation of partnership after the death of any of the partners on behalf of the surviving partners and the estate of the deceased partner, the partnership is not dissolved by the death of any of the partners.(g) *A fortiori*, joint-stock companies, formed with the intention of indefinite duration beyond the lifetime of any particular shareholders, will not be dissolved upon the death of any of the shareholders.(h)

The exact nature of the relationship between the parties must be gathered from the circumstances of each case, if any question arises as to the existence of a partnership. This is of importance, for it affects both the criminal (i) and civil liabilities of the parties.(k) Doubtful agreements of partnership must be construed according to the rules generally adopted for the construction of deeds and contracts.(l)

The partners are to a limited extent answerable *in solidum* for all the partnership debts. Thus where one of the partners was solvent and the other insolvent, the trustee of the insolvent estate was allowed the *beneficium divisionis* in the case of a claim by a partnership creditor against the

(b) *Lolly v. Gilbert*, 1 Menz. 434.

(c) 2 Menz. 239.

(d) 2 Menz. 238.

(e) 6 J. 68.

(f) 5 J. 341.

(g) *Torbet v. Executors of Attwell*, Buc. 1879, 195.

(h) *In re Paarl Bank in liquidation*, 8 J. 131. *Liquidators of the Union Bank v. Kiver, Hofmeyr's Executrix*, 8 J. 136.

(i) *R. v. Thesen & Co.*, 6 J. 68.

(k) *Henwood & Co. v. Westlake & Coles*, 5 J. 341.

(l) *Jameson v. Irvine's Executors*, 5 J. 222.

estate,<sup>(m)</sup> payment having been demanded after dissolution.

As a rule, no agreement between partners can affect their liability to third parties, and certainly no such subsequent agreements can affect claims of prior date.<sup>(n)</sup>

Execution can be taken out against the estate of any one of the partners, if a judgment has been obtained against them as partners, and that without any further order of court.<sup>(o)</sup>

The citation and joinder of all the members of a partnership can be insisted upon when the firm is being sued.<sup>(p)</sup> In this respect the law recognises that the liability is joint, and not absolutely *separate*.

If several persons carry on business under two different names, but the profits are shared among the partners as members of one joint concern or business, creditors who have given credit to one of the firms, or rather to the firm under one name, may prove their debts on the insolvent estate of the firm under another name.<sup>(q)</sup>

In an action for a debt due to a partnership, compensation or set-off of an amount due by one of the partners in his individual capacity cannot be made.<sup>(r)</sup>

There is, however, an exception to this rule, namely, where one of the partners is an undisclosed or dormant partner, for such dormant partner who has incurred debts cannot, merely by joining the non-dormant partner as co-plaintiff, deprive the debtor who is also a creditor of his right to compensate a debt due to him by the dormant partner.<sup>(s)</sup>

A partner is not allowed to pledge the partnership property for and on behalf of himself in security for his

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<sup>(m)</sup> Luck v. Chabaud, 1 Menz. 531. See also Haarhoff v. Cape of Good Hope Bank, 4 G. 304, and Blackburn v. Meintjes, 1 R. 56.

<sup>(n)</sup> Long, Ebdon, & Co's. Trustees v. Holmes, 2 S. 307.

<sup>(o)</sup> Theunissen v. Fleischer, Wheeldon, & Munnik, 3 E. D. C. 291.

<sup>(p)</sup> Meintjes & Co. v. Simpson Brothers & Co., 2 Menz. 230.

<sup>(q)</sup> Bate v. Hunt and Others, 2 J. 179.

<sup>(r)</sup> Voet, 16, 2, 10.

<sup>(s)</sup> Brider v. Wills, 4 J. 282.

private debts, and the pledgee therefore has no action on the pledge as against the partnership.(t)

When a person becomes surety to another on behalf of a debtor for goods supplied and to be supplied to such debtor, the surety will be liable for the debts arising from the supply of goods to the debtor both before and after the debtor had entered into partnership with others, although credit would not have been given to such debtor if it had been known that he had a partner.(u)

When a third person deals with a manager or trading partner of a firm, and elects to make such partner his sole debtor, and secure his debts out of the private estate of such partner, *e.g.*, by accepting a pledge or mortgage bond hypothecating the private property of the partner, with a full knowledge that the transaction is on partnership account, he cannot subsequently treat the other members of the firm as debtors.(v)

If there is not clear proof that credit was given exclusively to one of the partners upon his personal security, the debt will become a partnership liability, and the debtor will be entitled to claim payment from the firm.(x)

A partnership is dissolved either *ex tempore*, *ex re*, *ex voluntate*, or *ex persona*. Dissolution *ex persona* takes place upon the death or insolvency of one of the partners, *mortuus aut civiliter mortuus*, and the existence terminates *ipso facto, ipso jure*. It seems, however, that the partnership can be re-established by means of rehabilitation in the ordinary way after insolvency.(y)

(t) *Zeederberg v. Trustees of J. Norton & Co. and J. D. Norton & Co.*, 3 S. 12.

(u) *Green v. Beveridge*, 8 Jut., 154.

(v) *Guardian Insurance and Trust Company v. Lovemore's Executors*, 5 J. 205.

(x) *Benjamin v. Benjamin*, 1 E. D. C. 273.

(y) *Paulsmeier v. Lanham*, (S. A. R.), 1893; and see Van Zijl's "Judicial Practice," chap. "Rehabilitation."

## OPINION No. 82.

HOLL. CONS. III. B. 175.

[GROTIUS III. 24, 5.]

Insurance policy—Contraband—Nature of insurance—Duty of an agent—Expenses *bona fide* incurred—Fraud—When the agent represents his principal—*Bona fides* of tutors and agents.

1. AN insurer, who at the time of underwriting a policy of insurance did not know that the goods insured were contraband, whereas the insured was aware of the fact, is not bound to indemnify the insured for any confiscation suffered by reason thereof.

2. The nature of a contract of insurance includes a certain kind of partnership (*societas*).

3. In societatis iudicium non veniunt ea, quæ ex causis prohibitis amittuntur.

4. When notice of contraband has been given, and the insurers either expressly or tacitly concurred therein as if they were interested, they must obtain *relief* from the court.

5. To what extent the insurers are bound to pay the expenses stated to have been incurred by the insured for the protection and recovery of the goods. Under such circumstances the insured are the agents (*mandatarii*) of the insurers.

6. In materia mandati non omnes sumptus in infinitum restituuntur, sed impendia bona fide facta.

7. Mandatum cum libera, non extenditur ad donationes.

8. Tutor domini loco est, cum tutelam administrat, non cum pupillum spoliat.

9. In the case submitted the costs incurred will be confined ad illum modum, quem secutus fuisset vir diligens.

10. In bonæ fidei judiciis dolus exclusus censeri debet.

I have seen the documents in connection with the actions heard first before the Chamber of Assurance, and now pending before the Schepenen of Amsterdam. These actions are :—Willem Muilman *cum sociis*, appellants and plaintiffs in the civil suit, *v.* Diego Fernandes Diaz, respondent; Ijsbrand Dobbe *cum sociis v.* Antonio Martines Vegas; the widow and boedelhoudster of Jan van der Straten *cum sociis v.* Pedro Homez Menderos; Gijsbert Popta *cum sociis v.* Jacob Gallus; David A. Born *cum sociis v.* Ruy Somes Fontiera *cum sociis*; and Gijsbert Popta *cum sociis v.* David Nunes. I have looked over the depositions made in the above cases before the Chamber of Assurance, and also the documents filed by Muilman and the rest, according to the date of their depositions, especially a certain Placaat of the King of Spain dated 22nd April 1626, and a judgment given in Madrid in 1630. In answer to the questions :

(1) I am of opinion that the insurers, Muilman

and others, are not bound to indemnify the insured for any loss by confiscation of contraband goods, for the following reasons: It appears that the baize in question was of English make, such goods having been declared contraband by the Placaat of 1626, and it must be presumed that at the time the policy of insurance was passed, the insurers were unaware of the fact that the said baize was English, or that there were other contraband goods, which must have been known to the insured. The confiscation thus took place *ex facto ipsorum, qui assecurati fuerant*, and (2) the nature of an insurance contract comprises a species of partnership, with reference to which it is a well-known maxim, *quod in societatis iudicium non veniant ea, quæ ex causis prohibitis amittuntur.*(*a*) (3) And this is especially the case (*b*) in nostris terminis; si dominus mercium assecuratarum devehi fecit res prohibitas, ignorante assecuratore, cujus causa pervenitur ad perditionem mercium, vel navis, vel alterius damni (D. 39, 4, 11) quod non teneatur assecurator. (4) To strengthen their case, it is advisable for the insurers to seek relief from the court, on account of their having negotiated with the insured in ignorance of the true cause of the damage after they had received notice, or because they concurred in such notice, either expressly or tacitly, as if they were interested.

(5) Even should the insurers be unsuccessful in obtaining this, the expenses which the insured alleged

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(*a*) D. 17, 2, 59, § 1, and D. 17, 2, 52, § 18.

(*b*) Ait Petrus Santerna, tractatu de assecurationibus.



they incurred for the protection and recovery of the said baize need not be paid by the insurers to a greater amount than a diligent and honest agent would probably have incurred for his employer. Although the insurance policies stipulate that the insurers shall repay the insured the expenses incurred in connection with the salvage of the goods in case of loss or damage, and that the insurers shall be bound by the oath of him who incurred the expense and cannot go behind it, and, moreover, even after notice had been given the insurers renewed the same conditions, yet it must be remembered in these transactions that the insured are the agents of the insurers. (6) *Et in materia mandati, non omnes sumptus in infinitum restitui, sed impendia bona fide facta, (c) sumptus ex justa ratione factos ut loquitur in D., (d) quod et de litis impendiis specialiter dicitur in D. :—de procuratoribus. (e)* (7) *Et ideo mandatum, quamvis cum libera, non extenditur ad donationes. (f)* (8) *Et in re simili tutor domini loco est cum tutelam administrat, non cum pupillum spoliat. (g)* (9) For these reasons the expenses must be reduced ad illum modum, quem secutus fuisset vir diligens. In the present case this is rendered still more necessary, for the exorbitant costs charged against the insurers by the insured, although they made large profits by the sale of the baize, convey a

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(c) D. 17, 1, 27, 4.

(d) D. 17, 1, 45, 6.

(e) D. 3, 3, 46, 6.

(f) Gail, 11 obs. c. 72, n. 12.

(g) D. 41, 4, 7, 3.

strong suspicion of fraud, (10) *qui semper in bonæ fidei judiciis, etiamsi verba sint maxime generalia, exclusus censeri debet.*(*h*) This too is specially enacted, in the case of insurance, by the 32nd Art. of the Ordinance of this city (Amsterdam) treating of this subject.

AMSTERDAM,

6th April 1622.

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## I N S U R A N C E.

At the Cape of Good Hope the fire, life, and marine insurance law of England has been adopted by the General Law Amendment Act, No. 8 of 1879, and as a rule this law is followed throughout South Africa, unless it directly conflicts with the common law of Holland or local statutory law.

It will therefore be unnecessary to make any further general remarks upon this subject beyond referring to the more important South African cases dealing therewith.

Insurance is a contract nominate, consensual, and of good faith, whereby, in consideration of a certain price or premium, the losses which may arise from unforeseen danger to the property of another are undertaken to be made good (Van der Keessel, *Thes.* 712).

The contract is completed by agreement, and upon the execution of the policy and the giving of credit for the payment of the premium, and the insurer has a lien upon the undelivered policy in his possession until the premium has been paid.(*i*)

The policy lapses, as a rule, upon the non-payment of the premium on the due date, or after a certain period of grace depending on the terms of the policy. If the premium is payable yearly in advance with the option of half-yearly

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(*h*) L. *convenerit*, D. 23, 4, et D. 2, 14, 27, 3. *Jas. cons.* 40. *Gail*, lib. 11, obs. cap. 145, num. 3.

(*i*) *Hollet v. Nisbet & Dickson*, 1 *Menz.* 391.

payment, the payment of the first instalment does not keep the policy alive for the whole year, and the next instalment will have to be paid on its due date. If such is not done, and the risk insured against is then incurred, the benefits under the policy will lapse.(k)

No *res prohibita* can form the subject of a contract of assurance.(l) The contracts require the strictest good faith, *uberrima fides*.(m) and the conditions thereof must be strictly complied with. A contract of life insurance, not being a contract of indemnity, is not liable to be affected by mere non-disclosure apart from fraud.(n)

Before instituting an action the plaintiff must have complied with all the conditions of the policy. If the conditions be precedent, the terms thereof must have been previously carried out, *e.g.*, submission to arbitration(o) or the furnishing of proper accounts.(p)

The insured under warranty is bound by the terms of the policy, and if he does not abide by such terms the policy will be vitiated, for the condition is precedent and inherent in the contract, and, if broken by the insured, the insurer is freed from liability.

Thus, where an insured agreed under his policy of fire insurance to keep only sufficient spirits on the premises for the purpose of preparing his wines, and he kept in addition spirits for sale, it was held that the condition had been broken and the policy vitiated, although the loss by fire was not attributable to such spirits.(q)

In contracts of marine insurance there is an implied warranty of seaworthiness,(r) and if the vessel founders

(k) *Wood's Trustees v. South African Mutual Life Insurance Society*, 9 J. 220.

(l) Opinion No. 82 (Holl. Cons. 3 (b.) 175).

(m) *Dalby v. India and London Life Insurance Co.*, 15 C. B. 365.

(n) *Wheelton v. Hardisty*, 8 E. & B. 232. *Broom's Common Law*, 338.

(o) *Davies v. The South British Insurance Company*, 3 J. 416.

(p) *Kaffrarian Colonial Bank v. Grahamstown Fire Insurance Co.*, 5 E. D. C. 61. *Hollander & Co. v. The Royal Insurance Co.*, 4 J. 66.

(q) *Calf v. Jarvis and Others*, 1 S. 1.

(r) *Namaqua Mining Company v. Commercial Marine and Fire Insurance Company*, 3 S. 231.

immediately after proceeding on her voyage, there is a legal presumption that she was unseaworthy before the voyage.(s)

The insured in the case of marine or fire insurance policy must, as before stated, observe the strictest and utmost good faith. He must disclose all material facts which may influence the rate of the premium, and must not conceal facts within his knowledge which would affect the insurance policy.(t) In practice these facts are generally contained in a set of questions to be answered correctly by the insured when submitting his proposal for insurance. If the facts are not correctly answered or are purposely misstated, the policy will be vitiated. Thus, where the insured replied "No" to a question to the effect whether any loss by fire had previously been sustained by the insured, and it was proved that a small shop in another country belonging to the insured had been destroyed by fire about ten years before the present policy was entered into, the plaintiffs (the insured) were held to be not entitled to recover damages under the policy, on the ground that the terms thereof had been vitiated by the misstatement.(u)

The insurers will be liable for the acts of their agents. If the agents themselves, after personal inspection, fill in the proposal form, and the insured relies on the fact that they were satisfied and were relying on such personal inspection, the policy is not vitiated, if the proposal contains a misstatement of material facts or other material misdescription for which the agent is responsible, provided that the insured acted *bona fide* and without intent to conceal or mislead.(v) See *ante*, p. 550.

The insured cannot fraudulently remove the articles secured and then claim indemnification in the case of fire.(x)

(s) *Levy v. Calif and Others*, W. 1.

(t) *Jenssen & Co. v. Commercial Insurance Co.*, 4 J. 20. *Malcher & Malcomess v. King Williamstown Fire and Marine Insurance Co.*, 3 E. D. C. 271.

(u) *Israel Bros. v. Northern and Union Insurance Cos.* (S. A. R.), 1892.

(v) *Drysdale v. Union Fire Insurance Co.*, 8 J. 63. *Simon v. The Equitable Marine and Fire Insurance Co.*, 2 Shiel, 338.

(x) *Guites v. Queen Insurance Co.*, 1 A. 174.

The insurer is bound to pay the full amount of the damage sustained, as far as it is covered by the policy of insurance. The contract of marine and fire insurance is one of indemnification, and the assured cannot therefore recover from the insurers an amount in excess of the damage sustained, although the full amount covered by the policy be greater than the actual loss or the total value of goods insured.

If the goods are insured with different insurers, each insurer will be liable to make good a ratable amount of the loss.(y)

Under the average clause in a policy of fire insurance, if the insurer elects to rebuild or reinstate the property, he must proceed with the work, and cannot compel the insured to accept compensation.(z) He must erect a building of equal value to the insured, if the original building was fully covered by the amount of the policy, and if not so covered, he must erect a building equal in value to the amount thus covered. He cannot recover from the insured the difference in value between the rebuilt or reinstated property and the amount covered by the policy, if the former be in excess. On the other hand, the insured can recover from the insurer the difference between the amount covered and the value of the reinstated property, if the latter is not of equal value to the property destroyed.(a)

When the property is insured against risk for a certain period, the time will be computed *civiliter*, *i.e.*, *ultimus dies inceptus pro completo habetur*, and not *naturaliter*, *i.e.*, *de momento in momentum*.

Thus a policy of insurance for one year from 14th January 1857 to 14th January 1858 lapses at midnight on 13th January 1858, and if the loss is incurred on the 14th, the insured cannot recover.(b)

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(y) *Nathanson v. The Commercial Insurance Co.*, 4 J. 461.

(z) *Smith's Mercantile Law, Fire Insurance*.

(a) *Kaffrarian Colonial Bank v. Grahamstown Fire Insurance Co.*, 5 E. D. C. 61. See also *Goldberg v. Phoenix Fire Office*, 1 G. 216.

(b) *Cock v. Cape of Good Hope Marine Assurance Co.*, 3 S. 114.

## OPINION No. 83.

HOLL. CONS. III. B. 168.

[GROTIUS III. 32, 7, & III. 33, 2, & II. 21, 5.]

Reconciliation-money—Widow's share—Acceptance thereof is not adiation.

1. RECONCILIATION-MONEY (*soen-geld*) is a compensation made to interested parties when homicide has been committed. To what portion of such propitiation-money are the widow and the child or children of the deceased entitled?

2. The mere acceptance of the propitiation-money does not necessarily involve the adiation of the inheritance.

What must be done, prior to acceptance, to obviate any dispute?

Having been asked whether propitiation-money on account of homicide goes to the benefit of the orphan left by the deceased, or whether the widow is also entitled to a share:

Item, whether the guardians of the orphan can accept the money without placing themselves in the position of heirs of the deceased on behalf of the orphan:

(1) I am of opinion, concerning the first point, that the reconciliation-money, according to the tenor of the letters of remission, is a compensation made to the interested parties when homicide has been committed, and it cannot be denied that the widow sustains damage by such homicide. The widow is therefore entitled to a portion of the propitiation-money; but to a smaller share than the child, seeing that the child has a greater and deeper interest. Accordingly the widow ought to be content with one-third.

(2) Concerning the second point, I am of opinion that the mere acceptance of the propitiation-money does not necessarily entail adiation of the inheritance.*(a)* But in order to obviate any dispute, it would be advisable for the guardians, when accepting the money, to protest expressly that their acceptance thereof is not to be construed as an intention to adiate the inheritance.*(b)*

ROTTERDAM.

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In his chapter on "Obligations ex delicto" (3, 32), Grotius gives a short sketch of the criminal law in his day, with a brief review of its history, and of the manner of purging a delict and making compensation. See also

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*(a)* Bart. in D. 39, 2, 18, 11. Clarus, quæst. 58, No. 33.

*(b)* D. 29, 2, 20, 1.

Van Leeuwen's Comm. on Rom. Dutch Law (4, 34), and Matthæus de Criminibus, l. 48, 5, 7, 6, on this subject.(c)

No prosecution, whether private or public, is a bar to a civil action for damages sustained through the delict.(d)

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(c) The English law with reference to compensation to interested parties is regulated by Lord Campbell's Act, 9 & 10 Vict. c. 93, amended by 27 & 28 Vict. c. 95.

(d) *Eaton v. Moller*, R. 2, 85. *Mostert v. Fuller*, Buc. 1875, 32. *Schoeman v. Goosen*, 3 E. D. C. 7.



## OPINION No. 84.

HOLL. CONS. III. B. 165.

[GROTIUS III. 32, 10, & I. 22 (Schorer ad ib.).]

Delicts generally extinguished by death—Action for damages—  
*No jus retentionis.*

1. DELICTS are extinguished by death, unless they fall under the category of those in quibus post mortem memoria damnatur.

2. The contract of service with the East India Company does not entail a punishment ipso jure et sine facto judicis incurendam.

3. The managers of the East India Company cannot retain the goods of one of their servants on the mere allegation and pretext that he traded contrary to the articles of his contract of service. They have an action for damages sustained by the Company.

I have seen a certain pleading filed in the Court of Amsterdam by Mr. Adv. Jan Dictorinus, as guardian of Aafge Dirks, Duifge Dirks, Lucia Dirks, Jan Elis, husband and guardian of Fortina Dirks, and by the guardians of their minor brother and sister, all of

them heirs *ab intestato* of the Dr. Martinus Souft, in his lifetime Commander-in-chief in Pehou and on the coasts of China, who died in the service of the United East India Company, plaintiff *v.* The Managers of the Dutch East India Company, defendants. I have also seen the 62nd article of the contract entered into by the servants of the Company, and the 3rd article of the oath taken by commanders, chief merchants, captains, skippers, and other officers when entering into service with the said Company. I am instructed that the said defendants refuse to allow the goods of the aforementioned Dr. Martinus Souft to devolve upon the said plaintiffs, on the ground, as alleged by the defendants, that the said Dr. Martinus Souft has committed a delict by trading for himself in the East Indies, in contravention of his contract of service and his oath.

With reference to the question submitted :

(1) I am of opinion, presuming that the aforementioned Dr. M. Souft has never been accused of the contravention during his lifetime, and much less convicted, that the contention of the defendants is bad in law, *cum notissimi sit juris, crimina morte exstingui.*( $\alpha$ ) Moreover, the alleged delict does not fall under the category of those in *quibus post mortem memoria damnatur*, and the contract of service does not entail a punishment *ipso jure et sine facto judicis incurrendam*. The defendants

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( $\alpha$ ) D. 48, 1, 6, et c. 9, 6, 1.

must therefore allow the plaintiffs to have the said property, whilst they retain their action for the amount of damages which they think they can prove that the East India Company suffered by reason of the said trade carried on by Martinus Souft.

Thus advised 13th March 1632.

## OPINION No. 85.

HOLL. CONS. III. B. 166.

[GROTIUS III. 32, 20, & I. 2, 2, & II. 48, 15.]

Has the State a preferent claim for (a) fines, (b) costs of prosecution.

1. ALTHOUGH the public Treasury has no preferent claim for fines as against other creditors of the delinquent, it or its officer is nevertheless preferred before other creditors as regards the costs of prosecution. The reason for this :

2. Publice interest est delicta puniri.

A delinquent was apprehended by an officer of justice and prosecuted, with the result that he was sentenced to be flogged and his property was declared confiscated. The question is whether the officer is to be preferred before the other creditors as regards the costs of prosecution.

(1) I am of opinion that although he who confiscates property is also bound to pay the debts of the person whose property is confiscated up to the value of the said property, and although the public Treasury has no preferent claim for fines as against other creditors, yet the Fisc or its officer is to be preferred

before other creditors as regards the costs of prosecution. (2) *Idque propter favorem publicam, quia publice interest delicta puniri (a) et bona committentium. (b)* This was daily practised by the officers of the Government of Holland according to ancient custom.

ROTTERDAM,  
1614.

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The following authorities may be consulted on this subject:—

Van der Keessel, *Thes.* 419, 420, and 459.

*Regtsgeleerde*, *Observatien* 2, obs. 61.

*Treasurer-General v. Bosman's Trustees*, 2 J. 262, and the authorities there quoted.

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(a) *Ita in terminis Afflict. in tit. quæ sint Regalia in verbo.*

(b) *Num. 119, et Peregrinus de jure Fisci, lib. 5, tit. 1, n. 193.*

## OPINION No. 86.

HOLL. CONS. III. B. 342.

[GROTIUS III. 35, 9.]

Adultery—Proof of—Confession.

1. EVIDENCE required to prove that any one has committed adultery. *Et num.* 3.

2. Confessio extrajudicialis, concurrente verisimilitudine, facit probationem semiplenam; et sufficit ad plenam probationem, si accedat unus testis, clarè deponens.

3. Adulterium probatur per testes singulares; et sufficit si unus deponit de una re inhonesta et alius de alia.

I have seen certain certificates drawn up on behalf of Rachel de Fourmesteaux against Heyndrik van der Putten, her husband, and have been asked what she should do in consequence of the evidence aforementioned.

I am of opinion that it is sufficiently clear from the evidence that the said Heyndrik van der Putten has committed adultery: Firstly, through his own admission that he had had connection with Cornelia Jans van Haarlem, laid down in the presence of

the three witnesses Susanna Jacobs, Frans Jans, and Pieter Adriaans, his servants, and also through another general admission that he had not been content with his wife, deposed before Klaas Buyk. This confession is strengthened by the report that the said Heyndrik van der Putten led an immoral life, deposed to by Maurits Ooms, who was heard at the request of Van der Putten. (2) Quæ quidem confessio extrajudicialis, concurrente verisimilitudine, facit probationem semiplenam, (a) *Præses Everhardus, Cons. 131, ibi dicit, ad plenam probationem sufficere, si accedat unus testis clarè deponens.* In addition to this confession there is the deposition of the aforementioned Cornelia Jans van Haarlem, which states that she had had connection with Van der Putten on three occasions; the deposition of Geertge Gillis, who states that she saw that the said Van der Putten had had intercourse with Sara Pieters; the deposition of Susanna Jacobs afore-mentioned, stating that Van der Putten had also cohabited with her, (3) this deposition being strengthened by the declaration of Klaas Buyk, stating that Van der Putten had retired with the said Susanna Jacobs into one room of a house of ill fame; a deposition of Brechtge Jans, stating that Van der Putten had also made immoral overtures to her; and lastly, several other depositions as to his frequenting houses of ill fame, and his immoral habits in word and action. All this taken together supplement what was wanting to prove the adultery

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(a) *Imola in c. si cautio Ext. de fide instrum. Doct. in c. fin. Ext. de Confessis.*

over and above the confession above mentioned. (4) The law is clear, quod adulterium probetur etiam per testes singulares, (b) *Thomas Gram. infra*, ait sufficere testes singulares quorum unus deponeret de una re inhonesta, et alius de alia. Quibus accedit. (c) It is also accepted law quod in iis, quæ a communiter accidentibus fiunt et nascuntur, testes inhabiles et minime idonei habentur pro idoneis et habilibus, (d) quod præcipue locum habere debet, aliis adminiculis accidentibus ut in hac causa. The adultery having been proved, it follows that the said Rachel de Fourmesteaux is entitled, according to the Political Ordinance of the States-General of Holland and West Friesland and the general practice, confirmed by divers decisions of the Court of Justice, to sue for divorce *a vinculis matrimonii*. If any one should deem that the afore-mentioned evidence is not strong enough for such purpose, the said Rachel de Fourmesteaux will at least be entitled, for the sake of her health, and of the property which she might possess or acquire, to live apart and to be separated from her husband, and further to obtain an order of court for such separation, *per ea quæ tradit Bayardus*. (e) She is also entitled to a separation of the property, and to interdict her husband, the said Van der Putten, from administering her property.

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(b) Felin. in c. præterea de testibus. Boërius. decis. 23, num. 46. Thomas Gram. decis. 106, num. 9

(c) Johannes Baptista Bayar. in additionibus ad Jul. Clarum, § adulterium, n. 33, allegens Zasium, Socinum juniorem, Salicetum et alios.

(d) Thomas Gram. decis. 34, num. 37.

(e) Bayardus d. § adulterium, num. 85.



This interdict, when granted by the court and published, will have the effect that she, Rachel, will not be liable for the subsequent debts contracted by the said Van der Putten.

20th March 1632.

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The laws on adultery in relation to divorce, as interpreted and applied by the Colonial courts, will be found fully discussed in Van Zijl's *Judicial Practice*, title "Divorce," and more especially the subdivision "Adultery," pp. 479-494.

To the numerous cases there mentioned must be added the cases of *Chester v. Chester and Graham*, decided in the High Court of the Transvaal in 1893 (10 C. L. J. 340), as regards sufficient proof to substantiate the charge of adultery, and *Weatherley v. Weatherley* (Transvaal, Kotze's Reps., p. 66), as regards collusion.

In the former case, the defendant, the wife, was proved to have been intimate with the co-respondent, who was also a friend of the plaintiff. On one occasion when the plaintiff was away from home, the co-respondent came to the house and stayed there during the afternoon. He came again in the evening, and stayed there that night, occupying the bed usually slept in by plaintiff and defendant. Some of defendant's underclothing was found next morning, not in the only other bedroom in the house, occupied by a nurse, but in the dining-room; there was no accurate proof where the defendant slept that night. Under these circumstances, the court granted absolution, on the ground of insufficient proof.

In the case of *Weatherley v. Weatherley*, the plaintiff, the husband, having determined to sue his wife for a divorce, proposed a marriage between her and the man with whom she had committed adultery, and promised to give her £400 at once, and a monthly allowance of £30. The Transvaal court held that this amounted to collusion, for the plaintiff thus encouraged an illicit intercourse and union between the parties, a marriage between the wife and the adulterer being forbidden by Roman-Dutch law, and the case was dismissed.

## OPINION No. 87.

HOLL. CONS. III. B. 167.

[GROTIUS III. 36, & III. 34, 7.]

Libel—Person libelled must be named—Injury—None where no person is mentioned—Evidence of a relative and party to a fight—Of otherwise reproachable witnesses—Of those testifying to innocence—Aggressor, presumptions as to who is the—Self-defence, presumptions as to—Presumptions only not sufficient for a verdict of guilty.

1. AN accusation of a public libel cannot be upheld if no person is named or specially designated therein, or if it speaks in general.

2. The delict of publishing a libel presupposes an actual injury sustained by some one by reason thereof.

3. An injury cannot be inflicted without mention or designation of the person.

4. A relative of the deceased participating in the fight is not an admissible witness against a third person who is alleged to have committed the murder.

5. No one can be criminally punished on mere presumptions.(a)

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(a) Where, however, a person is found in possession of stolen property shortly after the theft has been committed, he is presumed to have stolen the same, unless he can reasonably account for his possession thereof.—[ED.]

6. Defence in case of need is not punishable according to law.

7. *Minans præsumitur aggressor.*

8. *Qui accedit ad locum alterum exspectans, is aggressor præsumitur.*

9. *Is præsumitur aggressor, qui creditur fuisse audacior.*

10. *Is præsumitur aggressor, qui melius est armatus.*

11. Strong and violent presumptions, even without other witnesses, are sufficient to prove that a certain person was the aggressor.

12. *Defensio necessaria probata ex insultu, non est opus aliis probationibus.*

13. *Coarctatio in loco facta, ita ut exire non liceat, probat necessariam defensionem.*

14. A witness—even an otherwise reproachable one—will be believed in matters where no one else was present, especially in favour of the accused; and all the more so when his deposition bears the stamp of probability and is supported by presumptive evidence.

15. When the accused has proved his innocence with a larger number of witnesses, the evidence of a smaller number against him will not receive credence.

16. *Testibus duobus negantibus maleficium, magis credendum est, quam mille affirmantibus.*

I have seen the documents relating to the defence of young Mr. Vincent de Trieux in respect of three

crimes with which he has been charged by the Attorney-General of the Court of Utrecht. These crimes are:—(1) The publication of a libel; (2) the alleged murder of young Mr. Adriaan van Oosterom on the 21st January 1612; (3) an assault committed on the person of Drossaart van Culeburg on 15th September 1613. Having been asked to express an opinion on these defences:

(1) I think, first, as regards the accusation of a public libel, that this is bad in law, for it appears from the said documents that the ballad composed by De Trieux does not mention or designate any one in particular, but refers generally to those who had made certain damaging ballads on him. (2) And the crime of publishing a libel presupposes an injury sustained by some one by means thereof. (3) It is, moreover, accepted law that no injury can be sustained unless the person is mentioned and designated. The authority is perfectly clear,<sup>(b)</sup> *Ibi ait jurisconsultus “si incertæ personæ convicium fiat, nulla executio est.”* It must further be noted that the afore-mentioned Mr. Adriaan van Oosterom, jun., as well as his father, were of opinion that the said ballad had been so worded by De Trieux that they could not consider it to refer to themselves.

(4) Secondly, with regard to the alleged murder, it appears sufficiently from the said documents that it is impossible to prove that the said Vincent de Trieux inflicted the wound on the person of the said Adriaan van Oosterom of which he died, since

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(b) D. 47, 10, 15, 9.

no one else besides De Trieux and Oosterom were present and witnessed the fight, except young Gert van Rhede and Jan Baarents van Haastenberg. The former had to admit that he participated at first in the fight against De Trieux; being therefore a party to the quarrel as well as a near relative of the deceased, he is not a qualified witness, and the latter, a servant of the said De Trieux, knows nothing about the infliction of the wound. (5) And even if it is held that such must be inferred (*viz.*, that Oosterom died of the wounds inflicted by De Trieux) from certain presumptions (although no one can be criminally punished on mere presumptions) (*c*), the said wounds must in any case be taken to have been inflicted on Van Oosterom by De Trieux in necessary self-defence, which, as is well known, is not punishable in law. (6) And it is, moreover, to be noted that it must be presumed that the said Oosterom and Van Rhede, and not De Trieux, were the aggressors, and that they assaulted him, of which there are several infallible indications. (7) First, it was proved that the said Oosterom and his mother had used threats towards the accused, which were overheard. *Minans enim presumitur aggressor.* (*d*) Secondly, it cannot be presumed that De Trieux premeditated an assault on Van Rhede or Oosterom, for when bidden by Oosterom to come to the inn, he excused himself in real earnest, whereas Oosterom, on the contrary,

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(*c*) Grat. cons. 130; Dec. cons. 175; Marsil. in rubr. de prob. No. 237. Grand. de males. in tit. de præ. circa finem.

(*d*) Felin. in C. delicti de exopt.; Cæpoll. cons. 29, vers. 8; Mars. cons. 41; Grammat. cons. 29.

proceeded to the inn after having bidden De Trieux to meet him there, and told Van Rhede to look him up in the same place. (8) Qui enim accessit ad locum alterum exspectans, is aggressor præsumitur; (e) quam legem ad hoc ipsum citat Carrerius—*Pract. Crim. fol. 360, post Cæpoll. in d. cons. 29.* Thirdly, De Trieux was alone in the room without help, whereas the others were two together. (9) Præsumitur enim aggressor is, qui creditur fuisse audacior.(f) Fourthly, the said Van Rhede had his gun slung over his shoulder, and Oosterom had his. De Trieux, on the other hand, had not his rapier, but only a poniard, which he was in the habit of carrying about with him. (10) Præsumitur enim aggressor is, qui melius est armatus.(g)

(11) All these strong and conclusive presumptions taken together are sufficient, without further evidence, to prove that the said De Trieux had been attacked by the other two. In addition we have the evidence of the witnesses regarding the words spoken by Van Rhede and Oosterom, clearly indicating a previous “complot,” and the words of a certain housemaid living in the house of the parents of the deceased. We further have the valuable evidence of the afore-mentioned Jan Barents concerning the whole occurrence, and this declaration is worthy of great credit, since immediately after the event, and before he had interviewed De Trieux at

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(e) D. 43, 16, 1, 28.

(f) Flor. in D. 9, 1, 1, 11.

(g) Cæpoll. cons. 28, et d. cons. 29; Bald. cons. 82, incip. quidam insultatus.

all, he gave a similar account of the matter as that contained in his deposition. From all this it is perfectly evident that Van Rhede and Oosterom were the aggressors. It follows from this that everything which De Trieux may have done must be presumed to have been done in necessary self-defence. (12) *Ex insultu enim probata est defensio necessaria, ita ut aliis probationibus non sit opus.*(*h*) And this was specially the case here, since it is quite clear that the door of the room was locked, so that De Trieux could not have escaped even if he had wished. (13) *Coarctatio enim in loco facta, ita ut exire non liceret, probat necessariam defensionem.*(*i*) Nor must the several severe wounds sustained by De Trieux be lost sight of. When all this is added to the deposition of the said Jan Barents, the fact of the afore-mentioned defence is removed beyond all doubt.

(14) The fact that Jan Barents is the sole witness, and that he may be presumed to bear De Trieux a certain amount of affection, does not conflict with this view; for it is accepted law that a witness, even if reproachable in other respects, will be believed in matters where no one else was present,(*k*) especially in favour of the accused,(*l*) and more so when the occurrence deposed to is likely to have happened, and is supported by strong presumptions, as above

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(*h*) Bart. in D. 9, 2, 6. Bald. in d. § cum arietes, et in l. 2, C. de sic; Jas. in D. 1, 1, 3.

(*i*) Cæpoll. d. cons. 29; Mart. sing. 692; Florian in D. 9, 2, 29, 2.

(*k*) Dec. cons. 342, num. 8. Clarus, Pract. crim. quæst. 24, num. 19.

(*l*) Gomes. c. 12, delictorum, num. 23.

set forth. Testi enim alioquin inhabili creditur, si testimonium ejus adjuvetur alius indiciis aut præsumptionibus.(*m*)

(15) With reference to the third point, the said De Trieux has proved his innocence by seven corroborating witnesses, and a lesser number giving evidence against him cannot be believed in preference.

(16) Cum testibus etiam duobus negantibus maleficio, magis credatur, quam mille adfirmantibus.(*n*)

For the reasons here stated, and for others advanced during previous consultations on this case, I am of opinion that the said De Trieux has a good defence, and is not guilty of the delicts with which he is charged, and certainly not of those which are criminally punishable. He is also entitled to appear before the Court of Utrecht, should the case pend much longer, and, having summarily proved his innocence, to claim that he be released, under security, from further appearance in person, and be allowed to appear by agent on giving proper verbal or other security (*handtasting*), per ea, quæ tractant.(*o*)

The Attorney-General of the Court of Utrecht, in his official capacity, after he had seen the documents relating to De Trieux, ought not to neglect to have Van Rhede summoned in person and detained.

Thus advised at ROTTERDAM,  
7th February 1616.

(*m*) Thom. Gram. decis. 34, No. 35; Socin. cons. 54, 3. Cacialup. in D. 12, 2, 31.

(*n*) Mart. Gl. in C. Clerici, 85 dist. Lud. in D. 45, 1, 8. Lud. Carr. tract. crim. 367.

(*o*) Dd. in D. 48, 3, 1.



## AD SECTS. 1, 2, 3.

The term "injuria" in Roman jurisprudence embraced also libel and slander or defamation, although the latter is sometimes specially referred to as "famosus libellus." No distinction was made between libel and slander.<sup>(p)</sup> The Roman-Dutch jurisprudence, founded on the Roman law, follows the same principles.<sup>(q)</sup>

The law of criminal libel is regulated in the Cape Colony by Acts 46 of 1882 and 29 of 1886.

Recent legislation in the South African Republic on this subject will be found in the local laws, No. 11 of 1893.

## AD SECTS. 14, 15, 16.

Consult also § 20 of Grotius, Opinion No. I., where he states the reason why two witnesses were required, in his time, to prove the commission of a crime. "Bona fama rei tantundem valet, quantum testis unus neque vinci potest, nisi majore numero."

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(p) Just. Inst. 4, 4. Digest 47, 10. Code, 9, 35.

(q) Grotius, 3, 36. Schorer ad ib. Van Leeuwen, R. H. R. 4, 37. Voet Pand. 47, 10. In connection with this subject consult "A Few Notes on Defamation" in *Cape Law Journal*, vol. ix. p. 150.

## OPINION No. 88.

HOLL. CONS. III. B. 199.

[GROTIUS III. 45.]

Bills of exchange—Payment—Protest.

1. WHEN the amount for which a bill of exchange has been passed is paid, the bill loses all legal force.

2. The holder of a bill of exchange, whether he holds it as principal or as agent for another, must within three days draw up a protest of non-acceptance, should such acceptance have been refused, and must send the same to the drawer of the bill; and in default thereof he will lose his recourse against such drawer.

3. *Nemo plus juris in alium transferre potest, quam ipse habet.*

(1) I am of opinion that the bill of exchange referred to gives no right of action, since he has been fully paid the amount for which the bill was drawn, whereby the said bill has lost all legal value.

(2) And it is a well-known practice that the holder of a bill of exchange, whether he holds it for himself or as agent for another, must within three days draw up a protest of non-acceptance should such

acceptance have been refused, and must send the said protest together with the bill to the drawer thereof; and in default thereof he loses his recourse against such drawer. Now since, in the present case, this has not been done by the factors referred to after the refusal by Daam, N.N., it follows that neither they nor the guardian appointed by them are entitled to any rights arising from the said bill. Further, since the said factors were not entitled to any rights arising from the bill, they could not transfer any rights to the said guardian, even if they had wished it: (3) *cum nemo plus juris in alium transferre potest, quam ipse habeat.*

AMSTERDAM,

2nd April 1632.

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#### PRESENTING AND PROTESTING OF BILLS AND NOTES.

The Roman-Dutch authorities on this subject are:—

Grotius, 3, 12, 13; 3, 13; 3, 45.

Van Leeuwen, R. H. R. 4, 27.

Schorer ad Grot., *supra*.

Van der Keessel, Thes. 574–628, 838–873.

Van der Linden, B. 4, c. 7.

Asser-Wisselrecht, and the writers quoted by them.

And in connection with these, Pothier on Bills of Exchange.

In the case of bills of exchange, notice of dishonour by non-acceptance or non-payment must be given to the interested parties, for there is a legal presumption that the drawer is injured if no such notice is given at the proper time, for he might have withdrawn his effects from the hands of the drawee or otherwise secured himself; and as

regards the indorser, that the want of timely notice imperils his remedies at law and renders them more precarious. Consequently, neglect to give timely notice discharges the interested party from all liability.

A drawer is not considered interested when the drawee is not indebted to him, or when he has no effects in the hands of the drawee, and protest or notice then becomes unnecessary.(a)

A preliminary step to a "protest" is the noting of the bill; it is unknown in law, as distinguished from the protest.(b)

By "noting" is meant the minute made by a notary public on a dishonoured bill at the time of its dishonour. It consists of the notary's initials, the month, day, and year, and his charges. A ticket or label is also attached to the bill, on which is written the answer given to him who presents the bill, e.g., "no orders," "no funds."(c)

The formal notarial certificate or protest is based upon the noting. This is a solemn declaration by the notary under a fair copy of the bill, stating that payment or acceptance has been demanded and refused, and the reason, if any, assigned.(c)

A bill or note may be presented and noted by the notary's clerk, but the duty of giving notice of dishonour of a bill or note is one which the notary has no power to delegate.(d)

The entries by a notary's clerk, since deceased, will be admitted as evidence to prove notice of dishonour.(e)

There must have been due negotiations, *omni erant rite et solemniter acta*, in order to render the drawer and indorsers liable, and there must be presentment for acceptance or sight, and for payment. These facts must be set out in a summons

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(a) Van der Keessel, Thes. 858.

(b) Per Buller, J., in *Leftley v. Mills*, 4 T. R. 170.

(c) Chalmers on Bills of Exchange, Notes, and Cheques, p. 160, and Byles on Bills (Protest and Noting). See also W. de Gelder, *Formulier—Boek voor Notarissen*, pp. 340-346.

(d) *Wilken v. Ritchie*, 4 S. 78.

(e) *Blackburn v. Webb*, 3 S. 35.

for provisional sentence.(*f*) Presentment three days after due date is not "due negotiation."(*g*) In the Colony there are no days of grace.(*g*)

When the estate of the interested party is under sequestration at the due date of the bill or note, notice *may* be given to his assignee or other legal representative.(*h*)

In order to bind the indorser, presentment must be made on the due date of a promissory note.(*i*) If the note is presented for payment after due date, and the answer given was simply "no funds," the indorsers will be discharged from liability, for the law provides certain safeguards for the protection of the indorser, who in some respects is treated as a surety; and one of these safeguards is, that on the date the note falls due, presentment should be made, or some statement to the effect that on that day there were no funds.(*k*)

If the indorser is a notary public, and he protests the bill or note for non-payment in his capacity as notary, the summons must allege that notice had been given to himself as indorser.(*l*)

A letter of demand to pay the note is not due negotiation, and does not constitute proper presentment.(*m*)

After dishonour by the drawer, the note may be protested on the very day it is due.(*n*)

In *Ziervogel v. Bekker* (2 S. 139), provisional sentence was granted on a promissory note payable at sight, subject to proof of presentment given to the Registrar of the Court.

(*f*) *Norton v. Speck and Another*, 1 Menz. 65. *Philips & King v. Ridwood*, 1 Menz. 66; and compare *Rens v. Van der Poel and Another*, 1 Menz. 122.

(*g*) *Randall's Trustees v. Haupt*, 1 Menz. 79. See also *Cruywagen v. Oliviera & Van Hellings*, 2 Menz. 268.

(*h*) *Ross v. Matthews*, 3 G. 278.

(*i*) *Twentyman & Warner v. Norden*, 2 M. 285.

(*k*) *Wethmar v. Lombard*, 2 J. 13, and judgment of the Chief-Justice *Et vide Meeser v. Combrinck & Albertyn*, 2 S. 110.

(*l*) *Oriental Bank Corporation v. Shaw and Others*, 1 E. D. C. 141.

(*m*) *Hay v. Codrington & McMaster*, 2 Menz. 301. *Steytler v. De Villiers* 2 Menz. 300.

(*n*) *Eston v. Hitzeroth & Leewner*, 1 Menz. 569.

A note for the accommodation of the indorser need not be protested to such indorser for non-payment by the maker.(o)

Likewise, if a note is endorsed by a party merely as surety or *aval*, formal notice of presentment and dishonour is unnecessary.(p)

The mere fact that the drawer of a bill has made part payment on account thereof does not give rise to the presumption that the bill is an accommodation bill. In the absence of proof to the contrary, such payments must be presumed to have been made in relief of the acceptor.(q)

If a note is made payable at a particular place, it must be presented at that place for payment.(r) If it is not payable at any particular place,(s) or if the description is vague,(t) the note must be presented to the interested party personally or at his residence or business place for payment, and a notarial protest becomes unnecessary.(u)

If a particular place of payment is merely designated in the margin, and not in the body of the note, a notarial protest is likewise not required.(v)

If a note is made payable at a particular place on a particular day, it is unnecessary to present it at such place after the due date, for the debtor is neither under any obligation to have, nor is there any legal presumption that he will have, funds at that place after that date.(x)

The foreign acceptor of a foreign bill of exchange will be bound by the law of the place where the bill was drawn, and if presentment at a particular place becomes unnecessary under that law under certain circumstances, he cannot claim

(o) *Discount Bank v. Heirs of Crous.*

(p) *Hjul Brothers v. Lyons*, 1 G. 164.

(q) *Tier v. Tonkin*, 1 S. 140.

(r) *Verwey v. Hannay Brothers & Dell*, 2 S. 270.

(s) *Steytler v. De Villiers*, 2 Menz. 300.

(t) *Verwey v. O'Reilly*, 2 S. 190.

(u) *Twentyman & Warner v. Norden. Schaffner v. Myburgh*, 1876. 14.

(v) *Hodgson & Co. v. Nefdt*, 1876, 163.

(x) *Beukes v. Van Wijk*, 2 Menz. 296.

the right of notice because the payee resides in a country where such notice is essential.(y)

Payment of a promissory note can be demanded at any time after due date within the period of prescription.(z)

If presentment is not made before summons, and the party liable *at once* tenders the amount of the note, he will not be liable for the costs of summons; (a) not so, however, when he only tenders the amount in court on the day of hearing.(b)

Presentment after summons is only necessary when, on the receipt of the summons, the defendant alleged that he had funds on that date.(c)

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(y) *Twentyman & Co. v. Butler*, 1874, 156.

(z) *Reitz v. Kock*, 1 Menz. 38. *Watermeyer v. Denyssen*, 1 Menz. 26.

(a) *Brink v. Gough*, 2 Menz. 270. *Orlandini v. Pope*, 2 Menz. 274.

(b) *Redelinghuys v. Theunissen*, 2 Menz. 272. *Steytler v. De Villiers* 2 Menz. 300.

(c) *Villiers v. De Kock*, 2 Menz. 299.

## OPINION No. 89.

HOLL. CONS. III. B. 304.

[GROTIUS 3, 48, 5 & 9, & 3, 52.]

Minors—Relief—*Læsio enormis*—Fraud.

1. MINORS can obtain relief in respect of all transactions, negotiations, and sales whereby they have sustained a loss.

2. Majors can obtain relief in respect of all transactions and sales whereby they have sustained a great and serious loss, and, irrespective of such loss, all transactions can be rescinded which have been brought about by withholding or doing away with some documents.

I have seen a certain deed entered into on the 4th of January 1575, whereby Klaas Leenderts enters into a purchase of the estate (*witkoop*) of his three children, Leentge, Jan, and Adriaantge, begotten in marriage with Grietje Jans, and also a deed of the 3rd of May 1592, whereby the said Klaas Leenderts makes a certain division of land, as against Pieter Engelbrechts, who had married the afore-mentioned Leentge, and also a deed of the same date whereby the said Leenderts enters into a further purchase of



the estate (*uitkoop*), as against the afore-mentioned Jan, his son, to be approved of by the uncle of the said Jan as guardian and relation, and by the Schout as supreme guardian. By this last deed it was stipulated that the said Jan Klaas, in lieu of the inheritance to which he had become entitled at the death of his mother, Grietje Jans aforesaid, and his sister Adriaantge Klaas, and which he resigned in favour of his father, should be supplied with food, drink, and clothing by his father, and upon the father's death that Leentge Klaas, his sister, or Pieter Engelbrechts, her husband, should receive him, the said Jan Klaas, into their house and supply him with the necessaries of life, as before; in consideration whereof they were to have the usufruct of certain 700 Carolus guildens, which the said Klaas Leenderts had promised to the afore-mentioned Jan out of his mother's estate. Pieter Engelbrechts by the document afore-mentioned accepted the maintenance during his or his wife's lifetime, the said 700 guildens to be paid in four yearly instalments by the heirs. I have also seen the copy of a certain deed entered into on the 18th of October 1615, between Maritge Jans, widow of Klaas Leenderts aforesaid, Pieter Engelbrechts, in his capacity as afore-mentioned, and the children of the said Klaas Leenderts and Maritge Jans, whereby it was stipulated that the said Jan Klaas, who was stated to be an idiot, should at once receive the 700 gulden which was to have been paid to him in four equal instalments according to the agreement of 18th of October 1615, and

should receive in addition 750 gulden out of the estate, payable in three instalments, together with the woollen and linen clothing of his father, and also a bed; under condition that if the said Jan Klaas could not be maintained as herein aforementioned, the half of such deficiency should be borne by the said Pieter Engelbrechts, and the other half by him and the said children, seven in number. I have also been instructed that at the time of the passing of the last deed (1615) the children aforementioned were kept in ignorance by Pieter Engelbrechts of the original deed of *witkoop* entered into with Jan Klaas or his guardian in 1592, nor had they ever seen it, although the last deed refers to a certain extent to the former. I have been asked whether the said children, among whom there are some minors, are entitled to relief as against the said last deed, and whether they can legally compel the said Pieter Engelbrechts to carry out his agreement of 1592.

(1) I am of opinion that, according to law, minors are entitled to relief in respect of all transactions, negotiations, and sales whereby they have sustained any loss,<sup>(a)</sup> and that also the majors, according to the general opinion of lawyers, as confirmed by practice, are entitled to relief in respect of all transactions and sales whereby they have sustained a great and serious loss, (2) and that, irrespective of such loss, all transactions can be rescinded which have been brought

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(a) C. 2, 32, 1 and 2.

about by withholding or doing away with certain documents.(b) For this reason the said children are quite justified to claim relief in respect of the last deed of *uitkoop*, provided that the said Jan Klaas sustained no loss by the deed of *uitkoop* of 1592, and that the said children allowed him one-ninth portion of his father's estate in addition to the 700 gulden which was to be paid in four instalments, in which case the said Pieter Engelbrechts and his wife will be bound to maintain the said Jan Klaas during their lives in consideration of the usufruct of the 700 gulden.

ROTTERDAM,  
17th August 1616.

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LÆSIO ENORMIS—RELIEF.

Relief is afforded by the court on equitable grounds. Sometimes it is granted by way of amendment in case of omissions, *e.g.*, where certain formalities have not been complied with, as in ante-nuptial contracts (see page 142), or where documents have been erroneously executed, as in diagrams (see page 449).

*Restitutio in integrum* is granted on the grounds of fear, fraud, or mistake.(c)

The fear must be great, and the court will require very clear proof of its existence, and that it was the direct cause in forcing the party seeking relief into the contract, before it will comply with the request.

Fraud cancels all contracts.

Mistake, like fraud, is an extensive term.

It includes any error of fact as well as implied *ignorantia*

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(b) C. 2, 4, 29.

(c) Van der Linden, 1, 18, 10.

*facti*, on the grounds of absence, minority, idiocy,(*d*) and drunkenness,(*e*) and also presumptive error in the case of *læsio enormis*.(*f*)

Relief on the ground of *læsio enormis* was not granted in the case of—

- (1.) Public sales.(*g*)
- (2.) Sales in execution.(*h*)
- (3.) Sales in terms of a last will.(*h*)
- (4.) Sales accompanied by an intention to make a donation.(*h*)
- (5.) In mercantile speculative contracts.(*i*)
- (6.) Sales of a "hope," e.g., a season's orange crop, a day's fishing.(*k*)

See also Morkel *v.* Morkel (O. F. S., April 27, 1880), where relief in case of the sale of doubtful rights is discussed.

Enormous loss is, speaking generally, considered to be damage sustained to the extent of one-half of the value of the property in question.

Thus where A. bought a property for less than one-half of its real value, and it was proved that the vendor was of infirm mind, the court granted relief both on the ground of *læsio enormis* and idiocy.(*l*) Likewise where a ring had been sold for £45, and it was proved that the fair marketable value thereof was only £20, the court, in an action by the vendor for the payment of the full purchase-price, gave judgment in favour of the vendee.(*m*).

By the General Law Amendment Act of 1879, relief on the ground of *læsio enormis* was abolished, the reason being that it was in conflict with free commerce, ample relief being afforded by the common law in cases of fraud or mistake.

(*d*) Broekman—Executor of Durr *v.* Rens, 3 Menz. 365.

(*e*) Konitsky *v.* Freeman (S. A. R.), 1892.

(*f*) Grotius, 3, 48, and 52. Voet, 18, 5, 3 ; 2 Burge on Colonial and Foreign Laws, 473. Van Leeuwen, 4, 20, 5. Schorer ad Grot. 3, 52, 1. Van der Keessel, Thes. 896–901.

(*g*) Van Leeuwen, *supra*.

(*h*) Grotius, 3, 52, 2.

(*i*) Voet, 18, 5, 15.

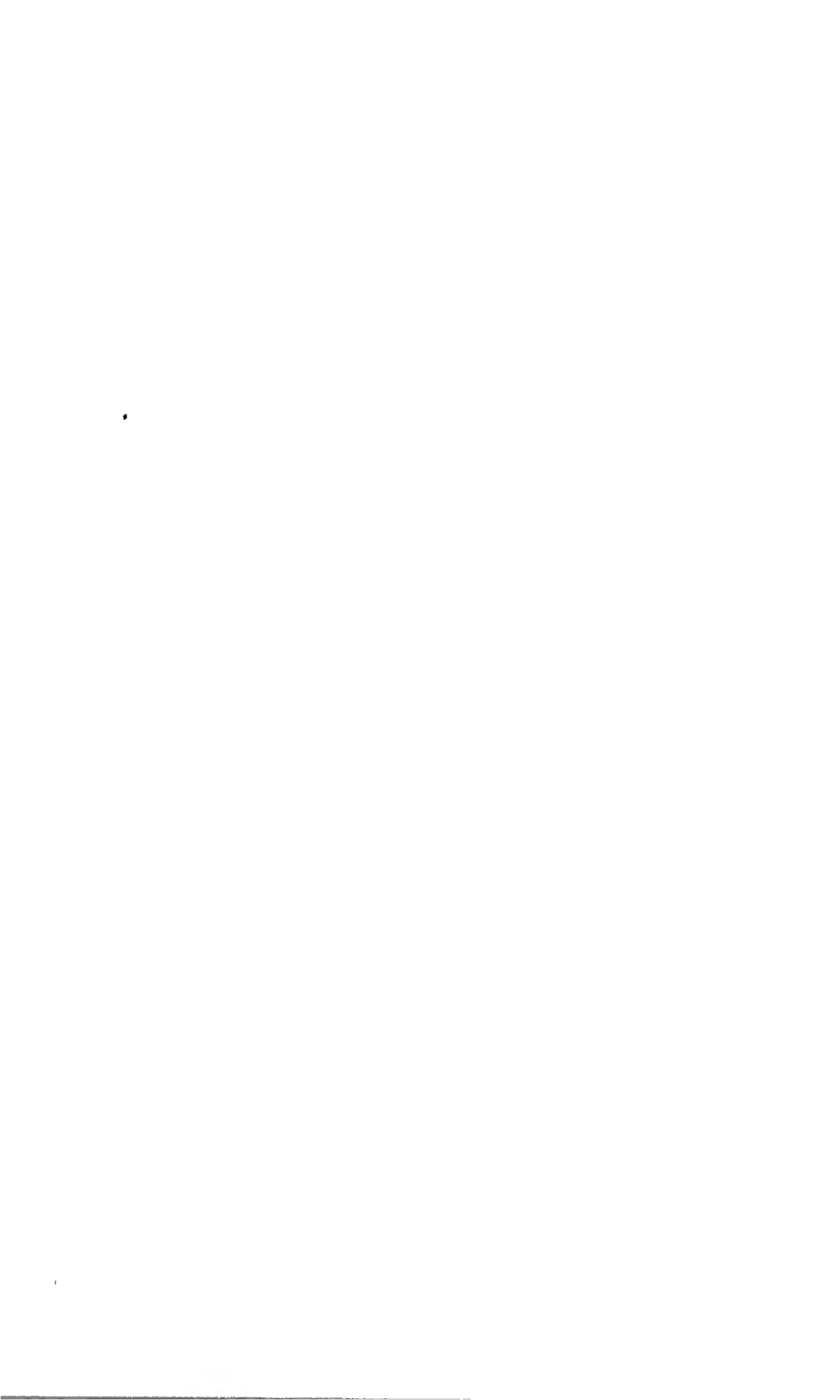
(*k*) Schorer ad Grot. 3, 52, 1.

(*l*) Broekman—Executor of Durr *v.* Rens, 3 Mens. 365.

(*m*) Levisohn *v.* Williams, Buc. 1875, 108.

## VENIA ÆTATIS.

In order to be liberated from the disabilities attaching to minority, relief is granted to minors who can give satisfactory proof of competency to manage their own affairs. This relief, which is known as *Venia ætatis*, is granted by the Government (see *In re Barrett*, Staats Courant, S. A. R., Feb. 1894), and not by the Courts (*Ex parte Botha*, 10 C. L. J. p. 174).



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